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THE NEW HULL CLAUSES

by

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PART I

THE NEW LONDON HULL CLAUSES

The new Hull Clauses, officially termed "Institute Time Clauses, Hulls," are indeed very new. A draft was not issued by London underwriters until February 1, 1983 and prior to that time it was impossible to obtain any idea of what the new clauses were to contain. The veil of secrecy surrounding them, and the work of the Committee, was impenetrable.

The new hull clauses are attached hereto as Exhibit "A."

Before launching into a discussion of the new clauses, it would be wise to consider the specific improvements, and changes, which the UNCTAD Report recommended with respect to hull insurance.(1) The Report summarized the suggested improvements(2) of which the following is a condensation:

1. Development of regulations relating to brokers requiring minimum standards of competency and financial responsibility;

2. The rule voiding policies written on a P.P.I. basis should be eliminated;(3)

3. Amendment of the rule that all, even innocent, nondisclosure or misrepresentations of material information at the time of making the insurance contract enables the insurer to avoid liability even as to damage caused by an event completely unconnected with the nondisclosure or misrepresentation;

4. Revise the antiquated S.G. form, including revision of the Perils Clause to make it more comprehensible in the modern day context as well as eliminating war risk terminology. Also, combine the Perils Clause with other appropriate Institute Clauses so that the designated risks appear in one unified Risks Clause. Alter the method of granting insurance from an enumeration of named perils to "all risks" grant of cover minus specific exceptions. Facilitate the method of granting war risk insurance...to the end that insurance coverage is easier to understand and to interpret;

5. Draft a temporary payment clause for situations where two or more insurers dispute who is liable for a loss;

6. Amend the rule making the agreed value in the policy binding on determination of rights of the parties to recoveries from third parties to eliminate the resulting inequitable preference given insurers when the actual value of the insured property is greater than the agreed value;

7. All policies written on a co-insurance basis should include an "agreement to be bound" clause to avoid the assured having to sue each insurer individually in the event of a dispute. All international insurances where the assured and insurers are situated in different countries should contain a jurisdiction clause stipulating a mutually convenient jurisdiction;

8. The discriminatory aspects of the Joint Hull Formula should be eliminated;

9. The "All Risks" cover contained in the Liner Negligence Clause should be made available to all shipowners

who are prepared to pay the appropriate premium. The Inchmaree and Liner Negligence Clauses should also be redrafted to make their intended effect easier to understand;

10. Reduce the difficulties in the use of "all claims, each accident" deductibles, such as when there are particularly large deductibles as well as the application of deductibles to heavy weather damage and to sue and labor expenses. Use special clauses to assist in the application of the concept of "each accident or occurrence";

11. A "co-insurance" clause is inappropriate in a standard hull policy;

12. The rule reducing the indemnity payable for general average contributions, salvage charges and sue and labor expenses where the agreed value is less than the actual value of the insured subject should be eliminated;

13. The collision liability coverage in the Running Down Clause should permit the fixing of an independent limit on the insurer's liability instead of automatically tieing this limit to the agreed value in the policy;

14. Eliminate two inequitable provisions in the Tender Clause relating to payment of an allowance for lost time while additional tenders are required by the insurer, and imposing a penalty for noncompliance with the terms of the Clause where the insured is prevented from doing so by circumstances beyond his control;

15. Insert a "payment on account" clause in hull policies;

16. Amend the clause in standard hull policies denying a shipowner a "co-insurer" status to the extent of

his deductible, thereby denying him proportional rights to participate in third party recoveries and instead giving the insurer preference to such recoveries;

17. Develop a standard clause granting coverage for physical damage resulting from delay caused by a peril insured against; and

18. Prohibit the use of "subrogation" forms assigning to insurers the assured's rights of action against third parties in return for payment of an insurance claim.

ANALYSIS OF THE NEW HULL CLAUSES

Keeping in mind that the new "MAR" form is really nothing more than a sheet of paper upon which the most vital information is to be entered such as the policy number, name of assured, vessel, voyage or period of insurance, subject-matter insured, agreed value (if any), amount insured, premium, the clauses and endorsements to be attached, and any "special conditions and warranties" are to be noted, the new hull clauses actually contain the basic terms of coverage. In this sense, the new "MAR" form is substantially identical to almost all the blank spaces which must be filled in on page one of the American Institute Hulls (1977) form.

Navigation/Adventure Clause

In the new hull form, this is termed the "Navigation" clause; in the AIH (1977) form it is termed the "Adventure" clause. In the old Institute Hulls Clauses, it is Clause 3. All three clauses are substantially identical except that the new "Navigation" clause contains an additional paragraph

which eliminates coverage for claims for loss or damage after a vessel sails with the intention of being "broken up" for scrap or sold for being broken up, unless previous notice is given to underwriters and any amended terms of cover, adjustment of the insured value, and additional premium required have been agreed.

The inclusion of the new paragraph is quite understandable when one considers that in this era of large deductibles, the owner of an aged ship may well forego repairs if he knows that in a relatively short time he is going to sell the vessel for scrap anyway. Moreover, the moral hazard involved in insuring a vessel for a relatively large amount when it is destined for the scrapyard is simply too great to be borne in these times with ships sinking in incredibly good weather, calm seas, and in the deepest portion of the waters being traversed.

Continuation/Duration of Risk Clause

This clause simply provides that should the vessel at the expiration of the policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice is given to underwriters, be held covered at a pro rata premium to her port of destination. The clause is identical in the new hull clauses, the AIH (1977) form, and in the old Institute Hull form.

In this connection, see Robertson v. Royal Exchange Assur. Corp.,[4] where it was held that an owner was entitled to invoke the clause where he gave notice of abandonment on the grounds that the vessel was a constructive total loss and the notice of abandonment was declined by underwriters. The

court held that by declining notice of abandonment the underwriters recognized that the owner still had an insurable interest in the vessel.

Breach of Warranty Clause

This clause simply provides that the vessel is held covered in case of any breach of conditions as to cargo, trade, locality, towage or salvage activities, or date of sailing, or loading or discharging of cargo at sea, provided notice is given immediately following receipt of knowledge by the assured and any amended terms of cover and any additional premium are agreed to by the assured. It is substantially identical in the new hull form, the AIH form, and the old Institute Hull form.

In connection with judicial construction of the clause, see The Tinkerbell,(5) Harris v. Glens Falls,(6) and Liberian Ins. Agency v. Mosse.(7)

Termination/Change of Ownership

In the new hull clauses, it is called the "Termination" clause; in the AIH form it is called "Change of Ownership"; in the old Institute Hull form it is denominated Clause 6. In any event, the language is substantially identical and provides (subject to deferral of termination in certain events) that the insurance terminates if there is a change in the vessel's classification, ownership, flag, charter, management, etc.

The loss experience of a shipowner is one of the main factors in rating a hull renewal. Consequently, when a vessel is sold or transferred to new management, underwriters usually prefer to cancel the policy. This correctly

reflects the "moral hazard" involved in insuring for a period of time, at an agreed value, a vessel which could easily be sunk by a new owner about whom the underwriters probably know nothing.

See Lemar Towing v. Fireman's Fund,[8] (no breach of the clause where the same two men retained direction and control of a tug while acting as controlling stockholders and officers of separate corporate entities); Prudent Tankers Ltd. v. The Dominion Ins. Co. (The Caribbean Sea)[9] (relating, in part, to classification of vessel); and Taylor v. Commercial Union,[10] (tower's liability policy did not by its terms provide coverage to a corporate successor of an individually-owned towing service, but underwriter estopped from asserting that defense by its own conduct).

Assignment Clause

This clause precludes assignment of the policy or of moneys due thereunder unless a dated notice of the assignment, signed by the assured, is endorsed on the policy and the policy is produced before payment of a claim. This reflects the more stringent conditions relating to assignment of policies under English marine insurance law than will be found under American law.

The language in the new hull form and in the old Institute Hull form is substantially identical. There is no comparable clause in the AIH form.

Attention is directed, in this instance, to the following English cases: Rayner v. Preston[11] and Samuel & Co. v. Dumas.[12]

Perils Clause

The new "perils" clause of the new hull form is a radical departure from past practice. In the AIH (1977) form, the perils clause follows rather closely the old perils clause in the Lloyd's S.G. form. However, in the new hull clauses, the London market seems to have taken to heart at least one recommendation of the UNCTAD Secretariat; i.e., the antiquated form should be revised to make it more comprehensible, eliminate war risk terminology, and combine it with other Institute Clauses (such as the "Inchmaree" Clause) so that the designated risks appear in one unified clause.

In doing so, several changes are immediately apparent. For example, the designated risks are not followed by the general words " . . . and of all other perils, losses and misfortunes, etc." The efficacy of those general words was demonstrated in Cullen v. Butler,(13) a case in which the ship and goods were sunk at sea by another ship firing upon her, mistaking her for an enemy. Although the loss was not one occasioned by "enemies," the court held that it was sufficiently "like" that peril as to be brought within the general words. Lord Ellenborough explained the principle in the following words:

> "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction by our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have due effect assigned to them in the construction of this instrument;

and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes."

Another example is The Lapwing, sub nom Baxendale v. Fane,[14] where the acting master of a yacht docked it so as to allow it to sit on a dangerous bottom. The loss was held to be ejusdem generis with stranding.[15]

The elimination of the general words must have been done for some purpose and, therefore, it must be presumed that other "like perils," not falling neatly into one of the named perils in the clause, would not be covered.

In the new hull form, the perils clause is divided into two distinct divisions. The first division, Paragraphs 6.1 through 6.1.8, sets forth the stated perils; i.e., perils of the seas, fire, violent theft by persons from outside the vessel, jettison, piracy, breakdown of or accident to nuclear installations or reactors, contact with aircraft or similar objects, land conveyance, dock or harbor equipment or installation, and earthquake, volcanic eruption or lightning. These last three named perils were formerly included in the so-called Inchmaree Clause; their position in the new hull form represents different placement.

The second division, Paragraphs 6.2 through 6.3, is obviously modeled on the old Inchmaree Clause. After enumerating the perils (which are: accidents in loading, discharging or shifting cargo or fuel; explosions; bursting of boilers, breakage of shafts or any latent defect in the machinery or hull; negligence of repairers or charterers provided such repairers or charterers are not an assured; and barratry), Paragraph 6.2.6 concludes with this proviso:

"Provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers."

Consequently, coverage for the perils enumerated in Paragraphs 6.2 through 6.2.6 is provided so long as the assured, owners and managers can demonstrate the exercise of due diligence.

It is not entirely clear from a reading of the clauses whether it was intended that the proviso also apply to the perils specified in Paragraphs 6.1 through 6.8.1 but the author is informed by reliable sources in the London market that the intent was that the proviso would apply only to the perils specified in Paragraphs 6.2 through 6.2.6.

It is interesting to note that "barratry," which was formerly a part of the old classic perils clause, now appears in what was formerly the Inchmaree Clause. The intent here presumably was to make the proviso as to a want of due diligence applicable to barratry. This is a decidedly new approach and could serve to relieve underwriters from liability where the loss is occasioned by barratry of the master, officers or crew and the shipowner/assured has "turned a blind eye" to the nature of the master and crew which was hired. It may be expected in the future that under the new hull clauses underwriters will closely scrutinize what the shipowner/assured did not do in terms of hiring an honest and competent master and crew. A "blind eye" will not suffice.(16)

It seems probable that the foregoing was drafted in the fashion it was in light of such cases as Astrovlanis

Compania Naviera S.A. v. Linard (The Gold Sky),[17] and Piermay Shipping Co., S.A. v. Chester (The Michael).[18]

As noted above, the UNCTAD Report criticized the fact that the limitations in the Inchmaree Clause are not easily detectable in the old format. For example, it was early decided that the term "latent defect" does not include error in design.[19] Moreover, early decisions clearly established that under the Inchmaree Clause, replacement or repair of the defective part causing the damage was not recoverable.[20]

The new hull clauses (see Paragraphs 6.2 through 6.2.6) do not clarify the foregoing. For example, if the scriviners of the clauses had wished, both these points could have been clarified by drafting Paragraph 6.2.3 to read:

> "Bursting of boilers, breakage of shafts, or any latent defect (other than error in design), excluding however, the cost and expense of replacing or repairing the defective part."[21]

In at least one area clarification has been achieved. That is, the term "thieves" appears as one of the perils in the old perils clause.[22] But the term was defined in Rule for Construction 9 of the Marine Insurance Act, 1906, as not covering clandestine theft or theft committed by any one of the ship's company, whether crew or passengers. Paragraph 6.1.3 now reads "violent theft by persons from outside the vessel." Consequently, anyone reading the new clauses should now be fully apprised that only theft with violence from persons outside the vessel is covered.

Pollution Hazard Clause

The AIH (1977) form has a clause denominated "Deliberate Damage (Pollution Hazard)." Essentially, it provides coverage for loss or damage to the vesssel directly caused by governmental authorities to prevent or mitigate a pollution hazard, provided such act of the governmental authorities did not result from a want of due diligence by the assured.

The new hull clauses contain an almost identical clause.

No such clause appears in the old Institute Time Hulls Clauses.

Collision Clause

The classic English form of collision clause has always been limited to three-fourths of the total liability incurred by the insured by reason of a collision of the insured vessel with another vessel. The theory behind the three-fourths limitation was to place some of the burden on the assured and to provide an inducement to employ non-negligent officers and crew.

By contrast, the American form of collision clause (exemplified by the Collision Clause in the AIH (1977) form), provides such coverage for four-fourths (100%) of the vessel owner's liability for collision with another ship or vessel.

With this exception, the Collision Clause in the old Institute form is almost identical with the Collision Clause in the AIH (1977) form.

The new 3/4ths Collision Liability Clause in the new hull form contains slightly different wording than will

be found in the AIH (1977) form and the old Institute form. At first glance, the different wording would not appear to significantly alter the legal effect of the clause but this conclusion may be more apparent than real.

For example, the old language provides that if there is a collision with another vessel and the assured shall in consequence thereof..... "become liable to pay and shall pay by way of damages....." underwriters will respond. The new language makes it very clear that the duty of the underwriters is only to indemnify the assured for 3/4ths of any sum or sums.... "paid by the assured to any other person or persons by reason of the assured becoming legally liable by way of damages...." Probably, in light of the American and English cases, the effect of the new language does not differ although it is submitted that the new language is, at least to this author, more clear and concise.

Under the old Institute form of the clause, the underwriters' liability could not exceed their "proportionate part of three-fourths of the value of the vessel....insured." Under the new form (Paragraph 8.2.2), the underwriters' liability shall not exceed their proportionate part of three-fourths of...."the insured value" of the vessel. The simple word "value" could be construed to mean market value which might greatly exceed the "insured value." By amending the clause to read "insured value," it is made crystal clear that underwriters are liable only for their proportionate part of the insured value and not the market value.

By contrast, the American form uses the term "Agreed Value" which is synonymous with insured value.

Paragraph 8.2 of the new clause provides that the indemnity to be paid shall be "in addition to" the indemnity provided by other terms and conditions of the overall policy. Thus, it is made quite clear that the collision clause coverage is supplementary to the other coverage. Conceivably, therefore, underwriters could be held liable for a very substantial particular average claim to the insured vessel under other applicable provisions of the policy and also be required to pay up to three-fourths of the insured value under the collision clause. This was not clear in the old Institute form of the clause, although court decisions had arrived at the same result. In terms of clarity, for the benefit of an unsophisticated assured, this is a decided improvement.

The "Exclusions" under the collision clause in the AIH (1977) form and the old Institute form have long been identical. They exclude liability of underwriters for sums which the assured shall pay for:

(a) removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever under statutory powers or otherwise;

(b) injury to real or personal property of every description;

(c) discharge, spillage, emission or leakage of oil, petroleum products, chemicals or other substances of any kind or description whatsoever;

(d) cargo or other property on or the engagements of the vessel; and

(e) loss of life, personal injury or illness.

Under "Exclusions" in the new hull form now appear the old exclusions found in the old Institute form plus additional exclusions and amendments. These are:

(1) Any liability arising under or by virtue of contract (whether oral or in writing) entered into by or on behalf of the assured;

(2) Any liability arising under statute; and

(3) The pollution exclusion has been broadened.

The exclusion relating to liability arising under or by virtue of contract is interesting. Since the case of Furness, Withy and Co. Ltd. v. Duder,[23] it has been established that the liabilities contemplated by the collision clause refer to those arising from "tort" rather than by contracts under which liability is assumed. In that case, a tug was damaged by the vessel in its tow, the tow being responsible for the cost of repairs under a provision in the towage contract, although the sole negligence was on the part of the tug. The assured was unable to secure reimbursement from the underwriters under the clause.[24]

It is clear that the new exclusion was designed to make it clear that any liability such as might be imposed under the U.K. Standard Towing Conditions is not covered under the new collision clause.

The new exclusion relating to "liability arising under statute" is much broader than it formerly was as it is not now tied to "removal of wreck," etc. Now, any liability arising under statute is unquestionably excluded. This would appear to be an affirmation of the pre-existing

decisional law established in such cases as Hall Bros. S.S. Co. v. Young[25] where the assured was compelled by French law to pay for damages sustained by a French pilot boat which collided with the assured's vessel through no fault of the latter. The court held, in essence, that payment was made because of French law and not by reason of collision liability per se.

It is also interesting to note that under the old Institute form, the exclusions proviso reads:

> "Provided always that this clause shall in no case extend or be deemed to extend to any sum which the Assured may become liable to pay or shall pay for or in respect of:"

The exclusions proviso in the new hull clause reads:

> "Provided always that this Clause 8 shall in no case extend to any sum which the Assured shall pay for or in respect of...."

This raises an interesting question. Inasmuch as the new collision clause in the new hull form now provides for an indemnity for three-fourths of any sum or sums paid by the assured, and the exclusions proviso again refers to sums which the assured shall pay, what happens if the assured is held liable for a collision but becomes insolvent....and consequently does not pay?

In England, the Third Parties (Rights Against Insurers) Act, 1930, provides, in essence, that where an assured becomes bankrupt and, before or after that event, liability is incurred, his rights against the insurer under the contract in respect of the liability (the insurance

contract) shall be transferred to and vest in the third party to whom the liability is so incurred.

Under the new exclusions in the new hull form, underwriters have specifically excluded "liability arising under statute," and now only cover non-excluded liabilities which the assured has actually paid. Query: Would underwriters be compelled, under the new form, to respond to a collision liability which the assured has incurred but which he is unable to pay by reason of insolvency?

Sistership Clause

This clause provides coverage (under the new form as well as the old Institute form) where the insured vessel comes into collision with or receives salvage services from another vessel belonging wholly or in part to the same owners or under the same management.

In the AIH (1977) form, the sistership clause appears in two different places in the policy. One such clause appears in the middle of the Collision Clause and applies to collisions; another similarly worded clause appears in the General Average and Salvage Clause and, of course, applies to salvage, towage or assistance being rendered by a sistership.

The English forms of this clause provide for a reference of the claim to be made to a sole arbitrator to be agreed upon between underwriters and the assured; the AIH form also provides for referral to three arbitrators if the parties cannot agree on a sole arbitrator.

There do not appear to be any cases in England or the Commonwealth nations dealing with the clauses. Interestingly,

there are two leading American cases interpreting the clause which appear to have been ignored by the English writers. They are: Augusta-Detroit,(26) and Ariosa and D-22.(27)

In Augusta-Detroit, a steamer was towing a barge, both being in common ownership. The steamer collided with a third vessel. The steamer was found solely at fault and her owner limited liability. She also collided with her barge and sank it with its cargo. The steamer and the barge were separately insured through different hull underwriters, with the policies containing a collision clause "sistership" provision. The court held that the underwriters on the steamer's hull policy were bound, under the sistership clause, to pay for the loss of the barge to the extent that the owner had not been compensated for it out of the proceeds of the barge's hull policy. The court also held that the underwriters on the barge hull policy - who had paid for the loss - had no right of subrogation since they had no greater or other right than the owner of the barge.

In Ariosa and D-22, the Federal Second Circuit took a slightly different tack. In that case, Ariosa, towing the D-22 (both being in common ownership), caused the D-22 to collide with another vessel. Fault was divided half on the Ariosa and half on the other vessel; the D-22 was found blameless. The D-22 and the other vessel sustained damage; the Ariosa was undamaged. The hull underwriters on the D-22 advanced the repair costs on a loan receipt. Other underwriters had insured the Ariosa with tower's risk, and a Collision Clause containing a sistership provision.

The court held:

(1) The hull underwriters on the D-22 recovered in full for its damages, one-half from the other vessel and one-half from the Ariosa;

(2) The other vessel recovered one-half of her damages from the Ariosa;

(3) The hull underwriters of the Ariosa reimbursed the Ariosa for one-half of the damage to the other vessel;

(4) The hull underwriters of the Ariosa reimbursed the hull underwriters on the D-22 for one-half of the damage to the D-22. The underwriters on the Ariosa were bound to pay according to their policy regardless of any hull insurance on the D-22;

(5) Whether the hull underwriters on the D-22 were subrogated to the rights of the D-22 against the tug and the other vessel was not decided because the loan receipt method of payment was effective as an equivalent of subrogation; and

(6) The tower's and collision clause underwriters on the Ariosa were not relieved of liability under the policy to the extent of hull insurance on the D-22.

Attention is also directed to the Industry,(28) where a collision took place between two vessels, owned by the same company, but insured by separate underwriters. Only one of the vessels sustained damage. The hull underwriters on the damaged vessel paid the loss in full under a loan receipt, thereafter claiming contribution from the other vessel's underwriters. It was held that the paying underwriters were entitled to contribution either as an assignee of the owner or in their own right.

In Bushey & Sons v. Tugboat Underwriting,[29] the court held that the arbitration provision in the sistership clause obligated the underwriters to arbitrate claims arising out of a collision between a tug and barge owned by separate corporations where the underwriters were aware that each owning corporation was a wholly-owned subsidiary of the same parent corporation and all were named assureds in the policy.

Tender Clause

The Tender Clause is identical in the old Institute form and in the new form. Under it, the underwriters are entitled to notice of loss or damage and may dictate the port to which the vessel is to go to effect repairs. Inasmuch as the standard used to determine underwriters' liability is that of the "reasonable cost of repairs," the selection of the port of repair can be highly important. It is expected that the assured will take tenders at first instance, but the Tender Clause allows the underwriters to veto the assured's choice, to take their own tenders, or to require the taking of further tenders. If, but only if, the underwriters do require the taking of further tenders, and a tender so taken is approved and accepted by the underwriters, and the assured in turn promptly accepts the tender after notification of underwriters' approval, the clause provides for an allowance of 30% per annum on the insured value of the vessel with respect to the time lost by the taking of such tenders.

If, however, the underwriters subsequently decide to rely on one of the earlier tenders taken by the assured, no allowance whatever is made. Moreover, the clause imposes a penalty of 15% of the total claim for failure to comply

literally with its terms. No exception is made for extenuating circumstances. Although underwriters may sometimes agree to an ad hoc waiver of the penalty, no firm assurance is given that this will be done.

As will be observed, no change has been made in the Tender Clause from earlier versions.

Although the tender clause in the AIH (1977) form is denominated "Claims (General Provisions)," and its wording is slightly different, the net effect is the same.

General Average and Waiver Clause

Under both English and American law, the indemnity payable by underwriters for general average and salvage charges is predicated upon the "contributory" values involved, rather than what the "Agreed Value" (AIH) or "insured value" (English) may be. Thus, if the vessel is valued, at at $2 million for insurance purposes and insured for that amount, but at the time of the casualty giving rise to a general average, is worth $4 million, underwriters' liability is only the proportion that the insured value bears to the actual value. This has sometimes come as a shock to an unsophisticated assured.

The new clause does not really clarify the situation but it does make it clear that it only covers the vessel's proportion of salvage, salvage charges and/or general average, reduced in respect of any under-insurance.(30) In another respect it also provides a little more guidance to an assured. Paragraph 11.4 provides that no claim under the Clause shall in any case be allowed where the loss was not incurred to avoid or in connection with the avoidance of a peril insured

against. Although this is nothing more than a statement of what the law is, it may be helpful to some.

The comparable clause in the AIH (1977) form is worded somewhat differently, but the net effect appears to be substantially the same.

It should be noted that in revising this clause, the scriveners ignored the recommendation of the UNCTAD Secretariat.

Deductible Clause

Under both the English forms (new and old) and the AIH (1977) form, the deductible (whatever it may be) is applied to the aggregate of all claims (including claims under the Sue and Labor Clause and Collision Clause) arising out of each separate accident. The "separate accident" concept is difficult to apply and has occasioned problems. There is one exception in both forms of clauses and that is in treating heavy weather damage (including contact with ice) occurring during a single passage between two successive ports as though due to one accident.

Under the old, as well as the new, forms, the underwriters receive all of any recovery made against third parties up to the amount they have paid and only when this is exceeded will the assured receive any of the recovery to offset his deductible. This is inequitable as the underwriters are, after all, in the business of insuring risks and should not merit such preferential treatment.

Moreover, interest comprised in recoveries is apportioned between the assured and the underwriters, notwithstanding that by the addition of interest the

underwriters may recover a larger sum than they have paid. Keeping in mind that the policy is really one of indemnity and that under subrogation principles underwriters are entitled to recoup only that which they have paid, it seems rather inequitable to require a greater recovery.

In the old Institute form (Clause 11), the underwriters may deduct 10% from the net claim where crew negligence contributes to the loss or damage to boilers, etc. The clause does not appear in the AIH (1977) form and the Canadian market has dropped the use of it. The clause was grossly unfair in many instances involving large values and came under severe criticism in the UNCTAD Report. It is refreshing to find that the clause does not appear in the new form.

The UNCTAD Report has severely criticized the application of the deductible to Sue and Labor claims except where the claim is for a total or constructive total loss. It will be recalled that the Sue and Labor Clause (discussed hereinafter) requires the assured to sue and labor to avert or minimize damages which is, of course, also to the underwriters' advantage. Having done so, it seems inequitable to apply a deductible to sums which the assured has paid or incurred in an effort to save the vessel and actually operates as a disincentive to do so. For example, suppose that a vessel is worth $1 million. The policy contans a $50,000 deductible. The vessel sustains an insured casualty. By the expenditure of $45,000, the assured is able to save the vessel from a total or constructive total loss. Application

of the deductible to the assured's claim results in the assured bearing the whole expense.

Notwithstanding the UNCTAD criticism, the new deductible clause in the new form still continues to apply to sue and labor claims. The inequity, if such it is, also appears in the AIH (1977) form and American underwriters seemingly are equally oblivious of the UNCTAD criticism.

Duty of Assured (Sue and Labor)

Under the old S.G. form, the Sue and Labor Clause merely recited that "it shall be lawful" for the assured to sue and labor. The AIH (1977) form uses the phrase "lawful and necessary." The new clause in the new hull form forthrightly states it shall be the "duty" of the assured to sue and labor. Since this is the law anyway, it is well that the new clause properly informs the assureds.

It is, however, a definite improvement to find the Sue and Labor Clause prominently displayed in the body of the new hull clauses, rather than having to refer back to the old S.G. form where it was literally buried in closely packed lines of type. In this respect, the new hull form follows the American practice where the Sue and Labor Clause is a part of the formal hull policy.

Although subject to UNCTAD criticism, the new clause perpetuates the restriction on recoveries under the policy to that proportion which the insured or agreed value bears to the "sound" value; i.e., the assured is penalized by under-insurance even though under-insurance may not have been his fault at all, and may have arisen by virtue of a

dramatic increase in vessel values after the inception of the policy.

The AIH (1977) form does not differ significantly in effect from the new clause although the wording is slightly different.

New for Old Clause

It was formerly the practice that when repairs were effected, the underwriter was responsible for the cost of replacing or repairing the old material. Thus, the practice developed of deducting "new for old," usually one-third. The "New for Old" clause in the new form merely duplicates the comparable clause in the old Institute form and the AIH (1977) form but with somewhat more clarity. The old Institute clause states that "average" is payable without deduction, new for old. The AIH form states that "general and particular average" is payable without deduction. The new clause simply uses the phrase "claims." The legal effect is the same.

Bottom Treatment Clause

Both the old Institute form and the AIH form provide that the expense of sighting the vessel's bottom after stranding will be paid if reasonably incurred especially for that purpose even though no damage is found. Also, no claim is payable in any case in respect of painting or scraping the vessel's bottom.

The new "Bottom Treatment" clause in the new form is considerably more explicit, and provides coverage for scraping, gritblasting and/or other surface preparation, or painting of the ship's bottom, but only as to new work or surfaces.

Wages and Maintenance Clause

This clause, which appears in the old Institute form, the new form, and in the AIH form, excludes claims (other than in general average) for wages and maintenance of the master, officers and crew except when incurred solely for the necessary removal of the vessel from one port to another for repairs, or for trial trips and then only while the vessel is underway.

The wording of the new clause in the new form is more precise but the net effect is the same.

The AIH form is somewhat more generous in that it allows for overtime or similar extraordinary payments to the master and crew incurred in shifting the vessel for tank cleaning or repairs or while specifically engaged in these activities, either in port or at sea.

Agency Commission Clause

This is totally new and will not be found either in the old Institute form or the AIH (1977) form. It reads:

> "In no case shall any sum be allowed under this insurance either by way of remuneration of the Assured for time and trouble taken to obtain and supply information or documents or in respect of the commission or charges of any manager, agent, managing or agency company or the like, appointed by or on behalf of the Assured to perform such services."

The new Agency Clause was apparently added to the new form to reflect that in hull claims there are often three surveys; i.e., one of the owner, one by the underwriters, and one by the classification society. In practice, the fees of the owner's surveyor and those of the classification society are paid by underwriters if the basic claim is otherwise covered under the policy.

The object of the clause appears to be to preclude reimbursement to owners for services which are performed by their own personnel. Such services normally take a great deal of time and effort for which the owner usually receives only his out-of-pocket expenses. If, however, the owner creates an "agency" or "management" company which is a separate entity and that entity performs the services, claims a commission, etc., it can be treated as a direct charge against the underwriters. The manner in which the clause is worded indicates that underwriters will no longer be responsible either for the expenses (direct) of the owner or for indirect expenses paid to an agency or management company appointed by or on behalf of the assured to perform such service.

Unrepaired Damage Clause

Great uncertainty exists under English law with respect to the amount to be paid for damage to a vessel which remains unrepaired at the time a claim is made on underwriters. Reference must necessarily be made to Section 69 of the Marine Insurance Act, 1906, as interpreted by the various court decisions.(31)

The uncertainty involves such questions as to whether the agreed value in the policy should be taken into account in determining the depreciation, whether the estimated cost of repairs should include the estimated cost of drydocking; and at what time the estimated repairs should be considered.

The new clause in the new form should assist in resolving some of the uncertainty. It spells out that the

measure of indemnity for claims for unrepaired damage shall be the reasonable depreciation in the market value of the vessel at the time the insurance terminates arising from such unrepaired damage, but not exceeding the reasonable cost of repairs. In no case shall the underwriters be liable for more than the insured value of the vessel at the time the insurance terminates, nor are underwriters liable for unrepaired damage in the event of a subsequent total loss sustained during the period covered by the policy or any extension thereof.

This new clause should also be read in para materia with Paragraph 1.3 under the "Navigation" Clause reading:

> "In the event of the Vessel sailing (with or without cargo) with the intention of being (a) broken up, or (b) sold for breaking up, no claim shall be recoverable under this insurance in respect of loss or damage to the Vessel occurring subsequent to such sailing unless previous notice has been given to the Underwriters and any amended terms of cover, adjustment of the insured value and additional premium required by them have been agreed. Nothing in this Clause 1.3 shall exclude claims under Clause 8 [collision] and/or 11 [General average and salvage]."

Unfortunately, left unanswered in the new language is whether the proportion of depreciation thus arrived at when the reasonable depreciation in market value is determined is applied to the insured value. If the insured value and the market value are the same no problem arises; the difficulty comes when the insured value and the market value differ. See, in this connection, the formula applied in Delta Supply Co., supra.

Constructive Total Loss Clause

The old Institute clause has been expanded upon in the new form by adding a sentence reading: "In making

this determination [whether cost of recovery and/or repair exceeds insured value], only the cost relating to a single accident or sequence of damages arising from the same accident shall be taken into account." This additional sentence already appears in the AIH (1977) form and it appears that the new Constructive Total Loss clause in the new form was modeled upon the comparable AIH clause.

As noted heretofore, the problem engendered in applying the concept of "separate accident or occurrence" has not been resolved.

Freight Waiver Clause

This clause appears in the old Institute form and in the AIH (1977) form, and has been carried over into the new form. It simply provides that in the event of a total or constructive total loss no claim is to be made by underwriters for freight whether or not notice of abandonment has been given.

Disbursements Warranty Clause

The purpose of this clause is to prevent shipowners from insuring a vessel against all risks for a comparatively low figure, and then making up the total loss value (or over-insuring) at a lower rate of premium by a series of insurance on interests which are ancillary to the hull insurance. The clause therefore limits the amount of such ancillary or supplementary insurance to the percentages specified in the clause. For example, the clause limits additional insurance on disbursements, managers' commissions, profits or excess or increased value of hull and machinery, and/or similar interests, and freight to only 25% of the insured value.

It should be noted that no restriction is placed on risks excluded by war, strikes and related exclusions nor general average and salvage disbursements.

The Disbursements Warranty Clause in the new form follows precisely the wording in the old Institute clause on the same subject. The American form differs slightly in language but the net effect is the same.

Returns for Lay-Up and Cancellation Clause

This clause provides for the return of the whole or a proportionate part of the premium if the policy is cancelled by agreement or if the vessel is laid-up, as provided in the clause. The language in the new form is almost identical with that of the old Institute Clause. The language of the AIH (1977) form does not differ significantly.

War, Strikes, Malicious Act and Nuclear Exclusion

Both the AIH (1977) form and the old Institute form contain exclusions which are paramount and which supersede and override anything contained in the policy inconsistent therewith. These are, of course, the exclusions relating to war risks, strikes, etc., malicious acts and nuclear weapons. The new form merely continues these exclusions but in language which is perhaps a little more clear and precise.

Miscellaneous

The old Institute form contained a "Grounding" clause which, in essence, provided that groundings in certain areas (such as the Panama Canal, Suez Canal, Manchester ship canal, etc., certain rivers such as River Mersey above Rock Ferry Slip, the River Plate, etc.) would not be deemed to be a stranding. Comparable language appeared in the earlier AIH

forms but has now been deleted. The clause is also deleted in the new form.

CONCLUSIONS

Unquestionably, the new London hull form is much superior in clarity and precision over the old system whereby the old Lloyd's S.G. form provided the basis for the insurance with various Institute clauses attached. Whether greater or additional coverages are provided is debatable. Moreover, new restrictions have been added. And, lastly, many of the recommendations and/or observations of the UNCTAD Secretariat have been ignored. Whether the new London policy forms will prove to be a suitable international vehicle rather than a revised national "regime" system remains to be seen. In any event, should the new London forms achieve substantial acceptance, the legal profession will be one of the principal beneficiaries as it will be many years before some of the new language has bee judicially construed and doubts laid to rest.

PART II

RECENT DEVELOPMENTS IN ADMIRALTY AND MARINE INSURANCE LAW

The courts continue to grind out interesting and provocative decisions to titilate and ingrigue the admiralty bars of all the English-speaking nations. Notable among these decisions are the following:

"All Risks" Policies

The Appellate Division of the South African courts recently handed down a most interesting decision involving an all risk policy which, however, specifically excluded loss, damage or expense caused by "inherent vice."

In that case, Blackshaws (Pty) Ltd. v. Constantia Insurance Co. Ltd.,[32] the plaintiff/assured was a printer in Cape Town. He purchased a second-hand printing machine in Norway and effected a cargo policy with the defendant/ underwriter in terms of which the machine was insured on its voyage to South Africa. The insurance was on an "all risks" basis, but, as noted, specifically excluded loss or damage by inherent vice.

The printing machine was packed into a container and thereafter shipped. When it arrived and was eventually unpacked, it was discovered that it had been extensively damaged. The assured claimed against the underwriter and, in response to a question from the underwriter as to the particulars, stated that the cause of the damage was the movement of various parts of the machine in the container and crate occasioned by reason of defective packing. The underwriter promptly defended on the grounds that the damage did not occurby reason of a peril insured against and that the damage had been caused by inherent vice; i.e., defective packing.

At first instance, the trial court held that defective packing amounted to inherent vice. The dispute in that court, as in the appellate court, turned mainly on

the question whether defective packing per se constituted inherent vice within the terms of the policy.

On appeal, the court acknowledged that there did not appear to be any South African cases on point, but recognized that there were a number of English cases which had a bearing on the problem. Although conceding that the English cases were not binding, it was noted that they were certainly entitled to respect and were of persuasive authority as there was no fundamental difference in the principles of construction of a policy of insurance between South African law and English law.

Citing F.W. Berk & Co. Ltd. v. Style [1955] 2 Lloyd's Rep. 382, and Gee & Garnham Ltd. v. Whittal [1955] 2 Lloyd's Rep. 562, the appellate division held that the defective packing of the machine in the container constituted "inherent vice," per se.

This, to the author, is the first instance in which a court subscribing to the principles of English law has held that defective packing of the contents of a container constituted inherent vice, although Professor William Tetley advises that a similar decision was handed down by a French court within the last two years.

The question of burden of proof in cases involving all risks policies is a recurrent one. It arose again in Quattrociocchi et al v. Albany Insurance Co.(33) In that case, the plaintiffs insured a cargo of cheese on an all risks policy on refrigerated dairy products. The insuring clause insured the cargo "...against all risks of physical loss or damage from any external cause." The policy was

also warranted free of claim for deterioration, decay or spoilage except to the extent as provided by the following clause:

> "While stowed [under refrigeration] this insurance is extended to cover all loss or damage due to or caused by derangement or breakdown of the refrigeration machinery and/or refrigerating plant and/or insulation..."

On preliminary motions, the court held that the plaintiffs' prima facie case against the underwriter would be established upon proof that the cargo was in good order and condition upon shipment and bad order or condition upon receipt by the plaintiffs at destination.

The court then held that upon establishment of plaintiffs' prima facie case, the underwriter would have the burden of establishing that the plaintiffs' loss constituted "deterioration, decay or spoilage," and, upon offer of such evidence, the underwriter could also offer evidence that such deterioration, decay or spoilage was not caused by a derangement or breakdown of the refrigeration machinery, plant or insulation.

Thus, it will be seen, after the plaintiff/assured had proved that the cargo was in good order and condition on shipment and bad order upon receipt, the burden of going forward with the evidence shifted to the defendant/underwriter who not only had to prove that the damage was due to one of the excepted causes (deterioration, decay or spoilage) but also had to negative the further exception as to derangement or breakdown of the refrigeration equipment.

In Morrison Grain Co. v. Utica Mutual Ins. Co.,[34] the policy was on bagged urea, shipped from Romania to

Mississippi, and insured against "all risks of physical loss or damage to property from any external cause." A clean on-board bill of lading was issued by the ocean carrier. Upon discharge, it was discovered that many of the bags were ruptured, distorted and damaged. Additionally, there was loose, caked and partially dissolved urea on bags in several holds. Additional damage occurred during discharge due to the hydroscopic nature of the loose urea which caused the bags to be wet and slippery and therefore difficult to handle. A large quantity of urea in one portion of one hold had simply dissolved and melted away.

The underwriter declined to pay. The trial court held for the assured. On appeal, the underwriter contended that the trial judge had improperly construed the law with respect to the allocation of the burden of proof under an "all risk" policy. The underwriter also challenged the trial court's factual determination that the damage to the bags of urea arose from improper stowage rather than inherent defect in the bags.

On the burden of proof issue, the underwriter contended that the assured should have had the burden of bringing itself within the express coverage of the policy by showing that the loss was occasioned by an external cause. The court on this submission, noting that all risks insurance was created for the very purpose of protecting the assured in those cases where difficulties of logical explanation or some mystery surrounded the loss, held that the assured need not prove the precise cause of the damage and, therefore, need

not demonstrate that the loss was occasioned by an external cause.(35)

The underwriter also contended that the trial court erroneously failed to impose on the assured the burden of showing that the loss was fortuitous. Citing cases, the appeals court observed that assureds under an all risk policy need not show the precise cause to demonstrate fortuity and that, moreover, a loss may be fortuitous even if it is occasioned by the negligence of the assured. The court continued by observing that whether the loss was due to improper stowage (as the trial court held) or inherent vice in the bags (as the underwriter contended), the damage was clearly fortuitous, as neither the shipper nor the consignee was aware, before the fact, that the events producing the loss were dependent on anything other than chance.

As evidence of good order and condition at the time of loading, the assured offered at trial, without objection, the clean on-board bill of lading. Conceding that a clean bill would be accorded substantial weight in a claim against the ocean carrier, the underwriter argued that in a claim on the insurance policy, the clean bill was merely a hearsay document and of no probative value.

The underwriter's argument was summarily dismissed, the court noting that the clean bill could not be dismissed as mere hearsay as it constituted a record of regularly conducted activity which, under the Federal rules of evidence, was an exception to the hearsay rule.

The court further held that the probative value of the clean bill could not be ignored as the importance

of a bill of lading as a commercial document, accepted as a negotiable instrument for over a hundred years, and relied upon in international banking and trade, was evident.

The court said, in part, on this point:

> "Furthermore, we feel that the particular circumstances of this case give additional probative weight to the bill of lading. First, the record shows that the bill of lading was signed by the carrier and there is no evidence that any agent of the carrier filed a protest to the bill of lading. (citing cases) Second, this is not a case in which it is alleged that the commodity itself (i.e., the urea) is inherently defective and therefore 'the internal condition is not adequately revealed by external appearances.' (citing cases) Rather, it is alleged that the bags themselves were inherently defective, a condition which presumably would have been readily observable during loading.... We do not find that evidence of spillage during loading is so necessarily inconsistent to override a finding of good order and condition of the cargo at the time the insurance policy attached."

The trial court had specifically found that "...the evidence does not establish that the urea bags were insufficient for the purpose used or that their quality was misrepresented." The underwriter contended on appeal that the finding of a sufficiency in the bags was clearly erroneous. On this submission, the appeals court emphasized that the question to be examined was not whether the bags were ideally suited for transporting urea or whether some other bag would have been preferable for that purpose, but rather whether a defect in the bags used was the real cause of damage to the urea. As the rule of review in Federal cases in the United States is that an appellate court must affirm a finding of fact of the trial court unless "clearly erroneous," the appeals court affirmed on the basis that there was evidence to support the trial court's finding and that the finding was not "clearly erroneous."

To the contrary, the appeals court held that there was substantial evidence before the trial court to sustain its finding that the real cause of the damage was bad stowage. In so holding, the appeals court stated:

> "In choosing between plausible, but controverting, explanations as to the cause of an event, the trial judge is able to view the demeanor of the witnesses and judge their credibility. Upon review of this record, we are unable to say that the trial court's determination that Insurer failed to carry its burden of proof in showing that defective bags caused the damage to the urea is clearly erroneous."

Attention is also directed to two recent American cases involving all risk policies. In Northwestern Nat'l Ins. Co. v. Chandler Leasing Corp. et al,(36) containers owned or leased by Pacific Far East Lines (PFEL) were unfortunately left scattered throughout the world by reason of the bankruptcy of that shipping company. Some were held in various foreign countries, principally in the Middle East, by third parties who held the containers as "ransom" for debts allegedly owed them by PFEL. Others simply could not be located due to PFEL's inaccurate inventory control. In a suit for declaratory judgment by the underwriter, Northwestern National, the lessors sought a partial summary judgment on the narrow issue of whether losses due to "mysterious disappearance" were covered by an all risk policy. Holding that an "all risk" policy protects against all fortuitous risks not expressly excluded, the court found that the policy covered mysterious disappearance.

In Consolidated International v. Falcon,(37) it was held that an all risks machinery cargo policy covering "new machinery" also included unused machinery stored in original

crates which, after importation, had been stored for three months in a New York bonded warehouse prior to exportation to Venezuela.

General Average

It is not often that the question of a general average arises in a towage situation. It did arise, however, in a very recent decision in the Federal Court of Canada in Northland Navigation Co. Ltd. v. Patterson Boilers Works Ltd., No. T-4655-75 (not yet reported), March 1, 1983. There, the defendant was the owner and shipper of eleven steel buoys. The buoys were to be sent to its customer, the Ministry of Transport, at Prince Rupert, British Columbia. The plaintiff was the owner of a barge and the parent company of a subsidiary corporation also engaged in the shipping business. They operated passenger and cargo ships, as well as tugs and barges. Although the defendant assumed that their buoys would be sent to destination on self-propelled vessels, the evidence showed that the plaintiff had sent a revised schedule to the defendant which indicated that the buoys would be shipped by tug and barge. Defendant did not protest.

After departure, the tug and barge encountered heavy seas. Water broke over the stern of the tug, flooding the bilge and entering the engine room. The engine began to shudder. The tow line was let go, setting the barge adrift while the tug headed for shelter. The barge was later found aground on a reef. Attempts were made by the plaintiff to pull the barge free but plaintiff was unsuccessful. The vessel's bottom had been pierced in several places and it

appeared that both the barge and her cargo would have to be treated as a constructive total loss.

A decision was then made between January 6 and 9 to abandon the barge, but to try and save the cargo. On January 9, the plaintiff formally abandoned the barge to underwriters.

General average adjusters were appointed. Most of the cargo owners were advised that attempts were going to be made to save the cargo and that in the plaintiff's view a general average situation existed.

Attempts were made between January 7 onward to shift the barge so that the cargo could be unloaded. Finally, and luckily, fortuitous action of the elements shifted the barge into a position where removal of the cargo was possible and by January 25 the entire cargo had been removed.

The bill of lading contained the usual general average clause. A statement in respect of general average payments and contributions was prepared by the adjusters, there being two main breakdowns. The disbursements and expenses incurred from January 1 to January 9 were classed as general average. The disbursements and expenses incurred from then on were shown as special charges on cargo.

Plaintiff contended that a general average situation arose when extraordinary expenditures were made first to try and save the barge and the cargo, and finally in respect of the cargo only. The defendant contended general average was not applicable in that case; the extraordinary peril or sacrifice was when the barge was cut adrift; everything which occurred thereafter was in the nature of a salvage operation.

Noting that general average can arise either where there has been an extraordinary sacrifice, or where there have been extraordinary expenses incurred, in the preservation of ship and cargo, the court held that the casting adrift of the barge was an extraordinary sacrifice made in respect of the safety of the tug, the barge, and the cargo on board the barge; i.e., the tug and tow as well as the cargo were in danger if the barge had not been set adrift. Thus, the casting adrift of the barge, in the knowledge that it would inevitably strand or go under, was characterized as a general average sacrifice.

Justice Collier, the trial judge, continued moreover to point out that in his view the expenses first laid out by the plaintiff to try and save both the barge and cargo, after the barge stranded on the reef, equally gave rise to general average, citing Blackburn, J. in Kemp v. Halliday, (1865) 6 B. & S., 723 at 746, where he said:

> "In order to give rise to a charge as general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if, instead of money being expended for that purpose, money's worth were thrown away. It is immaterial whether a shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off."

Continuing, Justice Collier held:

> "Until the decision was made to abandon the barge, both vessel and cargo were in peril. The measures taken to try and save or rescue both, and the resultant expenditures, were, as I see them, extraordinary in nature. The expenses incurred to that point were properly allocable as general average expenditures."

The defendants, however, did not give up. They then contended that if general average were applicable, the owners of the tug should contribute in general average. Acknowledging that it was a troublesome point with little or no authority in England and Canada, and "varying" authority in the United States, the court held that the tug should not be called upon to contribute. As the court put it, the expenditures laid out in the attempt to recover barge and cargo had nothing to do with the safety of the tug. There was, at that time, no common tri-partite peril; the jeopardy and the general average efforts toward recovery were in respect of barge and cargo alone.

As to the expenses incurred after the barge was abandoned to underwriters, the court took a different tack. It held that from approximately January 9, onward, the plaintiff's efforts were directed toward rescue of the cargo alone. Those efforts, with their translation into money, were successful. Consequently, these were to be treated as special charges on the cargo.

Defendants further argued that the services rendered were pure salvage services, a claim for which was not brought within the two-year limitation period in the Canada Shipping Act. The court disagreed, holding that while the services were akin to salvage, they were not salvage in the classical or true legal sense.

Finally, defendants contended that the towing tug was unseaworthy and, therefore, its owners could not claim in general average. The court held against this contention

as there was no evidence before the court which would warrant a finding of unseaworthiness.

The case is most interesting and will probably join those few cases which exist on the subject of general average in a tug and tow situation as being a landmark decision.

It will be recalled that when the York-Antwerp Rules were first introduced in 1890, they consisted of eighteen numbered rules designed to dispose of differences existing in law and practice on certain specific questions between various nations. By 1924, the rules also contained a general declaration of the principles of general average to be applied in circumstances not provided for in the numbered rules. These general principles were embodied in seven lettered rules.

It was clearly the intention of the draftsmen that the numbered rules should take precedence over the lettered rules but, unfortunately, in the celebrated case of Vlassopoulos v. British & Foreign Marine Insurance Co. Ltd. (The Makis),[38] the court held that the lettered rules constituted the general rules for general average, while the numbered rules were to be regarded as specific cases. Accordingly, expenditures which would have been recoverable under the numbered rules as general average were not allowed because the circumstances were not in accord with the general definition of general average in the lettered rules.

For obvious reasons, this did not meet with approval and an agreement was quickly drawn up to nullify its effect, binding all signatories, known as the "Makis Agreement." And,

in 1950, when the York-Antwerp Rules were again revised they were preceded by the following Rule of Interpretation:

> "In the adjustment of General Average the following lettered and numbered Rules shall apply to the exclusion of any Law and Practice inconsistent therewith.
>
> "Except as provided by the numbered Rules, General Average shall be adjusted according to the lettered Rules."

One would have thought that The Makis decision, followed by the Makis Agreement, and subsequently confirmed in the 1950 amendments, would have put the question at rest. Alas, not so.

In 1974, in Orient Mid-East Lines v. A Shipment of Rice,[39] the U.S. Fifth Circuit held that the Rules do not do away with the fundamental requirement that a ship be in a position of peril before the law of general average applies and consequently Rules X and XI were limited to actions taken for the common safety[40]....thus perpetuating the same error as was made in The Makis.

Fortunately, in Eagle Terminal Tankers, Inc. v. Insurance Company of U.S.S.R. (Ingosstrakh), Ltd.,[41] the U.S. Second Circuit rectified the confusion. In that case, the vessel left Texas loaded with grain and bound for Leningrad. Off the coast of England, while maneuvering to pick up a pilot, a "bump" was felt, although nothing could be seen in the water near the ship at the time. The ship continued on its voyage but about mid-afternoon on the following day, metallic scraping noises were heard coming from the stern. The ship reached its next port of call, Rotterdam, where divers were sent down to inspect, finding

that extensive damage had been sustained by the propeller. Repairs had to be made before the voyage could proceed. Accordingly, a portion of the cargo was offloaded and the ship placed in drydock where the propeller shaft was replaced and a spare propeller installed. The cargo was then reloaded and the vessel ultimately discharged the cargo in Leningrad.

The vessel owner declared a general average, seeking contribution for expenses arising from the Rotterdam repairs from the ship's underwriters and from the defendant as insurer of the cargo. The expenses claimed included the costs of unloading and reloading the cargo in connection with the drydocking, as well as the costs of maintaining the ship's crew and officers during the repair period. When the defendant cargo underwriters refused to pay, the vessel owner brought suit.

At first instance, the trial court held that the ship had not been threatened by a "peril," as required by the general principles of general average and the York-Antwerp Rules. Noting that the damage was discovered only after the vessel was safely moored, the trial court concluded that it could have been moored at Rotterdam indefinitely without incurring the slightest peril to itself or its cargo. That the voyage could not have been completed without the repairs was deemed "irrelevant."

On appeal, the Second Circuit reversed, holding inter alia that the critical issue in the modern law of general average is the "seriousness" of the danger created

by an accident or peril at sea rather than its immediacy, and applied Rules X(b) and XI(b) of the numbered rules.

Rule X(b), it will be recalled, provides in part:

> "(b) The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage." [Emphasis added]

Rule XI(b), a related provision, provides, in essence, that where a ship has been detained by accident or sacrifice, or to enable damage to the ship to be repaired, if the repairs were necessary for the safe prosecution of the voyage, the wages and maintenance of the master and crew, fuel and stores, and port charges referrable to repairs are allowable in general average.

Consequently, the court said, the safe prosecution clause is to be read not as eliminating the requirement of peril but as presuming its presence in cases where, because of accident or sacrifice, a voyage cannot safely be resumed without repairs. The court thereupon held that the trial court erred in relying solely on Rule A to the exclusion of Rules X(b) and XI(b).[42]

Wreck Removal

This perplexing problem, and its interrelationship with P & I policies, continues to rise, Phoenix-like, from the ashes to plague shipowners and underwriters alike.

It will be recalled that under the Running Down, or Collision Clause, in the new London hull clauses hull

underwriters do not provide coverage for "removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever" as well as "any liability arising under statute." Consequently, if that liability is to be covered at all, it must fall within the parameters of the P & I Club rules (in England) or the corresponding coverages in American P & I policies such as the American Steamship Owners Mutual Protection & Indemnity Association policy or the equally-current SP-38 form of policy.

Generally speaking, Club rules and American P & I policies provide coverage for wreck removal expenses "when such removal is compulsory by law." The question immediately arises: when is the removal of a wreck "compulsory by law"?

Unfortunately, in the United States, the term "compulsory by law" has received an incredibly liberal interpretation, and one which it is to be devoutly hoped will not spread beyond its borders to infect other English-speaking jurisdictions.

The liberality began with M. J. Rudolph v. Lumber Mutual Fire; Luria International et al, Third Parties (The Cape Borer).[43] There, a barge, not covered by any hull policy, capsized and sank in New York harbor. A department of the City of New York ordered her removal as a menace to navigation and as an obstruction to the pier. The owner had her removed and claimed against his P & I underwriters. Recovery was granted.

In Progress Marine, Inc. v. Foremost Ins. Co.,[44] a barge sank through the owner's negligence. The barge owner raised the wreck and sought indemnity under the wreck removal

provision of the standard SP-38 P & I insurance policy. The district court held that the removal, although prudent, was not compulsory by law. On appeal, the Fifth Circuit reversed and formulated a new definition of the term "compulsory by law," stating:

> "Removal occasioned by an unarticulated or unreasonable apprehension of criminal or civil liability could not be considered 'compelled by law.' On the other hand, where removal was reasonably required by law, or where failure to remove would have reasonably exposed an insured to liability imposed by law sufficiently great to justify the expense of removal, then, we believe, that such removal could be considered 'compelled by law' for purposes of recovery. However, an additional inquiry must be made as to whether the removal was in fact 'compelled by law,' that is, whether removal was performed as a result of a subjective belief on the part of the insured that such was reasonably necessary to avoid legal consequences of the type contemplated by this policy."

The underwriter had contended, based upon prior cases, that the term "compulsory by law" or "compelled by law" meant that a governmental agency must have ordered the removal. The court rejected this notion, observing that the potential liability exposure to the owner resulting from its wreck rupturing an oil pipeline or breaching the hull of an oil carrying vessel could have been enormous. Moreover, the court noted the potential applicability of the Federal Water Pollution Control Act of 1972 which prohibited the discharge of oil into or upon "contiguous" waters of the United States, and provided for third party liability to the United States in certain circumstances for oil spill removal costs. The only logical interpretation of the court's language is that if a statute imposes some kind of liability on a negligent vessel owner who does

not remove his wrecked vessel, then the removal by the owner will have been "compulsory by law."

But the highwater mark was not reached in Progress. That dubious honor belongs to Continental Oil v. Bonanza Corp.(45) In that case, a workboat used for offshore drilling operations drifted under an offshore drilling rig where its propeller and radio antenna became entangled in the drilling rig's mooring lines. Before the vessel could be freed, it began to take on water. The pumps were of no avail and the workboat sank below the drilling rig where it began to settle into the soft mud of the ocean floor. The workboat had been chartered by Conoco, the owner of the drilling rig, from its owner, Bonanza. Bonanza was to provide the captain and crew for the workboat.

The charter party agreement also required Bonanza to procure insurance on the vessel in which Conoco was to be named as an additional assured on each policy. Bonanza purchased a standard form P & I policy from Republic, providing for $1 million of coverage. The policy, known as an SP-38, afforded coverage for, inter alia, wreck removal expenses "when such removal is compulsory by law." The policy also provided that when the assured had any interest in the vessel other than as a shipowner, the insurer's liability would not be greater than "if the assured were the sole owner and entitled to petition for limitation of liability."(46) The policy named both Bonanza and Conoco as assureds.

Initially, Conoco was concerned about the dangers in moving the drilling rig with a sunken workboat beneath it.

Conoco demanded that Bonanza remove it; Bonanza refused. The drilling rig was then moved without incident. Conoco believed, however (or so it said), that the workboat still posed a danger to other wells and to oil pipelines in the vicinity. Because of the potential for damage if the workboat were thrown by seas against a nearby pipeline, and because Conoco wished to place a fixed structure on its newly drilled well, Conoco decided to remove the wreck. It determined that the most prudent means of removal was a derrick barge that was on the scene. The derrick barge eventually raised the workboat at a cost to Conoco of $109,000. Conoco then sued Bonanza and Republic (the underwriter) to recover its costs.

The principal thrust of the underwriter's defense was that the removal of the workboat was not "compulsory by law" and further, that the compulsion, if it existed, fell on Conoco in some other capacity than as "owner" of the vessel; i.e., as lessee of the lease on the submerged ocean bed.

On the first defense, although recognizing that there was no settled principle of law which would fix liability on Conoco as a time charterer if the sunken vessel damaged nearby properties, the court concluded that Conoco had been "compelled" to remove the wreck because:

(1) The likelihood that a storm would drive the wreck onto a nearby pipeline, although difficult to estimate, existed;

(2) The potential damages were incalculable and if the boat damaged the nearby pipeline oil pollution was sure to ensue; and

(3) The cost of the removal was "reasonable."

Subjectively, the court reasoned, although it was to the financial benefit of Conoco to remove the wreck as it might interfere with its oil drilling, its mixed motives for raising the wreck did not prevent it from recovering as its fear of legal liability was sufficient.

The court, although recognizing that under the law Conoco could recover under the wreck removal clause only if the compulsion of law arose out of Conoco's ownership of, or interest in, the workboat, and although recognizing that Conoco was only a time charterer and thus had no "ownership" interest in the vessel, nonetheless held that Conoco was "compelled by law" to raise the wreck in its capacity as "owner" of the workboat. The reasons assigned were:

(a) Conoco was responsible for the presence of the workboat in the midst of the offshore oil fields;

(b) The workboat came to rest on oil fields leased by Conoco; and

(c) Conoco knew that Bonanza had no intention of raising the wreck.

Judge Dyer, in a vigorous dissent, characterized the majority's opinion as constituting "judicial legerdemain." In the author's opinion, Judge Dyer is entirely correct. There is, in fact, no settled principle of law which could possibly fix liability on Conoco, as a time charterer, should

the workboat have been shifted by tides and currents so as to rupture a pipeline. Moreover, as recognized by the majority, a non-negligent time charterer is not liable for damages due to the owner's fault. The mere supposition that Conoco might well be sued should a pipeline be ruptured by the workboat shifting is not at all sufficient to presume that Conoco would ultimately be held liable. In essence, the majority held that "in the light of expanding concepts of enterprise and vicarious liability, Conoco faced a significant prospect of being held liable for damages should the [workboat] become a floating menace." That is not currently the law, no matter how vigorously it might be espoused by law professors. Nor should "policy reasons" override settled law. Courts should not decide cases on what the law may be, or presumably could be, many years in the future but on what the law actually is when those cases are before the courts for judicial review.

It is disconcerting to lawyers, as well as to scriveners of insurance policies, to labor mightily in couching their aims in clear and concise language, only to have the courts evade that language by what they perceive the result ought to be rather than construe the language in terms of its plain and natural meaning. It may well be that, for policy reasons, underwriters ought to bear the cost of wreck removal in such circumstances but, if so, they ought to be given the opportunity to fix the premiums to be charged on sound, actuarial principles rather than to be jolted by a loss which they never intended to cover.

A Towage Contract Converted into a Salvage Contract - When does it Happen?

A recent decision of the Court of Appeal, New South Wales, bids fair to be a landmark decision in salvage law. That is Texaco Southampton v. Burley,(47) with which probably every maritime lawyer is now familiar.

In that case, the tanker Texaco Southampton found itself without power as a result of a switchboard fire and was drifting in a westerly direction from a point about three and a half miles to the east of Coledale on the south coast of New South Wales.

Following a request from a master of the vessel, its agents requested J. Fenwicks & Co. Pty., sole supplier of tugs for Texaco ships, to render assistance. Fenwicks in turn, spoke with Wallace Tugs Pty. Ltd., owner of the tug Kembla II, and requested that one of its tugs go to the assistance of the vessel.

When the tug left port, all the plaintiffs (master, pilot and crew of the tug) were aware that it was likely they would be required to tow the vessel to Sydney. Few had any real experience in towing a disabled vessel at sea and the services they provided involved little more than the kind of work they customarily performed as members of a tug crew. For their efforts, the plaintiff was paid by the tug owner what the trial judge described as "generous sums" by way of wages and overtime and allowances amounting to $5,350. Wallace rendered an invoice for $13,002 to Fenwicks for towing the vessel to Sydney and was paid that sum. Fenwicks included this amount in an account totaling

$38,218 relating to the services of three tugs which it forwarded to the vessel's agents.

Plaintiffs contended that any service to a vessel in danger, by whomsoever rendered, were by their nature salvage services, and the fact that the services of the master and crew of a tug were rendered pursuant to their contract of employment did not deprive them of a salvage award since (a) they owed no duty to the salved vessel and (b) a contract binding the tug which excluded a claim by it to a salvage award would not bar such a claim on the part of its crew who did not assent to the contract. To the contrary, the owners conceded that if the services had been rendered by a passing ship, crew members on that vessel, would have been entitled to a salvage award, but when performed by the plaintiffs, lacked the element of voluntariness. Moreover, the owners of the tanker contended that neither the tug nor its crew was a volunteer because (a) the tug owner was bound by its contract to provide towing services and the plaintiffs were bound to it by their contracts of employment and (b) none of the services rendered either by the tug owner or the plaintiff lay outside the scope of their respective contracts having regard to the nature of those contracts and the nature of the danger to the ship.

Glass, J. A., recited the propositions which can be derived from the decided cases as follows:

(1) Towage services are services by one vessel to expedite the voyage of another vessel when nothing more is required than the acceleration of her progress, citing

The Princess Alice, 166 E.R. 914. Since by definition the tow is in no hazard, the question of salvage cannot arise;

(2) Towage services may also be provided a vessel in danger but do not qualify as salvage services unless additionally it appears that they were rendered by volunteers. The Neptune (1824), 166 E.R. 81 at 85, The Sappho (1871) 3 P.C. 690 at 695;

(3) Services rendered by a towing vessel to a distressed ship pursuant to a salvage contract are not voluntary. Accordingly they are not salvage services but towage services only unless supervening events place the services outside the scope of the contract. The Minnehaha (1861) Lush. 335. The requirements of the Minnehaha exception are not fulfilled unless (1) the tow is in danger by reason of circumstances which could not reasonably have been contemplated by the parties and (2) risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract. The Homewood (1928) 31 Ll.L.Rep. 336, at 339, The Slaney (1951) 2 Lloyd's Rep. 538, at 544;

(4) Salvage services rendered by a volunteer give no title to a salvage award unless the ship, freight or cargo is saved. The Renpor (1883) 8 P.D. 115 at 117;

(5) Hence, it follows that salvage services (which are voluntary and speculative) and towage services (which are contractual and rewarded in any event) cannot co-exist during the same space of time between the same parties, The Leon Blum (1914) P. 88 at 101, although they may alternate during

successive periods of time, The Aldora (1975) 1 Lloyd's Rep. 617 at 623.

After referring to the decision of Stephen, J. in The Oceanic Grandeur (1972) 127 C.L.R. 312, and numerous other decisions, particularly including The Sarpen (1916) P. 306, the court held that where there exists a contract to tow making no provision for salvage and the role of the tug and crew, as the trial judge found, was limited to the performance of that contract, neither the tug nor the crew had rendered voluntary servces. Moreover, the employment of Wallace by Fenwicks merely constituted Wallace a towing subcontractor who was bound by the towing contract already entered into by its principal, Fenwicks. In the result, a salvage award was denied.

Salvage - "Economic Uplift"

It will be recalled that Lloyd's Standard Form of Salvage Agreement (LOF 1980) provides, in Paragraph 18 thereof, that in fixing the award effect may be given "to the consequences of any change or changes in the value of money or rates of exchange which may have occurred between the completion of the services and the date on which the award is made." This has been referred to as an "economic uplift." Such an "economic uplift" was recently granted in a case in the Southern District of New York, B.V. Bureau Wijsmuller v. United States, No. 69,133, decided March 2, 1983 (not yet reported) even though LOF 1980 was inapplicable in the circumstances of that case. In that case, a professional salvor successfully got a privately owned vessel, loaded with U. S. government cargo, off the rocks on the

northern coast of Scotland. The contract between the professional salvor and the owner of the vessel was on Lloyd's Standard Form.

After the successful salvage operation, an arbitration was held in London in which a salvage award was made against the owner of the vessel and against the United States as owner of the cargo and bunkers. Invoking the doctrine of sovereign immunity, the United States refused to participate in the arbitration and refused to pay its share of the arbitrator's award.

The salvor brought suit against the United States in personam, as is permitted under the Suits in Admiralty Act, 46 U.S.C. §741, et seq., against commercial vessels operated by the United States. The trial court awarded a $500,000 salvage award and, applying an "equitable uplift" of 27% to reflect inflation since the services were rendered, raised the award to $635,000. The United States appealed and the salvor cross-appealed.

On appeal, the court discussed in great depth the history of salvage and the many cases relating to ascertainment of proper salvage awards, and affirmed the trial court's award. After noting that the United States had created a right of action against it in the Suits in Admiralty Act, the appeals court observed that the Act contemplates application of the general principles of admiralty law where no contrary rule is specified. While authority is sparse, courts have in the past taken inflation into acount in determining salvage awards involving private parties and on that basis the act

of the trial court in exercising its discretion to do so was upheld.

Miscellany

There have been two recent decisions relating to war risk insurance which are of interest. The first is Telstar Shipping Corp. v. Athos Shipping Co., S.A. et al (The Athos)[48] and the second is Ope Shipping Ltd. v. Allstate Insurance Co.[49] In the former, the Court of Appeal held, inter alia, that the time charterers of a vessel were obliged, pursuant to the terms of the charter, to pay additional war risk insurance premiums where the vessel transited the Suez Canal and engaged in trading with Iran. In the latter, hull underwriters were relieved of the obligation of payment for the total loss of four vessels (and the war risk underwriters were held liable) where the vessels were taken over by the Sandanista rebels when the Somoza government was overthrown in Nicaragua.

Attention is also directed to Visscher Enterprises Pty Ltd. v. Southern Pac. Ins. Co. Ltd.[50] and Gregoire v. Underwriters at Lloyds,[51] both involving, in part, the implied warranty of seaworthiness in a hull policy. (Visscher is the subject of a note in the September, 1982 issue of the MLAANZ Newsletter, and only brief mention is warranted.) In Visscher, at first instance, underwriters defended on the grounds of unseaworthiness and nondisclosure. Underwriters lost on the defense of unseaworthiness and this was not appealed. It is the trial court's decision on this issue which is most interesting. There, a vessel caught on fire and sank in calm seas. On reason she sank

was the fire breached a rubber coupling in the raw water line which admitted seawater for cooling the engines. But she would not have sunk had there not been a hole cut around the propeller shaft in the aft engine bulkhead....a hole which the owner knew about. The defense of unseaworthiness was based, of course, on Sec. 45(5) of the Marine Insurance Act, 1909 [which corresponds with 39(5) of the Marine Insurance Act, 1906], and provides that in a time policy there is no implied warranty of seaworthiness but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. On this point, the trial judge held that mere knowledge of the assured/vessel owner was insufficient to establish privity and that the insurer was required to show that the assured had a conscious realization of the implications of the facts making the vessel unseaworthy, thus following the decision in Compania Maritima Basilio S.A. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd. (The Eurysthenes).(52)

In Gregoire, a fishing vessel capsized and sank in moderate seas in Cook Inlet, Alaska. Underwriters contended that the assured overloaded the vessel with crab pots and that when the vessel proceeded into Cook Inlet she was unseaworthy and the owner knew it. The court cited Sec. 39(5) of the Marine Insurance Act, 1906 as the so-called "English" rule. He then contrasted it with the so-called "American" rule which is to the effect that the owner, from bad faith or neglect, will not knowingly permit his vessel to break ground in an unseaworthy condition, and concluded that

although the language used may be different, the legal effect is precisely the same. Interestingly, the trial judge also cited The Eurysthenes in support of his conclusion that the vessel owner must also have knowledge that the facts rendered the vessel unseaworthy...more negligence will not suffice.

Although there are American cases holding that in time policies there is an implied warranty of seaworthiness, the great weight of authority appears to be as stated in Gregoire.(53) It is indeed encouraging that a supposed inconsistency between the American rule in time policies and the English (and Commonwealth) rule appears to be on its way out.

Lastly, one would be remiss in not calling attention to Integrated Container Service Inc. v. British Traders Ins. Co. Ltd.,(54) which on its facts, is remarkably similar to Northwestern Nat'l Ins. Co. v. Chandler Leasing Corp. et al, discussed supra. Both cases involved missing containers in which the assured had expended sums in recovering some of them and claimed under the sue and labor clause. In both cases, recovery was allowed. Integrated Container is, however, doubly interesting in that Neill, J. refused to follow the New South Wales decision, Emperor Goldmining Co. Ltd. v. The Switzerland General Insurance Co. Ltd.,(55) where Manning, J. held, in effect, that inasmuch as the Marine Insurance Act plainly imposed upon the assured the duty to take such measures as are reasonable for the purpose of averting or minimizing a loss, recovery should be allowed for expenses even in the absence of a suing and laboring clause.

FOOTNOTES

(1) TD/B/C.4/ISL/27, 20 November, 1978, herein called the "Report."

(2) Report, p. 64-66.

(3) P.P.I. policies (policy proof of interest) have no legal standing under English law, although they are valid under American law to the extent to which the assured can prove an insurable interest. Nonetheless, it has always been the practice of underwriters in the English-speaking world to accept risks on such terms, although they are binding in honor only. They are, as it were, a commercial convenience in situations where, although the assured may have an insurable interest, it would be difficult and time-consuming to prove that interest. See, Sephie, 9 F.2d 304, 1926 AMC 447 (2d Cir.); Governor, 1923 AMC 741 (W.D. Wash.); Republic of China v. Nat'l Union F.I. Co., 163 F.Supp. 812, 1958 AMC 1529 (D., Md.).

(4) (1924) 20 Ll.L.Rep. 17.

(5) 533 F.2d 496, 1976 AMC 99 (9th Cir.).

(6) 1972 AMC 138, 493 P.2d 861 (St., Cal.).

(7) [1977] 2 Lloyd's Rep. 560.

(8) 471 F.2d 609, 1973 AMC 1843 (5th Cir.).

(9) [1980] 1 Lloyd's Rep. 338.

(10) 614 F.2d 160, 1982 AMC 1815 (8th Cir.).

(11) (1881) 50 L.J. Ch. 472.

(12) [1924] A.C. 431, [1924] 18 Ll.L.Rep. 211.

(13) 105 E.R. 119.

(14) (1940) 66 Ll.L.Rep. 174.

(15) Other cases involving the same principle are: Butler v. Wildman (1820) 106 E.R. 708 (throwing overboard of Spanish dollars to prevent capture by enemy; held, ejusdem generis with jettison); Phillips v. Barber (1821) 106 E.R. 1151 (vessel while in a graving dock heeled over due to a violent wind and was bilged; held, ejusdem generis with stranding); Jones v. Nicholson (1854) 156 E.R. 342 (master, a part owner of the cargo, sold the cargo; held, ejusdem generis with barratry); Palmer v. Naylor (1854) 156 E.R. 492 (emigrants aboard as passengers murdered the master and took over the vessel; held, ejusdem generis with piracy); Feinberg v. Ins. Co. of N.A., 260 F.2d 523, 1959 AMC 11 (1st Cir.) (yacht damaged by vandalism

coupled with theft of personal items on board; held, ejusdem generis with theft).

(16) See, Compania Maritima San Basilio S.A. v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd. (The Eurysthenes) [1976] 2 Lloyd's Rep. 171.

(17) [1972] 2 Lloyd's Rep. 187.

(18) [1979] 1 Lloyd's Rep. 55.

(19) See, Jackson v. Mumford (1902) 8 Com.Cas. 61, but compare with the more recent decision in Prudent Tankers Ltd. v. The Dominion Ins. Co. (The Caribbean Sea) [1980] 1 Lloyd's Rep. 338.

(20) See, Ocean Steamship Co. v. Faber (1907) 97 L.T. 466, C.A.; Hutchins Bros. v. Royal Exchange Assur. Corp. (1911) 2 K.B. 398; Rensselaer, 1925 AMC 1116; National Bulk Carriers v. American Marine Hull Ins. Synd., 1949 AMC 340 (Arb.); Ferrante et al v. Detroit F. & M. Ins. Co., 125 F.Supp. 621, 1954 AMC 2026 (D., Cal.).

(21) The AIH (1977) form has long contained a specific clause in this respect which mentions, parenthetically, "excluding the cost and expense of replacing or repairing the defective part."

(22) The term "assailing thieves" is used in the AIH (1977) form, and therefore refers to acts of obtaining access to property by force. It includes persons who break into and steal property from a vessel; it is not limited to thieves using violence against the person, as in robbery. See, Swift v. American Universal Ins. Co., 1966 AMC 269 (St., Mass.); Goodman v. U.S. Fire Ins. Co., 1967 AMC 1853 (St., N.Y.); Orange, 337 F.Supp. 1161, 1972 AMC 627 (S.D.N.Y.); Bobley v. California Union Ins. Co., 1976 AMC 216 (St., N.Y.).

(23) (1936) 55 Ll.L.Rep. 52.

(24) The applicability to the U.K. Standard Towing Conditions is readily apparent. By contrast, under the American form, the shipowner's coverage is not jeopardized. The Pilotage and Towage Clause in the main body of the policy reads:

> "This insurance shall not be prejudiced by reason of any contract limiting in whole or in part the liability of pilots, tugs, towboats, or their owners when the Assured or the agent of Assured accepts such contract in accordance with established local practice.
>
> "Where in accordance with such practice, pilotage or towage services are provided under contracts requiring the Assured or the agent of the Assured:
>
> "(a) to assume liability for damage resulting from collision of the Vessel insured with any other ship or vessel, including the towing vessel; or
>
> "(b) to indemnify those providing the pilotage or towage services against loss or liability for any such damages.

It is agreed that amounts paid by the Assured or Surety pursuant to such assumed obligations shall be deemed payments 'by way of damages to any other person or persons' and to have been paid 'in consequence of the Vessel being at fault' within the meaning of the Collision Liability clause in this Policy to the extent that such payments would have been covered if the Vessel had been legally responsible in the absence of any agreement. Provided always that in no event shall the aggregate amount of liability of the Underwriters under the Collision Liability clause, including this clause, be greater than the amount of any statutory limitation of liability to which owners are entitled or would be entitled if liability under any contractual obligation referred to in this clause were included among liabilities subject to such statutory limitations."

(25) [1939] 63 Ll.L.Rep. 143, C.A.

(26) 290 F. 685, 1923 AMC 754, 1923 AMC 816, 1924 AMC 872, aff'd 5 F.2d 773, 1925 AMC 756 (4th Cir.).

(27) 144 F.2d 262, 1944 AMC 1035 (2nd Cir.), cert. den. 323 U.S. 797 (1944).

(28) 1939 AMC 717 (Arb.).

(29) 1975 AMC 392 (S.D.N.Y.).

(30) However, it is possible for the assured to protect himself where the insured value is lower than the contributory value by obtaining special insurance to cover his liability to pay the excess general average contribution, such as the Institute Excess Liabilities Clause (Hulls).

(31) In this connection, see Irvin v. Hine [1949] 2 All E.R. 1089, 83 Ll.L.Rep. 162; Helmville Ltd. v. Yorkshire Ins. Co. (The Medina Princess) [1965] 1 Lloyd's Rep. 361; Pitman v. Universal Mar. Ins. Co. (1882) 9 Q.B.D. 192, 4 Asp. M.L.C. 544, C.A.; Aitchison v. Lohre (1879) 4 A.C. 755, 4 Asp. M.L.C. 168, H.L.; Compania Maritima Astra S.A. v. Archdale (The Armar), 1954 AMC 1674, [1954] 2 Lloyd's Rep. 95 (St., N.Y.); and Delta Supply Co. v. Liberty Mutual Ins. Co., 211 F.Supp. 429, 1963 AMC 1540 (S.D., Tex.).

(32) [1983] S.A.(1) 120, A.D.

(33) 1983 AMC 1152 (N.D., Cal.).

(34) 632 F.2d 424, 1982 AMC 658 (5th Cir.).

(35) The decision was written by Circuit Judge John R. Brown, a former maritime lawyer and a master of trenchant and pungent prose with a nautical flavor. Many of the landmark maritime law decisions in the United States in the last twenty years have been authored by Judge Brown.

(36) 1982 AMC 1631 (N.D., Cal.).

(37) 1983 AMC 270 (S.D.N.Y.).

(38) (1928) Ll.L.Rep. 313.

(39) 496 F.2d 1032, 1974 AMC 2593 (5th Cir.).

(40) The primary basis of the court's ruling was not the inapplicability of the Rules to the facts in that case but its finding that general average recovery was unavailable in any event because the damage had been incurred in the process of making the vessel seaworthy.

(41) 1981 AMC 137 (2d. Cir.).

(42) It should be noted that Nicholas J. Healy, Editor of the Journal of Maritime Law & Commerce and Adjunct Professor of Law (Admiralty) at New York University, filed a brief in the case for the Association of Average Adjusters of the United States, Amicus Curiae, urging that the court recognize the supremacy of Rules X(b) and XI(b).

(43) 371 F.Supp. 1325, 1974 AMC 1990 (S.D.N.Y.), [1975] 2 Lloyd's Rep. 108.

(44) 642 F.2d 816, 1981 AMC 2315 (5th Cir.), cert. den. 454 U.S. 860, 1982 AMC 2110 (1981).

(45) 677 F.2d 455, 1983 AMC 387 (5th Cir.).

(46) It will be seen that Conoco was a "time-charterer" as Bonanza was to provide both the boat itself as well as the crew. Under American law, a time charterer is <u>not</u> entitled to petition to limit its liability under the Limitation of Liability Act of the United States as it is not an "owner".

(47) 1982 2 N.S.W.L.R. 336; (1983) 1 Lloyd's Rep. 94 and 1983 AMC 524

(48) (1983) 1 Lloyd's Rep. 127, C.A.

(49) 687 F.2d 22, 1983 AMC 22 (2d Cir.)

(50) (1981) Qd. R. 561.

(51) 1982 AMC 2045 (D., Alaska)

(52) (1976) 2 Lloyd's Rep. 1171, C.A.; (1977) Q.B. 49.

(53) That eminent scholar and barrister, Benjamin Yancey of New Orleans, Louisiana, arrived at the same conclusion in his address as Chairman to the 104th Annual Meeting of the Association of Average Adjusters of the United States on October 7, 1982.

(54) (1981) 2 Lloyd's Rep. 460.

(55) (1964) 5 F.L.R. 247.

Date (FOR USE ONLY WITH THE NEW MARINE POLICY FORM) Draft 24/1/83

INSTITUTE TIME CLAUSES
HULLS
(This insurance is subject to English law and practice)

1 NAVIGATION

1.1 The Vessel is covered subject to the provisions of this insurance at all times and has leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but it is warranted that the Vessel shall not be towed, except as is customary or to the first safe port or place when in need of assistance, or undertake towage or salvage services under a contract previously arranged by the Assured and/or Owners and/or Managers and/or Charterers. This Clause 1.1 shall not exclude customary towage in connection with loading and discharging.

1.2 In the event of the Vessel being employed in trading operations which entail cargo loading or discharging at sea from or into another vessel (not being a harbour or inshore craft) no claim shall be recoverable under this insurance for loss of or damage to the Vessel or liability to any other vessel arising from such loading or discharging operations, including whilst approaching, lying alongside and leaving, unless previous notice that the Vessel is to be employed in such operations has been given to the Underwriters and any amended terms of cover and any additional premium required by them have been agreed.

1.3 In the event of the Vessel sailing (with or without cargo) with an intention of being (a) broken up, or (b) sold for breaking up, no claim shall be recoverable under this insurance in respect of loss or damage to the Vessel occurring subsequent to such sailing unless previous notice has been given to the Underwriters and any amended terms of cover, adjustment of the insured value and additional premium required by them have been agreed. Nothing in this Clause 1.3 shall exclude claims under Clauses 8 and/or 11.

2 CONTINUATION

Should the Vessel at the expiration of this insurance be at sea or in distress or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

3 BREACH OF WARRANTY

Held covered in case of any breach of warranty as to cargo, trade, locality, towage, salvage services or date of sailing, provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed.

4 TERMINATION

This Clause 4 shall prevail notwithstanding any provision whether written typed or printed in this insurance inconsistent therewith.

Unless Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of

4.1 change of the Classification Society of the Vessel or change, cancellation or withdrawal of her Class therein, provided that if the Vessel is at sea such automatic termination shall be deferred until arrival at her next port,

4.2 any change, voluntary or otherwise, in the ownership or flag, transfer to new management, or charter on a bareboat basis or requisition for title or use of the Vessel, provided that, if the Vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, such automatic termination shall if required be deferred, whilst the Vessel continues her planned voyage, until arrival at final port of discharge if with cargo or at port of destination if in ballast. However, in the event of requisition for title or use without the prior execution of a written agreement by the Assured, such automatic termination shall occur fifteen days after such requisition whether the Vessel is at sea or in port.

A pro rata daily net return of premium shall be made.

5 ASSIGNMENT

No assignment of or interest in this insurance or in any moneys which may be or become payable thereunder is to be binding on or recognised by the Underwriters unless a dated notice of such assignment or interest signed by the Assured, and by the assignor in the case of subsequent assignment, is endorsed on the Policy and the Policy with such endorsement is produced before payment of any claim or return of premium thereunder.

6 PERILS

6.1 This insurance covers loss of or damage to the subject-matter insured caused by

6.1.1 perils of the seas

6.1.2 fire

6.1.3 violent theft by persons from outside the Vessel

6.1.4 jettison

6.1.5 piracy

6.1.6 breakdown of or accident to nuclear installations or reactors

6.1.7 contact with aircraft or similar objects, land conveyance dock or harbour equipment or installation

6.1.8 earthquake volcanic eruption or lightning.

6.2 This insurance covers loss of or damage to the subject-matter insured caused by

6.2.1 accidents in loading discharging or shifting cargo or fuel

6.2.2 explosions

6.2.3 bursting of boilers breakage of shafts or any latent defect in the machinery or hull

6.2.4 negligence of Master Officers Crew or Pilots

6.2.5 negligence of repairers or charterers provided such repairers or charterers are not an Assured hereunder

6.2.6 barratry of Master Officers or Crew,

provided such loss or damage has not resulted from want of due diligence by the Assured, Owners or Managers.

6.3 Master Officers Crew or Pilots not to be considered Owners within the meaning of this Clause 6 should they hold shares in the Vessel.

Exhibit A-1

7 POLLUTION HAZARD

This insurance covers loss of or damage to the Vessel caused by any governmental authority acting under the powers vested in it to prevent or mitigate a pollution hazard, or threat thereof, resulting directly from damage to the Vessel for which the Underwriters are liable under this insurance, provided such act of governmental authority has not resulted from want of due diligence by the Assured, the Owners, or Managers of the Vessel or any of them to prevent or mitigate such hazard or threat. Master, Officers, Crew or Pilots not to be considered Owners within the meaning of this Clause 7 should they hold shares in the Vessel.

8 3/4THS COLLISION LIABILITY

8.1 The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for

8.1.1 loss of or damage to any other vessel or property on any other vessel

8.1.2 delay to or loss of use of any such other vessel or property thereon

8.1.3 general average of, salvage of, or salvage under contract of, any such other vessel or property thereon,

where such payment by the Assured is in consequence of the Vessel hereby insured coming into collision with any other vessel.

8.2 The indemnity provided by this Clause 8 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions:

8.2.1 Where the insured Vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 8 shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision.

8.2.2 In no case shall the Underwriters' liability under Clauses 8.1 and 8.2 exceed their proportionate part of three-fourths of the insured value of the Vessel hereby insured in respect of any one collision.

8.3 The Underwriters will also pay three-fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, with the prior written consent of the Underwriters.

EXCLUSIONS

8.4 Provided always that this Clause 8 shall in no case extend to any sum which the Assured shall pay for or in respect of

8.4.1 any liability arising under or by virtue of contract (whether oral or in writing) entered into by or on behalf of the Assured

8.4.2 any liability arising under statute

8.4.3 removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever

8.4.4 any real or personal property or thing whatsoever except other vessels or property on other vessels

8.4.5 the cargo or other property on, or the engagements of, the insured Vessel

8.4.6 loss of life, personal injury or illness

8.4.7 pollution or contamination of any real or personal property or thing whatsoever (except other vessels with which the insured Vessel is in collision or property on such other vessels).

9 SISTERSHIP

Should the Vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same Owners or under the same management, the Assured shall have the same rights under this insurance as they would have were the other vessel entirely the property of Owners not interested in the Vessel hereby insured; but in such cases the liability for the collision or the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

10 NOTICE OF CLAIM AND TENDERS

10.1 In the event of accident whereby loss or damage may result in a claim under this insurance, notice shall be given to the Underwriters prior to survey and also, if the Vessel is abroad, to the nearest Lloyd's Agent so that a surveyor may be appointed to represent the Underwriters should they so desire.

10.2 The Underwriters shall be entitled to decide the port to which the Vessel shall proceed for docking or repair (the actual additional expense of the voyage arising from compliance with the Underwriters' requirements being refunded to the Assured) and shall have a right of veto concerning a place of repair or a repairing firm.

10.3 The Underwriters may also take tenders or may require further tenders to be taken for the repair of the Vessel. Where such a tender has been taken and a tender is accepted with the approval of the Underwriters, an allowance shall be made at the rate of 30% per annum on the insured value for time lost between the despatch of the invitations to tender required by Underwriters and the acceptance of a tender to the extent that such time is lost solely as the result of tenders having been taken and provided that the tender is accepted without delay after receipt of the Underwriters' approval.

Due credit shall be given against the allowance as above for any amounts recovered in respect of fuel and stores and wages and maintenance of the Master Officers and Crew or any member thereof, including amounts allowed in general average, and for any amounts recovered from third parties in respect of damages for detention and/or loss of profit and/or running expenses, for the period covered by the tender allowance or any part thereof.

Where a part of the cost of the repair of damage other than a fixed deductible is not recoverable from the Underwriters the allowance shall be reduced by a similar proportion.

10.4 In the event of failure to comply with the conditions of this Clause 10 a deduction of 15% shall be made from the amount of the ascertained claim.

11 GENERAL AVERAGE AND SALVAGE

11.1 This insurance covers the Vessel's proportion of salvage, salvage charges and/or general average, reduced in respect of any under-insurance, but in case of general average sacrifice of the Vessel the Assured may recover in respect of the whole loss without first enforcing their right of contribution from other parties.

11.2 Adjustment to be according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; but where the contract of affreightment so provides the adjustment shall be according to the York-Antwerp Rules.

11.3 When the Vessel sails in ballast and where there are no other contributing interests, the provisions of the York-Antwerp Rules, 1974 (excluding Rules XX and XXI) shall be applicable, and the voyage for this purpose shall be deemed to continue from the port or place of departure until the arrival of the Vessel at the first port or place thereafter other than a port or place of refuge or a port or place of call for bunkering only. If at any such intermediate port or place there is an abandonment of the adventure originally contemplated the voyage shall thereupon be deemed to be terminated.

11.4 No claim under this Clause 11 shall in any case be allowed where the loss was not incurred to avoid or in connection with the avoidance of a peril insured against.

12 DEDUCTIBLE

12.1 No claim arising from a peril insured against shall be payable under this insurance unless the aggregate of all such claims arising out of each separate accident or occurrence (including claims under Clauses 8, 11 and 13) exceeds .....in which case this sum shall be deducted. Nevertheless the expense of sighting the bottom after stranding, if reasonably incurred specially for that purpose, shall be paid even if no damage be found. This Clause 12.1 shall not apply to a claim for total or constructive total loss of the Vessel or, in the event of such a claim, to any associated claim under Clause 13 arising from the same accident or occurrence.

12.2 Claims for damage by heavy weather occurring during a single sea passage between two successive ports shall be treated as being due to one accident. In the case of such heavy weather extending over a period not wholly covered by this insurance the deductible to be applied to the claim recoverable hereunder shall be the proportion of the above deductible that the number of days of such heavy weather falling within the period of this insurance bears to the number of days of heavy weather during the single sea passage.

The expression "heavy weather" in this Clause 12.2 shall be deemed to include contact with floating ice.

12.3 Excluding any interest comprised therein, recoveries against any claim which is subject to the above deductible shall be credited to the Underwriters in full to the extent of the sum by which the aggregate of the claim unreduced by any recoveries exceeds the above deductible.

12.4 Interest comprised in recoveries shall be apportioned between the Assured and the Underwriters, taking into account the sums paid by Underwriters and the dates when such payments were made, notwithstanding that by the addition of interest the Underwriters may receive a larger sum than they have paid.

13 DUTY OF ASSURED (SUE AND LABOUR)

13.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

13.2 Subject to the provisions below and to Clause 12 the Underwriters will contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures. General average, salvage charges (except as provided for in Clause 13.5) and collision defence or attack costs are not recoverable under this Clause 13.

13.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

13.4 When expenses are incurred pursuant to this Clause 13 the liability under this insurance shall not exceed the proportion of such expenses that the amount insured hereunder bears to the value of the Vessel as stated herein, or to the sound value of the Vessel at the time of the occurrence giving rise to the expenditure if the sound value exceeds that value. Where the Underwriters have admitted a claim for total loss and property insured by this insurance is saved, the foregoing provisions shall not apply unless the expenses of suing and labouring exceed the value of such property saved and then shall apply only to the amount of the expenses which is in excess of such value.

13.5 When a claim for total loss of the Vessel is admitted under this insurance and expenses have been reasonably incurred in saving or attempting to save the Vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the Vessel; but if the Vessel be insured for less than its sound value at the time of the occurrence giving rise to the expenditure, the amount recoverable under this clause shall be reduced in proportion to the under-insurance.

13.6 The sum recoverable under this Clause 13 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the amount insured under this insurance in respect of the Vessel.

14 NEW FOR OLD

Claims payable without deduction new for old.

15 BOTTOM TREATMENT

In no case shall a claim be allowed in respect of scraping gritblasting and/or other surface preparation or painting of the Vessel's bottom except that

15.1 gritblasting and/or other surface preparation of new bottom plates ashore and supplying and applying any "shop" primer thereto,

15.2 gritblasting and/or other surface preparation of:

the butts or area of plating immediately adjacent to any renewed or refitted plating damaged during the course of welding and/or repairs,

areas of plating damaged during the course of fairing, either in place or ashore,

15.3 supplying and applying the first coat of primer/anti-corrosive to those particular areas mentioned in 15.1 and 15.2 above,

shall be allowed as part of the reasonable cost of repairs in respect of bottom plating damaged by an insured peril.

16 WAGES AND MAINTENANCE

No claim shall be allowed, other than in general average, for wages a. d maintenance of the Master, Officers and Crew, or any member thereof, except when incurred solely for the necessary removal of the Vessel from one port to another for the repair of damage covered by Underwriters, or for trial trips for such repairs, and then only for such wages and maintenance as are incurred whilst the Vessel is under way.

17 AGENCY COMMISSION

In no case shall any sum be allowed under this insurance either by way of remuneration of the Assured for time and trouble taken to obtain and supply information or documents or in respect of the commission or charges of any manager, agent, managing or agency company or the like, appointed by or on behalf of the Assured to perform such services.

18 UNREPAIRED DAMAGE

18.1 The measure of indemnity in respect of claims for unrepaired damage shall be the reasonable depreciation in the market value of the Vessel at the time this insurance terminates arising from such unrepaired damage, but not exceeding the reasonable cost of repairs.

18.2 In no case shall the Underwriters be liable for unrepaired damage in the event of a subsequent total loss (whether or not covered under this insurance) sustained during the period covered by this insurance or any extension thereof.

18.3 The Underwriters shall not be liable in respect of unrepaired damage for more than the insured value at the time this insurance terminates.

19 CONSTRUCTIVE TOTAL LOSS

19.1 In ascertaining whether the Vessel is a constructive total loss, the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

19.2 No claim for constructive total loss based upon the cost of recovery and/or repair of the Vessel shall be recoverable hereunder unless such cost would exceed the insured value. In making this determination, only the cost relating to a single accident or sequence of damages arising from the same accident shall be taken into account

20 FREIGHT WAIVER

In the event of total or constructive total loss no claim to be made by the Underwriters for freight whether notice of abandonment has been given or not.

21 DISBURSEMENTS WARRANTY

21.1 Additional insurances as follows are permitted:

21.1.1 *Disbursements, Managers' Commissions, Profits or Excess or Increased Value of Hull and Machinery.* A sum not exceeding 25% of the value stated herein

21.1.2 *Freight, Chartered Freight or Anticipated Freight, insured for time.* A sum not exceeding 25% of the value as stated herein less any sum insured, however described, under 21.1.1.

21.1.3 *Freight or Hire, under contracts for voyage.* A sum not exceeding the gross freight or hire for the current cargo passage and next succeeding cargo passage (such insurance to include, if required, a preliminary and an intermediate ballast passage) plus the charges of insurance. In the case of a voyage charter where payment is made on a time basis, the sum permitted for insurance shall be calculated on the estimated duration of the voyage, subject to the limitation of two cargo passages as laid down herein. Any sum insured under 21.1.2 to be taken into account and only the excess thereof may be insured, which excess shall be reduced as the freight or hire is advanced or earned by the gross amount so advanced or earned

21.1.4 *Anticipated Freight if the Vessel sails in ballast and not under Charter.* A sum not exceeding the anticipated gross freight on next cargo passage, such sum to be reasonably estimated on the basis of the current rate of freight at time of insurance plus the charges of insurance. Any sum insured under 21.1.2 to be taken into account and only the excess thereof may be insured.

21.1.5 *Time Charter Hire or Charter Hire for Series of Voyages.* A sum not exceeding 50% of the gross hire which is to be earned under the charter in a period not exceeding 18 months. Any sum insured under 21.1.2 to be taken into account and only the excess thereof may be insured, which excess shall be reduced as the hire is advanced or earned under the charter by 50% of the gross amount so advanced or earned but the sum insured need not be reduced while the total of the sums insured under 21.1.2 and 21.1.5 does not exceed 50% of the gross hire still to be earned under the charter. An insurance under this Section may begin on the signing of the charter.

21.1.6 *Premiums.* A sum not exceeding the actual premiums of all interests insured for a period not exceeding 12 months (excluding premiums insured under the foregoing sections but including, if required, the premium or estimated calls on any Club or War etc. Risk insurance) reducing pro rata monthly.

21.1.7 *Returns of Premium.* A sum not exceeding the actual returns which are allowable under any insurance but which would not be recoverable thereunder in the event of a total loss of the Vessel whether by insured perils or otherwise.

21.1.8 *Insurance irrespective of amount against:*
Any risks excluded by Clauses 23, 24, 25 and 26 below.

21.2 Warranted that no insurance on any interests enumerated in the foregoing 21.1.1 to 21.1.7 in excess of the amounts permitted therein and no other insurance which includes total loss of the Vessel P.P.I., F.I.A., or subject to any other like term, is or shall be effected to operate during the currency of this insurance by or for account of the Assured, Owners, Managers or Mortgagees. Provided always that a breach of this warranty shall not afford the Underwriters any defence to a claim by a Mortgagee who has accepted this insurance without knowledge of such breach.

Exhibit A-4

(Continued)

22 RETURNS FOR LAY-UP AND CANCELLATION

22.1 To return as follows:

22.1.1 Pro rata monthly net for each uncommenced month if this insurance be cancelled by agreement.

22.1.2 For each period of 30 consecutive days the vessel may be laid up in a port or in a lay-up area provided such port or lay-up area is approved by the Underwriters (with special liberties as hereinafter allowed)

(1) ..... per cent net not under repair

(2) ..... per cent net under repair.

If the Vessel is under repair during part only of a period for which a return is claimable, the return shall be calculated pro rata to the number of days under (1) and (2) respectively.

22.2 PROVIDED ALWAYS THAT

22.2.1 a total loss of the Vessel, whether by insured perils or otherwise, has not occurred during the period covered by this insurance or any extension thereof

22.2.2 in no case shall a return be allowed when the Vessel is lying in exposed or unprotected waters, or in a port or lay-up area not approved by the Underwriters but, provided the Underwriters agree that such non-approved lay-up area is deemed to be within the vicinity of the approved port or lay-up area, days during which the Vessel is laid up in such non-approved lay-up area may be added to days in the approved port or lay-up area to calculate a period of 30 consecutive days and a return shall be allowed for the proportion of such period during which the Vessel is actually laid up in the approved port or lay-up area

22.2.3 loading or discharging operations or the presence of cargo on board shall not debar returns but no return shall be allowed for any period during which the Vessel is being used for the storage of cargo or for lightering purposes

22.2.4 in the event of any amendment of the annual rate, the above rates of return shall be adjusted accordingly

22.2.5 in the event of any return recoverable under this Clause 22 being based on 30 consecutive days which fall on successive insurances effected for the same Assured, this insurance shall only be liable for an amount calculated at pro rata of the period rates 22.1.2 (1) and/or (2) above for the number of days which come within the period of this insurance and to which a return is actually applicable. Such overlapping period shall run, at the option of the Assured, either from the first day on which the Vessel is laid up or the first day of a period of 30 consecutive days as provided under 22.1.2 (1), (2), or 22.2.2 above.

The following clauses shall be paramount and shall override anything contained in this insurance inconsistent therewith.

23 WAR EXCLUSION

In no case shall this insurance cover loss damage liability or expense caused by

23.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

23.2 capture seizure arrest restraint or detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat

23.3 derelict mines torpedoes bombs or other derelict weapons of war.

24 STRIKES EXCLUSION

In no case shall this insurance cover loss damage liability or expense

24.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

24.2 caused by any terrorist or any person acting from a political motive.

25 MALICIOUS ACTS EXCLUSION

In no case shall this insurance cover loss damage liability or expense arising from

25.1 the detonation of an explosive

25.2 any weapon of war

and caused by any person acting maliciously or from a political motive.

26 NUCLEAR EXCLUSION

In no case shall this insurance cover loss damage liability or expense arising from any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.
