HAAKON STANG LUND

HANDBOOK ON LOSS OF HIRE INSURANCE

BASED UPON THE NORDIC MARINE INSURANCE PLAN OF 2013

3rd Edition

Preface by the publisher of the third edition

The Nordic Plan is a mutually agreed set of conditions with regular updates to match the insurance needs in the market. Hence, it is with pride that a third edition of this handbook is published, hopefully assisting the reader searching for answers to what is a complex product.

Loss of Hire Insurance has maintained its relative importance to the Club's insurance portfolio despite our diversification strategy, and we are considered as one of the global Leaders within this area.

Haakon Stang Lund is still to be seen as the "father" of the Handbook, and maybe even more so, the Nordic Plan. He has actively participated in the work of the revision committee drawing up the amendments, including Chapter 18 of the Plan.

We are most grateful to him that he was willing to take up the task of up-dating this book, which proved more time consuming than originally anticipated, so some long hours have been spent not only on weekdays, but also on weekends and during the Easter holidays.

Haakon retired this year, and we wish him all the best in taking on new tasks and challenges. However, he has left his legacy for the future, both in the Club and in his work with the Nordic Plan and this book.

Norwegian Hull Club
Hans Christian Seim
Chief Executive Officer

Preface by the author of the third edition

Since the second edition of the Handbook on Loss of Hire Insurance was published in 2008, three new versions of the Plan has been published. The second edition was based on the 2007 version of the Plan. In 2010 a new and the last version of the Norwegian Marine Insurance Plan was published. Then, a discussion commenced within the Nordic Maritime Community to issue a Nordic Marine Insurance Plan. This Nordic Plan materialized in 2013 after agreement was reached between Cefor - the Nordic Association of Marine Insurers and the four Shipowners' Associations of Finland, Denmark, Norway and Sweden. The need for a third edition of the Handbook is, therefore, long overdue.

Norwegian Hull Club, which published the two first editions of the book, asked me to be the author of also the third edition. It was again with some reluctance, but also joy that I accepted to be the author of the third edition of this book. The reluctance was this time due to the fact that I was approaching retirement, and I feared that I might not have the strength required to complete the task. Even though the challenges due to health reasons proved to be greater than anticipated, I am now very pleased that I was able to complete the task although a little behind the original planned schedule. As of 31.12.2015 I retired from my position as Legal Counsel of Norwegian Hull Club. The original schedule was to finalise the book before retirement, but when this was not possible, we agreed that I should continue after the turn of the year to complete the book.

The third edition is, of course, up-dated with the amendments to the Plan since the 2007 version, including the latest and current 2016 version of the Nordic Plan. Parts of the book has been rewritten, not only due to amendments of the Plan, but also to expand and clarify topics discussed. The third edition contains two new chapters, chapter 17 on loss of hire insurance for fishing vessels and chapter 18 on Mobile Offshore Units, as some special rules on loss of hire insurance has been included in chapters 17 and 18 of the Plan.

This time, all chapters were distributed for comments to an internal reference group as I completed my drafts.

This group consisted of:

Per Åge Nygård, Roar Sanden and Brian Roberts of the Legal department,
Olav Hausvik of the underwriting department,
Jostein Egeland, Olav Tufta, Truls Langeland and Joannis Bloch Danielsen of the claims department.

I will express my sincere thanks in particular to Roar Sanden and Brian Roberts for very valuable comments and suggestions for improvements. Also Truls Langeland and Joannis Bloch Danielsen has contributed with practical examples and other valuable inputs.

I will also express my thanks and gratefulness to Håkon Roer-Eide, who has been kind enough to go through the whole manuscript and formatted it. He also drew up the Index, List of abbreviations etc. and has given me other valuable input.

My thoughts and gratefulness goes also to my beloved, patient and understanding wife, Lill Selmer Stang Lund, who has seen me disappearing into the "author's den" and remain there for long hours in the evenings, over week-ends and during holidays.

Also for the third edition it is to the highest degree important to emphasize that I alone is accountable for the content and solutions advocated for where the available sources of law is not giving any definite answer. I do not hold any authority to bind Norwegian Hull Club to any specific solutions on doubtful issues, and any possible mistakes by me must not be deemed to be admissions made by the Association.

Cefor - The Nordic Association of Marine Insurers, holder of the copyright of the Plan, has graciously allowed me to reproduce Chapter 16 of the Plan.

Finally, it only remains for me to thank Norwegian Hull Club for having entrusted me with writing also the third edition of this book.

Oslo March 2016

Haakon Stang Lund

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1. INTRODUCTION

1.1 Norwegian Hull Club

Norwegian Hull Club (NHC) was established in 2001 through a merger between Bergens Skibsassuranseforening (*Bergen Hull Club*) and the Oslo based UNITAS Gjensidig Assuranseforening (UNITAS Mutual Association). Bergen Hull Club was established in 1937 through a merger of two old and distinguished mutual clubs, Bergens Assuranceforening founded in 1850 and Bergens Dampskibs-Assuranceforening founded in 1879. UNITAS was the result of a long series of mergers of in all eight mutual hull clubs, the last one in 1996, when UNITAS took over the portfolio and staff of Christianssands Skibsassuranceforening. UNITAS traces its' origin back to 1837 when Skibsassuranceforeningen of Arendal was established. Thus NHC celebrated its 175 years anniversary in 2012.

Marine insurance had been offered for some time internationally before interest in establishing insurance institutions began to arise in Norway. However, the rapid growth of the Norwegian merchant fleet during the 19th century precipitated the establishment of a large number of local insurance associations in coastal cities. These were all mutual hull insurance associations. Several decades were to pass before insurance companies, which were also being founded at that time, began to accept marine risks. The mutual clubs were thus in a position to dominate the Norwegian marine market for a long time.

For many years the clubs remained reluctant to insure steamships. In Bergen, where the steamship fleet was growing more rapidly than anywhere else in the country, the problem was particularly acute and, in response, Bergens Dampskibs-Assuranceforening (*Bergen Steamship Association*) was founded. Thereafter, all the major hull clubs gradually began to accept steamships in their portfolios. Bergen's position as Norway's most important shipping centre during the decades preceding World War I gave the city's hull clubs a firm position among the Norwegian mutual hull insurance associations. Although Bergen's share of the Norwegian merchant fleet has since been reduced, Bergen Hull Club not only retained its strong position, but also improved it significantly.

A similar development was experienced in Oslo where an important maritime cluster developed. UNITAS was the major hull club in the east part of the country and through mergers also in the south part. After the merger in 2001, NHC became the only mutual association insuring ocean going vessels.

International and domestic development necessitated that the mutual clubs enter the international insurance market, and NHC is today an important international insurer rather than a domestic insurer for Norwegian flag vessels.

The Nordic marine insurance market (ex. P & I) is per 2013, the second largest, with about 10.9% market share of the global market. The latest statistics available at the time of printing this book is for 2013 and comprises hull, loss of hire, war, construction risks and total loss insurances. The market leader is UK (Lloyds 16% and IUA 5.8%). China follows third (10.4%) and Japan fourth (8.3%) trailed by Latin America (8.2%). There are no separate statistics available for the loss of hire market, but it is assumed that the Nordic market has a similar, or even larger, share of this segment of the market

1.2 Scope of the work

The aim of this book is to explain the Nordic loss of hire insurance conditions that are primarily found in Chapter 16 of the Nordic Marine Insurance Plan of 2013. Chapter 16 constitutes the Nordic loss of hire conditions which is used by many non-Nordic owners even if their hull insurance is not covered on the Plan.

The Nordic conditions will be compared to the English and American conditions to some extent, but not to the level of a full comparative study. Additional foreign sources of law will also be considered, although not exhaustively.

1.3 What is loss of hire insurance

1.3.1 Brief history of loss of hire insurance

Loss of hire insurance does not have a very long history and tradition. Such insurance was rarely taken out by shipowners before the Suez Canal crisis in 1956. Air strikes by the British and French forces aimed at preventing President Nasser of Egypt from taking control of the Suez Canal resulted in the demobilisation of several vessels and the closing of the Canal. Because of the ensuing international crisis, the Canal remained closed for a number of years. The pattern of commercial shipping routes changed overnight, and vessels trading from Asia to Europe or vice versa had to sail around Africa. The demand for tonnage increased correspondingly without any possibility to increase the supply. Charter rates soared until the supply of vessels adjusted to the new demand.

Shipowners felt the need to insure their interest in their vessels' earning capability in addition to traditional hull- and P & I insurance. Initially, the owners insured loss of hire in the literal sense, namely their loss of charter hire as opposed to their loss of earnings in general. As will be explained in 5.4**,** this distinction is relevant in current loss of hire conditions, but development has made the significance of the distinction less important. Today, it is possible to insure both types of losses. It would be more precise to call it "loss of earnings insurance" rather than "loss of hire insurance", but the Plan has maintained the latter terminology, and it is therefore also adopted in this book.

1.3.2 Subject matter insured

The term "loss of hire insurance" suggests that the assured is insured in general for any incident that causes one or more of his vessels to be demobilised so as to be deprived of income. However, loss of hire insurance has never been that comprehensive. It has only covered the assured for loss of income resulting from damage to a particular insured vessel, which damage must be recoverable under the hull insurance of the vessel, see further under 3.4 – 3.6 below.

However, loss of hire and damage to the vessel are not necessarily connected. An assured may sustain a loss of income through many sources other than damage to the vessel. Natural catastrophes such as typhoons, floods etc., as well as strikes in port, congestion, riots, war and other man-made events may disturb the operation of the vessel. Many such events are equally fortuitous as damage to the vessel, but the assured in some cases may be able to influence to a certain degree the way in which these events will affect his operation of the vessel and consequently the loss of income sustained. In the case of damage to the vessel, the assured

may not be able to influence the economic consequences of the damage, although he may be able to avoid the damage itself to a certain degree.

It is therefore natural to ask why loss of hire insurance is linked to the hull insurance of the vessel. The answer is that the insurer offering loss of hire insurance found that the traditional hull insurance of vessels had developed over such a long period that hull insurance had established the "right" balance between what should be covered and what should be excepted from cover. The "right" balance between the assured and the insurer when it comes to cover for loss of income has still not been explored.

The insurance market presently appears unready to embark upon the task, and instead it seems minded to go about the product development of loss of hire insurance on a case by case basis. There has been a trend towards extending the insurance to cover loss of income resulting from a grounding without any damage to the vessel so that there is nothing to recover from the hull insurer. Further extensions of the cover have been made, but they are few and casuistic and not very far-reaching, see under 3.7 below.

1.3.3 Comparison with non-marine insurance

Loss of hire insurance is in principle the same type of insurance that land-based factories and industry may cover as loss of use insurance. The relevant civil perils (like marine perils) are fire and natural catastrophes. War perils are equally relevant on shore as at sea. However, the mobility of vessels makes war a greater and more complex risk for insurer to evaluate. On the other, hand mobility of vessels makes it possible for insurers to define trading areas and to get vessels moved out of harm's way when a conflict escalates into a war or war-like situation. Therefore, it is generally easier for owners of vessels to get war risks insurance than it is for the owners of fixed property on land. The non-marine insurers generally exclude war risks altogether, while many marine insurers are prepared to cover war risks at an additional premium in combination with ordinary marine perils. There are also entities specializing in covering war risks for vessels and other floating and movable units.

Loss of hire insurance for vessels and loss of use insurance for shore-based industry have apparently developed completely independently of each other. There also seems to have been very little, if any, communication between professionals within the different branches. It is difficult to say who would benefit the most by such communication apart from, hopefully, the customers.

The Nordic marine insurance market, broadly speaking, has put much greater emphasis on developing the various insurance products in co-operation with the customers (the shipowners) than has the non-marine insurance market. For example, the Nordic non-marine market has no equivalent to the Nordic Marine Insurance Plan which has been developed through a co-operation between insurance professionals and shipowners in four Nordic countries (Denmark, Finland, Norway and Sweden). This seems also to be true outside the Nordic market. It is likely that the strong tradition of shipowner-controlled mutual insurance in the Nordic market has contributed significantly to this phenomenon of shipowner participation in the development of marine insurance terms.

1.4 The insurance conditions

1.4.1 The current loss of hire insurance conditions

The Nordic market covers as of 2016 loss of hire insurance based on the Nordic Marine Insurance Plan of 2013, version 2016 (hereinafter the Plan). The Plan is a set of standard insurance conditions agreed and adopted by the Nordic market.

The Plan is governed by the law of one of the Nordic countries, see for the details Cl. 1-4. However, the Plan is, for practical purposes, the main source of legal regulation of marine insurance. The Plan is not a source of law in and of itself because it is not a legislative act. It is a document agreed between organisations representing respectively the Nordic marine insurance market, the shipowners and other interested parties. Therefore, it becomes legally binding only if it is expressly incorporated into the individual insurance contract.

The Nordic Plan has maintained the same widespread international acceptance as the previous Norwegian Plan of 1996 and subsequent versions, the latest of 2010. Furthermore, it has been intended to expand this acceptance even further, in view of which the 2013 Plan has been structured to lend itself easily to international application.

The Nordic Plan has maintained the structure of the Norwegian Plan of 1996, which in turn maintained the structure of the Norwegian Marine Insurance Plan of 1964. Part One is maintained as the General Part applicable to all insurance covered on the basis of the Plan, including loss of hire insurance. Part Two contains provisions on hull insurance, including liability for collisions or striking (4/4th RDC and FFO). Part Three contains provisions on other insurance for ocean-going vessels, such as total loss insurance (Chapter 14), war risk insurance (Chapter 15) and loss of hire insurance (Chapter 16). Part Four contains provisions relevant to other insurance, such as insurance for coastal and fishing vessels (Chapter 17), movable off-shore units (drilling rigs etc.) (Chapter 18) and building risks (Chapter 19). Chapter 15, Section 6 contains some special rules for war risks, loss of hire insurance, which are dealt with in Chapter 16 below. Chapter 17, Section 7 contains some special conditions for fishing vessels which are dealt with in Chapter 17 below. Chapter 18, section 4 has incorporated to a large extent verbatim the same clauses as in Chapter 16, but there are some material differences which will dealt with in Chapter 18 below.

The provisions of immediate interest to a shipowner who wants to cover loss of hire insurance on the basis of the Plan will be those found in Chapter 16, in combination with the provisions of Part One.

1.4.2 Earlier loss of hire insurance conditions

As mentioned in 1.3.1 above, loss of hire insurance developed out of the Suez crisis in 1956. The development originated in the London market and the Norwegian market followed suit, initially using the conditions adopted by the London market. Later on, each of the insurers introduced their own conditions, to a large extent based on the conditions used by the competing foreign markets, with the US emerging as a third alternative market to London and Norway.

In connection with the 1964 revision of the Norwegian Marine Insurance Plan, new loss of hire insurance conditions were introduced in Chapter 20 of this Plan. This was the first attempt to create common loss of hire conditions for the Norwegian market based on the

Norwegian tradition of using the framework of the Plan. However, the new conditions were never used by the Norwegian market because the insurers engaged in this type of insurance still preferred their individual conditions, and the market was not prepared to adopt some of the solutions introduced in Chapter 20 of the 1964 Plan. § 261 of the 1964 Plan regarding simultaneous repairs in particular was at the time considered unsuitable by the market, see the 1972 Commentary, page 13.

In 1972, another attempt was made to create common Norwegian conditions on loss of hire insurance, this time successfully. The 1972 conditions were initiated and published by four insurance companies: Vesta and three other companies that merged into the previous Storebrand Property Insurance Company. Substantial restructuring has occurred within the Vesta and Storebrand Groups, the gist of which, for the purpose of loss of hire insurance, is that the ocean marine portfolio was transferred to Gard Marine and Energy.

The 1972 conditions were prepared by an expert group. The leader of the expert group was the late Professor dr. jur. Sjur Brækhus. The three average adjusters practicing in Norway at the time constituted the other members of the expert group. These were the late Henrik Ameln and the late Leif Strøm-Olsen and Jan Frøystein Halvorsen, who was later appointed Supreme Court Judge (now retired). Sjur Brækhus wrote extensive commentaries to the 1972 conditions in co-operation with the other members of the expert group. Furthermore, the four insurance companies that originally published the 1972 conditions had appointed a committee of six representatives from their own staff, which closely examined and commented on the proposals of the expert group.

Amendments to §§ 6 and 8 of the 1972 conditions were introduced in 1977 and were generally accepted and used by the market. They came to be known as "Amendments 1977".

As late as 1993, there was a general overhaul of the loss of hire insurance conditions by market people with assistance from the average adjuster Ragnar Svarstad (now retired). The 1993 revision was published by the then Mutual Marine Insurers' Committee (GSK)[1] and was entitled General Conditions for Loss of Charter Hire insurance (1972) (Revised 1993). The company market published the same conditions as CEFOR form No. 237.

By this time, the committee entrusted with the task of revising the Norwegian Plan itself was already appointed and had commenced its work. Part of its mandate was to incorporate the loss of hire conditions into the new Plan. This mandate was not restricted to merely incorporating the 1993 revision, but extended also to reviewing the conditions anew. This review resulted in the new Chapter 16 of the Norwegian 1996 Plan. Chapter 16 was amended in the 2003, 2007 and 2010 versions of the Norwegian Plan and maintained with one amendment in the Nordic Plan of 2013. One further amendment was made in the 2016 version which, as explained under 1.4.1 above, now comprises the current loss of hire conditions used by the Nordic market.

1.4.3 Future amendments to the Plan

Parties to an individual insurance contract are of course free to agree individual conditions. The market wishes, however, to avoid any development in the direction of generally adopted

[1] GSK was dissolved with effect from 1 January 2001. The members of GSK, including NHC, joined The Central Union of Marine Underwriters (CEFOR) from the same date, which changed name to the Nordic Association of Marine Insurers (Cefor) in 2009.

additional clauses, such as the 1977 amendments. In furtherance of this goal, the market has appointed a permanent Plan revision committee whose mandate is to propose amendments to the Plan, including the loss of hire insurance conditions contained in Chapter 16 of the Plan, if developments suggest that further amendments to the Plan are called for.

Such amendments are incorporated into the Plan itself, and the consolidated amended text of the Plan will be reprinted every third year. The internet version of the Plan will be updated correspondingly. The first printed version of the Norwegian 1996 Plan was published as version 97. At the end of 1998, version 1999 was released. Subsequently, versions 2002, 2003, 2007 and 2010 have been published. The Nordic Plan was published in 2013 and a new version in 2016. The next version is anticipated only in 2019, as the market agreed in 2003 that there is no need to produce new versions of the Plan with such high frequency as in the first years of the Norwegian 1996 Plan. There should at least be three years between each new version.

The Plan and the Commentary are published in English and posted on the internet, at address:

http://www.nordicplan.org/

The English text is now the only official version of the Plan, but translations of the Plan text into Danish, Finnish, Norwegian and Swedish are published at the same website. If there is any conflict between the English text and any of the translations, the English text shall prevail. The Commentary has not been translated into any of the Nordic languages.

Amendments, if any, are normally published on the above website by 1st October and are intended to enter into force on 1st January of the calendar year following the publication with effect for insurances entered into or renewed in the course of that year. General principles of contract law dictate that amendments cannot have retroactive effect on current policies unless expressly agreed by the parties to the particular insurance contract. There is nothing preventing the parties from agreeing to apply a new version of the Plan immediately after publication.

If the amendments are to the benefit of the assured, the insurer may not be willing to let the assured enjoy these benefits on current policies without additional premium. But if there are several simultaneous amendments that go either to the detriment or the benefit of the assured, the parties may agree that on balance the amendments do not require any adjustment of the premium and therefore can apply to a current policy. That was in fact the case when the Norwegian Plan of 1996 entered into force on 1st January 1997. It was given retroactive effect on a large number of the current policies by express agreement. The same procedures have been followed with regard to the subsequent versions of the Plan.

1.5 Foreign loss of hire conditions

1.5.1 English conditions

The English conditions are known as the A.B. Stewart conditions or, in the latest version, only "ABS conditions". The full name of the latest version of the English conditions is Loss of Charter Hire Insurance - Including War (ABS 1/10/83 Wording). These conditions are subject to English law and practice. They contain no jurisdiction or arbitration clause.

1.5.2 US conditions

The U.S. conditions are known as the Lazard form, or in its full name, Loss of Charter Hire Form (August 1961). There is no choice of law clause in the Lazard form, but Clause J provides for New York arbitration.

1.6 Sources of Law - Norwegian conditions

1.6.1 The Nordic Plan of 2013, version 2016

As explained in 1.4.1 above, Chapter 16 of the Nordic Marine Insurance Plan of 2013, version 2016 which must be read in conjunction with Part One of the Plan, contains the current conditions for loss of hire insurance.

It will be remembered that the Plan takes effect over a contract of insurance only if it has been incorporated therein, whether expressly or by necessary implication, and thereby becomes the primary legal reference of the contract.

If the parties to the contract have agreed to cover loss of hire insurance on Nordic conditions, the policy forms and other documents used by the insurers and/or the brokers will usually contain express reference to the Plan, thereby incorporating it as part of the agreed terms. Any terms specifically agreed will supersede the provisions of the Plan in accordance with the general principle of contractual interpretation that individually agreed terms take precedence over standard conditions and typed clauses take precedence over printed clauses.

If the parties have not referred to or otherwise incorporated the Plan, it will be a matter of construction whether the parties intended to insure on the basis of the Plan. The first step is to determine whether the insurance was agreed on Nordic conditions. This will normally not be problematic, since the contractual documentation is almost always clear on this point. (If it is not clear, a question will be raised as to whether any agreement has been reached at all, since it is hardly conceivable that an agreement has been reached if it is uncertain which country's insurance conditions are to apply.)

However, there are cases where the documentation prepared by the broker (perhaps more often by non-Norwegian brokers) refers to Norwegian or Nordic conditions without expressly incorporating any particular set of conditions or the Plan. In such cases it seems reasonable to imply that the parties have intended to refer to the relevant current conditions applicable in the Norwegian/Nordic market, and currently this means Chapter 16 of the Nordic Plan. In this way, it may be possible for the Plan to come to apply to the insurance contract not only by express incorporation but also by necessary implication.

1.6.2 The Commentary to the Plan

The Commentary is a kind of "travaux préparatoires" to the Plan. However, since it has been agreed in the same way as the text of the Plan itself, it is an important source of law. The Commentary to Cl. 1-4, explains:

> *"The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. This is in keeping with the approach of the Norwegian 1996 Plan. Nevertheless, the Commentary shall still carry more weight as a legal source than is normally the case with the Traveau Preparatoire*

> *(sic) of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Nordic Revision Committee, and it must therefore be regarded as an integral component of the standard contract which the Plan constitutes. However, in case of any obvious conflict between the Plan text and the Commentary, the text shall prevail as the primary legal source over the Commentary."*

It is clear that the Plan's creators intended that the courts, not only in Norway but also in other countries, including England and the US, should consider and be guided by the Commentary when deciding on matters governed by the Plan. However, Norwegian insurers have experienced an unwillingness of certain foreign courts to consider the Commentary, particularly in the US. This can probably be explained by the fact that common-law countries do not consider travaux préparatoires and similar commentaries in contractual or statutory interpretation. However, this attitude is misplaced if the foreign court is to apply the Plan and Norwegian background law, since Norwegian courts have repeatedly held that the Commentary is an important source of law, see for example ND 1973 page 428 NH (The Hamar-Kapp) and ND 1990 page 194 NH (The Brødrenes Prøve).

Bergen Hull Club (as it was at the time) succeeded in convincing the US District Court, Western District of Washington at Seattle to consider the Commentary in the Emerald Resource Management Inc. vs. Bergen Skibsassuranseforening, case C93-1788Z. The judge simply stated: "Norwegian Law includes the Commentary". (The judgement is unpublished.)

Some brokers and insurers include in the policy or in other contract documentation a clause to the effect that the Commentary shall be deemed part of the agreement in the same way as the Plan itself. The intention is thereby to force English and US courts to consider and be guided by the Commentary to the same extent as Norwegian courts. Whether such a clause will achieve its purpose remains to be seen. However, the clause may at the same time have an unintended side effect which seems difficult to avoid, namely that the Court (also a Norwegian court) applies the clause literally and treats the Commentary in the same way as the text itself. This would lead to every word in the Commentary being read and treated as part of the contract, even though the Commentary was not written with this purpose in mind and therefore contains passages and language which do not deserve equal treatment with the text of the Plan. Thus the parties may find themselves bound to undesirable results due to an excessively literal interpretation of the Commentary by the court in question. On page 414 of the 1999 version of the Commentary there is a glaring example of a specific solution to which the market reacted negatively. Those insurers who did expressly incorporate the Commentary in the policy were in a contractual mess on this point. However, this example is now obsolete as the Commentary was appropriately amended in 2003, see under 9.4 below, but there may still be other examples not yet brought to the fore and therefore not getting the attention of the market.

1.6.3 Statutes or statutory instruments

Most countries have legislation relevant to insurance. The main purpose of such legislation is to ensure proper control over the solvency of insurance companies or their ability to pay claims. In Norway this area is covered by the Insurance Act of 10th June 2005, No. 41, which also contains provisions setting out the legal framework for the operation of insurance companies. More importantly for the purpose of the present discussion, there may also be legislation governing the insurance contract as such, enacted for the main purpose of ensuring

fair terms for the assured. In Norway, this field is covered by the Insurance Contract Act of 16th June 1989, No. 69.

The Insurance Contract Act is not mandatorily applicable to marine policies such as loss of hire insurance. To the extent that the individual insurance contract is silent on any point, the Insurance Contract Act may be applicable as background law. However, for practical purposes the Plan constitutes a complete set of rules leaving little, if any, room for the 1989 Act to supplement it.

It should be noted that the English conditions are supplemented by the English Marine Insurance Act (1906) and/or the Insurance Act (2015) to a much greater extent. Thus, while the English conditions may initially look less complex than the Nordic conditions because they appear more condensed, they must be read together with the applicable Act. The Norwegian conditions based on the Plan are, on the other hand, a self-contained set of rules.

Admittedly, insurance law is complex regardless of what background law governs the insurance contract. However, there is a good basis for saying that the current Nordic conditions are simpler and clearer than the English, although we do not expect that the English market will necessarily agree with this view.

1.6.4 Jurisprudence

It goes without saying that jurisprudence (i.e. earlier court judgements) is an important source of law, but one should be somewhat cautious in accepting judgements by the lower courts as having high legal authority, particularly in the special field of loss of hire insurance. The courts seldom deal with this area of law and may not necessarily possess the required expertise to express broad legal principles on point. Generally, the courts will be reluctant to do so and one should avoid trying to draw inferences from a judgement beyond what is clearly expressed in it.

1.6.5 Arbitration Awards

It is not unusual that insurance contract disputes are resolved by arbitration rather than by the ordinary courts. One of the advantages of arbitration is the ability to have the dispute decided by experts. An arbitration award by qualified arbitrators may constitute, from a practical viewpoint, an equally important source of law as a judgement by the ordinary courts. An arbitration award may be considered even by the Supreme Court, if the reasoning of the arbitrators is sufficiently persuasive.

1.6.6 Text books

There are no comprehensive textbooks on loss of hire insurance, but some authors dealing generally with marine insurance also comment to some extent on loss of hire insurance, see Brækhus and Rein: Kaskoboken, page 241, Wilhelmsen and Bull: Handbook in Hull Insurance, pages 182,271,339 and 347, Brautaseth, Falkanger and Bull, Scandinavian Maritime Law, The Norwegian perspective, 3rd ed. pages. 554-556, Kenneth Goodacre, "Marine insurance Claims", 2nd ed. pages 378-381. David Sharp, “Upstream and Offshore Energy Insurance” pages 413-439 deals with Business Interruption, delay in Start-up and Loss of Hire.

The Commentary to the Plan is not unlike a textbook regarding the Plan. The Commentary to the 1972 conditions contains discussions that are still relevant and worth reading, particularly regarding how to co-ordinate the cover under the hull insurance and the loss of hire insurance, see the 1972 Commentary, pages 39-47 and 77-80.

2. PERILS INSURED AND LOSSES COVERED

2.1 Overview

In daily insurance terminology, it is unusual to distinguish between peril and loss. The term "risk" is often used to include both peril and loss. Risk is often used synonymously with peril: for example, "war risk insurance" is a more commonly used term than "war peril insurance". In Norwegian legal terminology it is customary to distinguish between peril (or risk) and loss. The Plan adopts this terminology and treats risk as synonymous with peril, but distinct from "loss".

A peril may be described as the cause of a "casualty" which is also referred to as an "insured incident" or the "average".[2] The Plan does not define these concepts nor is such definition necessary for practical purposes. It suffices to define the insured perils and the losses recoverable under the insurance in question. Depending on the terms of the insurance contract, the insured perils may be "named perils" i.e. only those perils expressly mentioned are covered under the insurance, or "all perils"/"all risks" meaning that all perils are covered except those expressly excluded in the contract. The Plan adopts the latter approach.

However, even all risk insurances are limited to cover only "named losses". No market has yet developed an "all losses" insurance, which would not be in great demand, since the owners have different needs. Therefore, different types of insurance have been developed, such as hull and machinery, P & I, loss of hire, etc. Under the Plan, all these types of insurance are covered as "all risks" insurances, but each type of insurance covers only the loss defined in the relevant chapters of the Plan. The Plan does not contain a chapter on P & I insurance, but Chapter 17 Section 6 contains rules on liability insurance for coastal and fishing vessels not entered with one of the P& I clubs, and Chapter 15 Section 7 contains rules on war risks liability insurance (P &I insurance). Chapter 18 Section 6 and Chapter 19 Section 5 contain provisions for liability insurance for respectively Mobile Offshore Units and conventional vessels construction risks.

The following example may illustrate the difference between peril and loss:

A vessel catches fire due to crew negligence - welding without removing combustible cargo on the other side of the bulkhead. The peril is the negligence of the crew. At the same time the negligence is the cause of the fire. The fire results in extensive damage. The hull and machinery insurer shall pay for the repair costs, or possibly for a total loss if the damage is so extensive that the vessel is deemed a constructive total loss. However, the hull and machinery insurer shall not pay for all possible losses suffered by the assured as a result of the fire, such as loss of market, special market value of this particular vessel etc., as these losses are excluded under this type of insurance. Loss of or damage to consumables and some special equipment may also be excluded losses, see Cl. 10-1.

Loss of income is not included in the hull and machinery insurance but may be covered under a separate loss of hire insurance. However not every conceivable loss of income is covered. There are limitations and exclusions, or - in keeping with the present terminology - some loss of income is excluded, see above under 1.3.2.

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[2] In Norwegian; *forsikringstilfellet* and *havariet.*

2.2 Perils insured

Traditionally, hull insurance has covered both marine and war perils. In principle marine and war hull-insurance are separate insurances provided by different insurers or groups of insurers. The borderline between marine and war perils is clearly defined, see Clauses 2-8 and 2-9 of the Plan.

Loss of hire insurance may likewise cover both marine and war perils and often the same insurer covers both risks under the same policy. In such a case of dual coverage, the issue of apportionment of responsibility between more than one insurer is eliminated and there is consequently no practical reason to distinguish between marine and war perils.

War risk cover under Chapter 15 of the Plan also includes war risk loss of hire insurance. Therefore, those assureds who are covered for war risks pursuant to Chapter 15 of the Plan do not need to include any war risks extension to their ordinary loss of hire insurance for marine perils.

2.2.1 Marine perils

Loss of hire insurance for marine perils will cover loss of income resulting from damage to the vessel caused by a marine peril. Cl. 2-10 of the Plan provides that unless otherwise agreed, the insurance covers only marine perils. This means that it must be expressly agreed if the loss of hire insurance is also to cover war perils. Without such express agreement, the loss of hire insurance will be deemed to be a marine peril insurance.

Cl. 2-8 of the Plan defines marine perils insurance as an "all perils insurance" with four exceptions:

a) war perils pursuant to Cl. 2-9
b) intervention by a state power
c) insolvency
d) release of nuclear energy and other perils excluded by the English Institute Extended Radioactive Contamination Exclusion Clause (known as the RACE II clause).

The all-risk principle means that it is not necessary to look for which perils are positively covered, since there is no such listing. Every risk is covered unless it is expressly excepted by one of the four heads listed above. This means that damage to the vessel and any loss of income caused by grounding, fire, explosion, collision or perils of the sea such as heavy weather etc. is covered under a marine loss of hire insurance.

Since Cl. 2-8 (a) expressly refers to war risk cover as defined in Cl. 2-9, there will be no overlap or gap in the cover between marine and war risk insurance under the Plan. Thus, if a peril is not a war peril pursuant to Cl. 2-9, it is by definition a marine peril under Cl. 2-8, unless excepted pursuant to letters (b) to (d).

This is different from the English and American conditions (both for hull and loss of hire insurance) which are based on the "named peril" principle. The named peril principle has exactly the opposite effect of the all risk principle. Only those perils expressly listed or named in the policy or the insurance conditions will be covered. Owners which are familiar with the English conditions, but not with the Plan all risk principle may be confused and feel

uncomfortable at not seeing a list of the perils covered in the policy or conditions. Under the Plan conditions it is important to look for the exceptions rather than the perils covered.

The real difference between the perils covered under the various systems is not great and may be unimportant to the assured if no dispute arises. However, the Plan all risk principle is more beneficial to the assured than the English named peril principle in the event of any dispute or uncertainty. According to the Plan Cl. 2-12, sub-clause 2, it is the insurer who bears the burden of proving that the loss has been caused by an excepted peril, while under the English conditions, the burden is on the assured to prove that the loss was caused by a named peril. This means that English insurers, once they decide to dispute a claim, simply inform the assured that the claim is rejected because the loss was not caused by an insured peril.

2.2.2 War perils

Loss of hire insurance for war perils will cover loss of income resulting from damage to the vessel caused by a war peril as defined in Cl. 2-9. A war peril insurance based on the Plan is a named peril insurance as an exception to the general all risk principle adopted for marine peril insurance under Cl. 2-8 (see 2.2.1 above). Similarly, under English conditions the war peril insurance is also a named peril insurance.

The war peril concept is, in practical terms, almost identical under the Plan and the English systems with one important difference: piracy and mutiny are marine perils under the English system whilst they are war perils under the Plan Cl. 2-9, sub-clause 1 (d). For the assured, this difference will be irrelevant as long as there is a consistent choice of conditions. However, the assured may either have an overlap or a gap in cover if the Plan and English conditions are mixed. There will be a gap in cover if the Plan marine and English war peril insurance is taken out, whilst there will be an overlap of cover in the reverse situation. It is, of course, possible to fill the gap or eliminate the overlap by appropriate clauses in the policy. For further discussion on the war peril concept, see the Commentary to Cl. 2-9 and Brækhus and Rein: Kaskoboken, pages 55 et seq.

The war perils insurance covers, inter alia, damage to the vessel caused by war or war-like conditions; the use of weapons etc. in the course of military exercises in peacetime, or in acts guarding against the infringement of neutrality, as well as riots strikes, lockouts, sabotage, acts of terrorists etc.

Where a certain peril results in a series of events or consequences, which in and of themselves may constitute insured perils, it will be the original peril which will be determinative in classifying the insured event. A classic example is the "Torrey Canyon" casualty where the vessel, which had begun leaking oil as a result of grounding, was deliberately bombed to prevent oil pollution damage and consequently sank. According to Cl. 2-8 (b), such loss and the damage caused by the measure taken is a marine peril because the original peril (the grounding) is a marine risk. If, however, the original peril had been a war risk (e.g. damage by torpedo), the loss and consequential damage would, according to Cl. 2-9, sub-clause 1 (e), be a war peril.

2.3 Perils not insured

As per Cl. 2-9, sub-clause 2, insolvency and RACE II exceptions are expressly exempted from war perils coverage, which means that these risks are covered neither by the marine nor war peril insurers.

2.3.1 Insolvency

The vessel may be delayed and lost as a result of insolvency (e.g. arrest and subsequent forced sale of the vessel). Such delay and loss is not insurable regardless of whether it is the owner, the assured (if different from the owner) or a third party who faced financial difficulties resulting in damage or loss to the assured. A shipyard in financial difficulties is a third party that may cause the assured damage or loss by delayed or ineffective repairs etc. due to financial strain on the yard.

2.3.2 Nuclear energy – RACE II exceptions

Commercial insurance markets exclude nuclear incidents and other RACE II perils as insured perils because of the long-term and cumulative consequences which such incidents may have. The accidental release of nuclear energy from a nuclear power plant in central Europe may result in nuclear contamination of extensive areas and a large number of vessels simultaneously. Separate compensation schemes for nuclear perils have been established internationally, see the Paris Convention 1960 with subsequent additions and protocols. See further Brækhus and Rein: Kaskoboken, page 115.

The use of nuclear arms is also excluded from commercial war risk insurance for the same reason. International compensation schemes have not been established and the owners must turn to the flag state or to the state of registration (if different from the flag state) in order to obtain compensation or to obtain assistance in recovering compensation from a hostile power which has used nuclear arms. The same goes for other RACE II excepted perils.

2.3.3 Intervention by state power

"State power" is defined as individuals or organisations exercising public or supranational authority see Cl. 2-8 (b) and Cl. 2-9, sub-clause 1.

The combined effect of Clauses 2-8 and 2-9 is that intervention by the vessel's "own" state is not an insurable peril. This means that intervention by the state of the vessel's registration (normally also the flag state) is not covered by any insurance. The reason is that the intervening state should compensate the owner (e.g. for requisition for title or use). The insurance market was concerned that if the owner was covered by insurance, the flag state might more easily decide not to compensate the owner since his loss would be covered by the insurer.

However, if the flag state is neither the state of registration, nor the state where the major ownership interests are located (which requirements a flag of convenience state could conceivably meet), it would qualify as a "foreign state" under Cl. 2-9(1) (b) and interventions such as capture at sea, condemnation in prize, confiscation etc. would be covered by war perils insurance.

It should be noted that requisition for title and use by any state power is not be considered an intervention. Requisition is excluded from coverage regardless of whether the requisition is carried out by the vessel's "own" state or a foreign state power. Thus an important and practical type of government intervention is excluded from cover.

This exclusion of requisition from cover may lead to some uncertainties. Cl. 2-9 (1)(b) mentions capture at sea, condemnation in prize and confiscation as interventions by foreign state powers which are covered by war peril insurers. The distinction between confiscation and requisition is that the owner is not compensated by the confiscator, whilst he should be compensated by the state power requisitioning the vessel, see the Commentary to Cl. 2-9.

3. SCOPE OF THE INSURANCE, CLAUSE 16-1

Clause 16-1 reads:

> *"The insurance covers loss due to the ship being wholly or partially deprived of income as a consequence of damage to the ship which is recoverable under the conditions of the Plan, or which would have been recoverable if no deductible had been agreed, see Cl. 12-18. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules in Chapters 10-12 of the Plan shall be replaced by the corresponding conditions of the insurance concerned when assessing whether the damage is recoverable.*
>
> *The insurance also covers loss due to the ship being wholly or partially deprived of income:*
>
> *(a) because it has stranded,*
>
> *(b) because it is prevented by physical obstruction (other than ice) from leaving a port or a similar limited area, or*
>
> *(c) as a consequence of measures taken to salvage or remove damaged cargo, or*
>
> *(d) as a consequence of an event that is allowed in general average pursuant to the 1994 York-Antwerp Rules."*

Sub-clause1 of this provision contains several fundamental requirements that must be satisfied in order for the assured to recover under his loss of hire insurance:

1. the word "loss" means that the assured must have suffered a loss of income;
2. the words "due to" and "as a consequence of" require a causative connection between the damage and the loss;
3. the words "wholly or partially deprived of income" mean that the vessel could not have been operated as intended;
4. the words "damage etc." require that the vessel is physically damaged and that this damage is recoverable under the hull insurance.

These four elements are discussed below.

3.1 Loss of income

The words "The insurance covers loss due to the vessel being wholly or partially deprived of income" are a verbatim repetition of § 2, subparagraph 1 of the 1972 and 1993 conditions.

The 1972 Commentary, page 32 made it clear that the intention of these words was that if, the vessel would have been unable to earn any freight regardless of the damage, there should be no recovery under the loss of hire insurance. The English courts have confirmed and settled the law on this point in "The Capricorn", Cepheus Shipping Corporation v. Guardian Royal Exchange Assurance plc. [1995] 1Lloyd's Rep 622. The Commentary to Cl. 16-3 refers to "The Capricorn" and re-emphasised this fundamental principle.

In the “Capricorn” the plaintiffs claimed 60 days’ loss of time under the loss of hire policy. The policy was subject to the Norwegian "General Conditions for Loss of Charter Hire Insurance (1972)" with 1977 amendments and with the incorporation of a reference to the Institute Time Clauses (Hull) 1.10.83. The plaintiffs argued that it was irrelevant to consider what, if any, use they might have made of the vessel after the end of the peak season but for the damage. They submitted that the policy wording compensated them for loss of earning capacity without proof that such capacity would have been deployed by them in the market. The defendants argued that the policy was not to be read as covering loss which the vessel would have sustained, damage or no damage, because she would in any eveny have been out of the market. They submitted that the vessel was due to be and would have been laid up throughout the low season and thus that the plaintiffs had no insurable interest.

The judge held that the plaintiff's insurable interest in the subject matter insured (i.e. freight and income from trading) must have existed at the time of loss. The judge found that it was clear that the assured would not have exercised their off-season option to trade the vessel, and that their intention throughout was and would (irrespective of the damage repairs) have been that the vessel should remain in lay-up. In other words, any loss of earnings was not due to the damage, but due to the fact that the vessel would have been out of the market anyway.

However, assuming that the assured would have reconsidered his intention to continue the lay-up had the market improved substantially, the judge concluded that the market never actually did and any prospect that it might was remote.

Although the vessel must have been deprived of income, firm evidence of possible employment is not required. It is not necessary that the vessel has been employed at the time of the casualty. A reasonable possibility of obtaining employment for the vessel during the repair period will be sufficient to show that the vessel had the necessary earning capacity.

However, the assured must show that, from a commercial point of view, it is both the intent and purpose of the assured to place the vessel in the market and that there exists a possibility of obtaining employment. The assured thus has the burden of proving that although the vessel happened to be unemployed, his loss of income was the result of the insured damage. Such burden of proof follows from Cl. 2-12, sub-clause 1, according to which the assured has the burden of proving that he has suffered a loss of the kind covered by the insurance and the extent of the loss.

If, for example, the assured places his vessel in the Persian Gulf as one of several vessels waiting for a possible voyage charter and certain fixtures are made for other vessels, he must be deemed to have fulfilled the condition regarding earning capacity. One cannot demand that the vessel actually has been employed during the relevant period. But, if the allegedly available employment is geographically distant, the assured must prove that moving the vessel from where it lay when it was decided to carry out the repairs was both feasible and commercially realistic.

The borderline between a laid-up and an unemployed but freight seeking vessel may be difficult to draw. There are in general two lay-up conditions to be considered, so called hot lay-up and cold lay-up depending on the extent of the functions that are shut down. In the author’s opinion guidance can be found in the classification societies’ guidelines on cold and hot lay-up.

DNV (now DNV/GL) Guidelines of March 2012 has the following definitions for vessels:

Hot lay-up: In this lay-up condition, the machinery is kept in operation for the sake of fast re-commissioning, but measures may be taken to reduce various operational costs.

Cold lay-up: In cold lay-up condition the machinery is taken out of service and the vessel is kept "electrically dead" with the exception of emergency power. This condition usually implies 3 weeks re-commissioning time or more depending on the level of preservation and maintenance during lay-up. The level of preservation is mainly decided based on the age and value of the vessel and the most likely re-commissioning scenario.

For cold lay-ups as defined above, it is clear that a lay-up plan is to be approved by the insurers and to be followed by the assured, ref the Plan Cl. 3-26, cf. Cl. 3-25. As long as the vessel is in such cold lay-up the assured has not been deprived of income due to any damage to the vessel.

For hot lay-ups as defined above, it seems equally clear that a lay-up plan pursuant to the Plan Cl. 3-26 is not required. At the outset, therefore, a vessel in hot lay-up must be considered to be freight seeking and thus may be deprived of income due to a damage triggering the loss of hire insurance. However, if the assured elects to reduce the crew on board and/or shut down certain functions, it is difficult to outline exactly when an approval of lay-up plan is a requirement according to the Plan Cl. 3-26. As a general rule, if a unit has a lengthy stay out of operation due to no contract, accompanied by a request of reduction in premium, it must be deemed to be laid-up both according to the Plan Cl. 3-26 and in relation to the test "deprived of income".

However, this principle must not be extended to apply in those cases where the assured is entitled to a proportionate recovery pursuant to Cl. 16-12 for simultaneous repairs. From a logical viewpoint, it could be argued that if damage repairs are postponed to be carried out simultaneously with owners repair or reconstruction, the owner has not suffered any loss if damage repairs are carried out simultaneously with owner's work. But there is no doubt that, in adjusting practice, Cl. 16-12 prevails over Cl. 16-1, so that the owner will be compensated for half the common repair time if at least one of the requirements under Cl. 16-12 for such apportionment is satisfied. Prior to the Nordic Plan, in 2013 it was proposed that Cl. 16-12 should be amended to reflect the principle that the loss of hire insurance would not respond if the owner had not suffered any loss because the vessel had been deprived of income in any event. This proposal was rejected by the insurers and never came before the Standing Revision Committee for discussion.

If, however, there had been any common repair time in the "Capricorn" case, then the owner would still not have recovered under the loss of hire insurance for any time "lost" while the vessel was in any event in lay-up. One must distinguish between lay-up and taking out a trading vessel from service to carry out required class work or other categories of work as listed in Cl. 16-12 (a) - (c).

3.2 Causation

Causation is primarily a question of fact. In many instances it is easy to establish the required causation. If the vessel collides with another vessel and is severely damaged, the vessel must be repaired at the nearest yard capable of carrying out repairs. If no other repairs are carried

out at the same time, the assured is entitled to be compensated under his loss of hire insurance for the whole period, from the time of the collision until the completion of the repairs (possibly even longer, subject to Cl. 16-13), less the deductible period.

However, in real life, once the vessel has to be taken out of service, the assured will more often than not take the opportunity to carry out other repairs and maintenance work simultaneously with the average repairs in order to use the time lost as efficiently as possible.

On the other hand, the assured does not take the vessel out of service for damage repairs if such repairs can be postponed to a later planned docking period and carried out concurrently with the assured's work.

Regardless of which category of work triggered the off-hire period it is, in principle, a combination of causes that contribute wholly or in part towards the loss of income for the assured during the common repair period or other common loss of time.

It is difficult to resolve the causation problem in these cases based on generally applied principles such as the *causa proxima* doctrine or the apportionment rule. Therefore, the Nordic loss of hire conditions contain specific rules on how to adjust the claims in cases of simultaneous repairs, see further Cl. 16-12 dealt with under 7.4.1 below. The solutions adopted in Cl. 16-12 are premised upon the principle of equal apportionment regardless of the question of causation in each case. This solution may not always be fair and reasonable, but it provides a clear and practical solution.

Cl. 16-10 contains another solution on how to apportion time lost during removal to the repair yard, see under 7.3 below. This period of time lost shall be attributed to the category of repairs that necessitated the removal. The same applies to time lost after completion of repairs, if recoverable pursuant to Cl. 16-13 (see 7.4.2 below) and to time lost during surveys, while obtaining tenders, during tank cleaning, waiting to commence repairs and other similar measures necessary to carry out the repairs. Cl. 16-10 introduces something very similar to the *causa proxima* doctrine.

In other cases of combined causes, the apportionment rule set out in Cl. 2-13 applies

The 1972 Commentary illustrates the apportionment principle by the following example on page 16: a vessel is damaged and has to seek a port of refuge and carry out temporary repairs shortly before the winter season. Before the repairs are completed, the port is closed by ice. The 1972 Commentary suggests that all loss of time until completion of the repairs should be attributed to the damage, while additional loss of time thereafter due solely to the ice should be excluded from the adjustment.

However, this method of apportionment is open to criticism. The time lost during the period when the vessel was prevented from sailing due to *both* the repairs and the ice could have been apportioned equally between these two independent but simultaneously contributing causes. It is conceivable that even the period after the repairs were completed (when only ice prevented the vessel from sailing) should be apportioned, since the vessel would not have found itself in an ice-bound port but for the damage causing it to become delayed into the ice season.

As can be seen from the above, the apportionment rule gives little guidance and therefore gives a broad discretion to average adjusters, the courts and/or arbitrators.

The Commentary to Cl. 16-1 discusses the application of the apportionment rule in Cl. 2-13 in loss of hire insurance at some length.

Firstly, the case is discussed where the hull damage is caused by an insured and an uninsured peril. The insured peril may be an error in navigation by the master leading to grounding of the vessel and the uninsured peril may be a breach of safety regulation that can be imposed against the assured such as e.g. failure to provide the vessel with an adequate and/or updated chart for the area. Another example, damage to the hull may have been caused partly by a peril of the sea (heavy weather) which is an insured peril, and partly by corrosion, which is excluded from the hull cover pursuant to Cl. 12-3. Even if the repair period and other loss of time due to survey etc. are not increased as a result of the uninsured peril, the loss of time must be apportioned. The Commentary points out that an apportionment made by the hull insurer according to Cl. 2-13, will normally be followed by the loss of hirer insurer unless there are special reasons to apply a different apportionment in relation to the loss of hire insurance. If the damage has been caused by a combination of marine and war perils, the rules in Cl. 2-14 to Cl. 2-16 apply.

Secondly, in cases of simultaneous repairs the Commentary emphasises that the equal apportionment rule of Cl. 16-12 applies instead of the apportionment rule in Cl. 2-13, cf. above.

Thirdly, there may be a situation where perils not covered or attributable to another insurance period may result in delays or prolongation of the loss of time or stay at a repair yard. Such perils may be external, for instance, strike at the yard, extreme weather conditions delaying the repair work or detention of the vessel due to arrest or similar measures. There may also be delays related to the vessel itself, such as discovery during repairs of damage previously unknown and not covered by the current loss of hire insurance. Cl. 16-12 on simultaneous repairs may also apply in the latter case. The Commentary to Cl. 16-1 states with regard to this third situation:

As to the third situation, we must fall back on the general rule of apportionment in Cl. 2-13. In this case, contrary to the first situation, there will be no apportionment settlement for the underlying hull damage, and Cl. 2-13 must thus be applied directly to the loss-of-hire settlement. Consequently, the loss of time shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss. Guidance has to be sought in the Commentary to Cl. 2-13 where criteria for weighing the different causes in different situations are given. <u>One of the criteria will be how foreseeable the event prolonging the loss of time is when the ship is sent to the repair yard</u>. In relation to Loss of Hire insurance, this criterion of foreseeability must be seen in connection with the rules regarding evaluation of tenders in Cl. 16-9, the assured's duty to reduce the loss and general preventive considerations. (Emphasis added)

This paragraph of the Commentary was amended in 2013 in order to underscore that the apportionment principles of Cl. 2-13 should be applied unless otherwise expressly provided so that the guidelines contained in previous versions of the Commentary should no longer apply.

The Commentary to Cl. 16-1 goes on to discuss how the apportionment rule may be applied, if the repair period is prolonged because of a strike. In the 1996 and subsequent versions until version 2003, the Commentary to Cl. 16-1 contained the following passage:

Questions relating to causation must also be dealt with in accordance with the rules in the general part of the Plan. If time is lost partly because of damage to the ship and partly because of other circumstances not covered by the insurance, then the apportionment rule in § 2-13 will determine the extent of the insurer's liability. In principle, such an apportionment should be made where the stay at the repair yard is prolonged because of a strike. In practice extra delay arising from a strike by workers at a repair yard has been covered. On the basis that a strike at the repair yard is not unforeseeable, it is assumed that this practice will be continued. The extent of the cover will, however, depend on what was the reason for the vessel's stay at the repair yard, c.f. § 16-12 and below. [3]

The Commentary stated that the whole period at the yard should be covered in full, subject to Cl. 16-12, if it is the yard's own workers that go on strike and thereby prolong the loss of time.

In 2003, Chapter 16 was reviewed and the above quoted passage was replaced as follows:

In practice, it is particularly the prolongation of stays in a repair yard due to strikes that has caused problems. The 1996 Commentary states that while, in principle, the apportionment rule in § 2-13 was to be applied, in practice a prolongation of the stay in a repair yard due to a strike among the yard workers had been covered. However, the practice referred to consisted only of accepting local strikes at the yard as "foreseeable", and in such cases paying "full" compensation, i.e. without proportionate apportionment. In the Committee's view, prolongation due to a strike must be considered in the customary manner on the basis of § 2-13, and not on the basis of whether or not the strike is local.[4]

Since 2003 there has been no amendment to the Commentary on this point. The effect of this amendment of the Commentary to Cl. 16-1 is that the previous alleged practice is abolished. Prolongation of the repair period due to local strike at the repair yard must be apportioned in accordance with Cl. 2-13. Such "apportionment" may still be 100-0, depending on the circumstances in each case, see further the Commentary to Cl. 2-13.

The above quoted passages from the Commentary to Cl. 16-1 put weight on whether a concurrent cause prolonging the loss of time or stay at a repair yard is *foreseeable.*

In cases where the insured vessel after an incident triggering the loss of hire insurance is delayed by the local authorities, the foreseeability criterion has been applied in determining whether such delays may be wholly or partly allowed under the loss of hire insurance. If the delay caused by the local authority is a foreseeable consequence of the damage to the vessel, at least a certain part of the delay has been allowed. If, on the other hand, the delay is unforeseeable, the chain of causation is broken. According to adjusting practice the delay must be a foreseeable consequence of the vessel's own damage. If the vessel causes damage to third parties property and is delayed as a result of arrest by a third party claimant and/or the local authorities held the vessel while the incident is investigated, such delays are not covered under the loss of hire insurance at all. This point was emphasised in the 1972 Commentary in the smaller font on page 15. The current Commentary does not discuss the point, but no amendment was intended by omitting this discussion.

[3] See the 1999 Commentary page 367

[4] This amendment of the Commentary was overlooked in error in the second edition of this book.

In recent years local authorities have become increasingly concerned about damage to coral reefs after groundings on such reefs. In many cases not only the coral reef is damaged, but also the vessel. If the vessel is delayed solely due to the authorities concern for the environmental damage, no part of the delay will be allowed. But if the authorities are also concerned with the damage to the vessel and wishes to ensure that the vessel is capable of continue safely either by its own power or in tow, adjustment practice has allowed a few days delay caused by the local authorities' investigation and to issue necessary towage permits etc. This practice dates back to the 1972 Conditions. But only two or three days were allowed as this was deemed what was reasonable and necessary for the authorities to complete the investigation and to issue the required permits to continue the voyage or to move to an appropriate repair port. There are examples of authorities delaying the vessel for longer periods, but such extended delay is not compensated under the loss of hire policy.

Adjustment practice may apply a relative foreseeability test depending on where the incident takes place. In countries where the bureaucracy is known to work slowly, five days delay for example may be deemed foreseeable. Any further delay is unforeseeable and is thus not allowed.

Other examples from adjustment practice:

(1) The vessel entered the repair dock for class work and other owner's work. The vessel struck the dock gate so that the bunker tank was punctured causing bunker oil to run out into the dock. The dock gate was closed in time to avoid any oil spill outside the dock. No repairs could be commenced until the bunker oil was removed from the dock. This took 15 days. The repair of the contact damage took another 10 days. Deductible was 14 days. The 15 days it took to clean the dock was deemed a foreseeable consequence of the damage and allowed under the loss of hire insurance, even if it was not the damage to the vessel itself that caused the delay. Thus 10 plus 15 days were allowed, less the deductible of 14 days, giving 11 days compensation under the loss of hire insurance.

(2) A tanker is damaged but the class does not require immediate repair and issues a Condition of Class that the repair is carried out within a certain time or at the next docking etc. Traditionally, under the general mitigation rule in Cl. 3-30 the assured must then postpone repairs and cannot opt to repair immediately at the expense of the loss of hire insurer. This tradition is challenged if the vessel for commercial reasons cannot defer repairs. It may be that the major oil companies will not charter the vessel for trade to US ports as long as there is a Condition of Class pending. If the vessel can nonetheless be employed in other trade, such a commercial restriction is no reason for the assured to repair the vessel before required by the class. But it may be situations where such commercial restriction is inflicting upon the assured loss of income so that it must be deemed reasonable to allow the assured to carry out repairs earlier than required by class.

(3) When it comes to auxiliary engines and multiple failures the typical scenario is as follows: A vessel has one auxiliary engine out of commission due to either maintenance or damage, then there is a damage to a second auxiliary engine, with consequential off-hire for repairs. There is clear practice with regard to a combination of different perils, in accordance with the Plan section 2-13, for this type of incidents. If reasonable measures have been taken to re-commission the first auxiliary engine, then the loss of hire is allocated to the latter auxiliary engine damage only. It is considered that the latter auxiliary engine damage is the triggering cause. Of course,

this is provided that the Class would not allow the vessel to sail with two auxiliary engines out of operational condition. In the Nordic marine insurance practice, insurers, and the independent and sworn average adjusters, have frequently referred to and found analogous support in the NMIP 16-10, sub-clause 1.

3.3 Wholly or partially deprived of income

The vessel is wholly deprived of income when it is unable to operate due to the damage. Normally this will correspond to the period when the vessel is physically unable to operate. If the vessel is able to operate with the damage, the situation might be that it is only partially deprived of income. Typical examples are where the vessel has to operate at reduced speed due to engine damage or the cargo capacity is reduced due to damage to the hull or damage to the cargo handling equipment. However, the terms of the contract of affreightment may put the vessel wholly off-hire even if the vessel is able to perform the services required. This will be the case if the charterparty provides that the vessel will remain off-hire under the charterparty until it is restored to its earlier condition, see 5.2.1 below.

Where the vessel is partially deprived of income compensation is granted on a pro rata basis, see 5.3.1 below.

3.4 Damage to the vessel

Cl. 16-1 contains another fundamental principle of loss of hire insurance: there is no recovery under the loss of hire insurance unless the vessel has suffered damage recoverable under the Plan. Cl. 16-1 was amended in 2003 so that damage to the vessel covered under the actual hull insurance for the vessel may also trigger cover under the loss of hire insurance, see further under 3.6 below. Whether the damage is recoverable pursuant to Chapter 12 or in General Average and thus recoverable under the hull insurance via Cl. 4-8, is immaterial. In both cases, loss of time caused by the damage is recoverable under the loss of hire insurance, see the Commentary to Cl. 16-1. Total loss and constructive total loss are not considered to be damage for this purpose, see Cl. 16-2 and further comments under 4 below.

Even if the damage was in fact not recoverable under the terms of the Plan, the requirement would nevertheless be satisfied if it would have been recoverable but for any agreed deductible. The amount of the deductible is immaterial, which means that the assured is free to agree any deducible he wants with his hull insurer without affecting his cover under the loss of hire insurance. The assured may even increase the "deductible" to 100%, that is to say the vessel may be kept uninsured without affecting the loss of hire insurance.

3.5 Damage excluded from the hull cover

There are several exceptions from cover under the Plan that may be relevant to the hull cover. The wording of Cl. 16-1 suggests that any and all of these exceptions would be relevant also in relation to the loss of hire insurance, but the Commentary to Cl. 16-1 clearly suggests that it is the objective exceptions from the hull cover contained in Chapters 10 and 12 that are relevant. This means that, if the hull insurer is entitled to refuse cover under the hull insurance on the basis of the exceptions contained in Chapter 3 of the Plan, it is necessary to evaluate separately and independently whether the same exceptions apply also in relation to the loss of hire insurance. In many instances, the exceptions will apply equally to both types of

insurance. If the vessel is deemed in a poor condition in violation of applicable safety regulations in relation to the hull insurance so that Cl. 3-22 et. seq. is applicable, this will normally also apply in relation to the loss of hire insurance.

In relation to the duty of disclosure, Cl. 3-1, it is possible that the assured may be in breach of his duty in relation to his hull insurer while full disclosure was made to the loss of hire insurer. The fact that the assured may not recover from his hull insurer because of non-disclosure is completely irrelevant for the loss of hire insurer who has been provided with all relevant information. The same goes for change of class, see Cl. 3-8, sub-clause 2. The assured may have remembered to inform his hull insurer about a change of class, while he forgot to inform his loss of hire insurer. Even if the damage is covered under the hull insurance, the loss of hire insurer is entitled to reject the claim if the condition for denying the claim pursuant Cl. 3-8, cf. Cl. 3-9 is satisfied, for instance if the loss of hire insurer is able to substantiate that he would not have accepted the insurance in the first place, if he had known that the assured would change class.

Breach of the warranty of class contained in Cl. 3-14 would normally be equally relevant to both groups of insurers but, in the unlikely event that the hull insurer for one reason or another has accepted to continue the hull insurance in spite of the fact that the class is lost or suspended, does not deprive the loss of hire insurer from invoking the class warranty in order to deny any claim under the loss of hire insurance.

These examples illustrate that these two types of insurances must be treated separately in many respects, even if they are linked together by virtue of Cl. 16-1.

The loss of hire insurer is not bound to accept or be guided by any settlement which might have been reached between the assured and the hull insurer. The loss of hire insurer will only be responsible to the extent that the loss of hire was caused by a physical damage which would have been recoverable under the Plan, regardless of whether any settlement was reached with the hull insurer. Any decision with respect to the loss of hire insurance issue, even if it rejects the basis for the hull settlement, will of course not affect the hull settlement *per se*, since the hull insurer is not party to the dispute between the loss of hire insurer and the assured.

3.5.1 Exclusions contained in Chapter 10 of the Plan

The most important provisions of Chapter 10 are Clauses 10-1 (objects insured), 10-2 (objects temporarily removed from the ship) and 10-3 (damage due to ordinary use). Loss of hire resulting from physical damage which is not covered under the hull policy is not recoverable. The same applies for loss of hire resulting from physical damage caused by ordinary use of the vessel (e.g. loss of time during repairs of the cargo holds which have been damaged by normal use of the grabs during discharge operations).

3.5.2 Exclusions contained in Chapter 12 of the Plan

The most important exceptions from hull cover in Chapter 12 are the exceptions in Clauses 12-3 (inadequate maintenance, etc.), and 12-4 (error in design of parts not approved by the class). These exceptions will not be dealt with here, other than to note that loss of time during repairs of damage to the hull and/or machinery due to lack of maintenance etc. is not recoverable under the loss of hire insurance. For a detailed discussion of these exceptions, see the Commentary to Cl. 12-3 to Cl. 12-5 and Brækhus and Rein: Kaskoboken, pages 86-108,

on the similar, but not identical provisions of the 1964 Plan, Clauses 175 and 176 (m), and Wilhelmsen and Bull, Handbook in Hull Insurance, chapter 10.5.

3.6 Vessels insured on foreign hull cover conditions

The assured is free to take out loss of hire insurance on Nordic conditions and simultaneously insure the vessel on non-Nordic hull conditions. Cl. 16-1 was amended in the 2003 version to take care of this combination of insurance conditions. It is expressly provided that the loss of hire insurer must accept the non-Nordic hull conditions in writing. The reasons for this stringent and formal requirement of acceptance of foreign hull conditions in writing are two-fold:

1. avoidance of any discussion of which hull conditions will trigger cover under the loss of hire insurance;
2. the loss of hire insurer's need to carry out a proper risk evaluation and quote adequate premium.

If the foreign hull conditions have not been accepted in writing by the loss of hire insurer, the loss of hire insurance will be triggered only when any damage sustained by the vessel would have been covered under the Plan, regardless of whether the foreign hull cover on point is more extensive or restricted than the Plan. The loss of hire insurer may deny cover because the damage to the vessel is not recoverable under the Plan. If the cover under the Plan is the more extensive, the loss of hire insurer must compensate regardless of the assured's recovery under the actual hull cover.

What is written above applies to well-known standard conditions. If the assured has agreed with his hull insurer special clauses deviating from the standard conditions, such special clauses will never trigger the loss of hire insurance unless the special clauses have been expressly agreed in writing by the loss of hire insurer. The same applies, of course, equally to any special clauses agreed in a hull policy based on the Plan.

In those cases where the loss of hire insurer has accepted the foreign hull conditions in writing, the question arises to what extent the foreign clauses and the foreign background law should be deemed incorporated into the loss of hire insurance contract. Cl. 16-1 expressly provides that only Chapters 10, 11 and 12 are replaced by corresponding provisions in the foreign hull cover. No reference is made to chapter 13 because this chapter is not relevant in this regard, as it deals with the hull insurer's cover of collision liability.

Consequently, only the provisions of the foreign hull conditions which are accepted in writing that correspond to chapters 10-12 of the Plan are relevant in relation to the loss-of-hire cover.

On the one hand, this means that cover must be based on the foreign hull conditions in question insofar as they state which objects are covered by hull insurance and the scope of the hull cover in the event of damage to the ship. Furthermore, the foreign hull conditions must be followed in order to determine whether the vessel is an actual or constructive total loss. If the vessel is deemed an actual or constructive loss under the foreign hull conditions, the assured is not entitled to any compensation under the loss of hire insurance, cf. Cl. 16-2.

On the other hand, this means that issues that are regulated by chapters 1-9 of the Plan, must always be decided based on the rules in the general part of the Plan. Coordination with foreign

hull conditions is only linked to the assessment of the underlying hull damage; issues related to the loss-of-hire insurance itself, such as the rules regarding the duty of disclosure or special trading limits relating to loss of hire cover must always be decided in accordance with the Plan. If the ship is outside the trading area covered by the foreign hull insurance but within the trading area covered by the Plan, the loss of hire insurer will therefore be liable, even if no compensation is payable under the hull insurance.

The assured may conceivably change his hull insurance in the course of the insurance period under the loss of hire insurance, for instance from Plan conditions to English ITCH conditions. In such case, the hull insurance and the loss of hire insurance must be coordinated on the basis of the hull conditions that applied when the loss of hire insurance was effected, unless the assured has notified the insurer of a change to other standard conditions and received the latter's written acceptance of these, because the loss of hire insurer calculates the premium in relation to the hull conditions that apply at the time the loss of hire insurance is effected.

As regards the burden of proof, the Norwegian Supreme Court has stated in obiter dicta that where the hull insurance is governed by foreign conditions, the burden of proof will also be governed by the foreign rules, cf. the "White Sea" Rt. (Law Reports) 1997 page 1459, in particular page 1464. The vessel in question was hull insured on the English ITC 1983 conditions including the Liner Negligence Clause. The issue was whether damage to the boiler was due to wear and tear, or to crew negligence, or to accident. In this case, the court did not actually have to apply any burden of proof rules because the facts indicated that the cause of the damage was wear and tear, which was excluded under the ITC conditions. The damage was therefore not recoverable under the actual hull conditions, which by express agreement replaced the reference to the Plan, and there was thus no claim under the loss of hire insurance.

Unless there is an express agreement with regard to choice of law and/or jurisdiction, Cl. 1-4 of the Plan will apply since this clause is in Chapter 1 of the Plan and therefore prevails over any reference to foreign hull conditions. This means that for a Norwegian based insurer, such as Norwegian Hull Club, Norwegian law and jurisdiction will apply on the loss of hire insurance, even if the foreign hull conditions are subject to foreign law and jurisdiction.

However, in those cases where the loss of hire policy is expressly made subject to foreign law and/or jurisdiction, the question arises whether the foreign background law should prevail over the provisions of chapters 1 to 9 of the Plan to the extent that the application of foreign law will lead to other results than those following from Chapters 1 to 9 of the Plan.[5]

Neither the Commentary nor any other Nordic legal sources offer any solutions to this question. If the choice of foreign law is combined with a corresponding foreign jurisdiction clause, the question will be decided by the foreign court which may favour its own legal system to the provisions of the Plan. But disregarding the potential for such preferences, we venture to suggest that the foreign court should apply chapters 1 to 9 of the Plan, rather than its own background law. The reference to governing law in Cl. 1-4 is obviously not meant to set aside the provisions of chapter 1 to 9 of the Plan, but merely to supplement the contract with relevant and applicable background law where there are no solutions to the contrary in the Plan. The Norwegian ICA contains provisions on duty of disclosure, safety regulations

[5] Further on the subject, see Casper M. Meland, MarIus Nr. 356, *En komparativ analyse av norsk og engelsk kontraktsrett.*

etc. at variance with the corresponding Plan provisions, and there is no doubt that Norwegian courts must apply the Plan provisions rather than competing Norwegian law. The same must apply to foreign courts, even if the parties have agreed to apply a foreign background law. The foreign court must apply its own background law chosen by the parties only to the extent that it is not in conflict with but supplementing Chapters 1 to 9 of the Plan.

3.7 Loss of hire in cases where there is no damage to the vessel

Under 1.3.2, it is briefly mentioned that there has been a development towards extending the loss of hire insurance to include loss of income resulting from a grounding which does not result in damage to the vessel. Under Cl. 16-1, sub-clause 1, and the earlier loss of hire conditions, there would be no recovery if there were no damage to the vessel. This result was seen as unsatisfactory in those cases where the vessel was delayed because of a grounding but the assured and hull insurer were lucky enough to refloat the vessel without any physical damage. Delay may also occur because the authorities investigating the cause of the grounding will wish to satisfy themselves that the vessel is not damaged and fit for service, see the discussion under 3.2 above.

Cl. 16-1, sub-clause 2, included loss of hire insurance coverage, without reference to the hull insurance, in three different cases. Version 2003 added a new cause of loss at letter (d), so that Cl. 16-1, sub-clause 2 now reads:

> *"The insurance also covers loss due to the vessel being wholly or partially deprived of income:*
> *(a) because it has stranded,*
> *(b) because it is prevented by physical obstructions (other than ice)from leaving a port or a similar limited area,*
> *(c) as a consequence of measures taken to salvage or remove damaged cargo, or*
> *(d) as a consequence of an event that is allowed in general average pursuant to the 1994 York-Antwerp rules.*

3.7.1 Loss of hire due to "stranding"

Letter (a) extends cover in those cases where the vessel has "stranded". The word "stranded" must be read as synonymous to "grounding". Thus cover is extended to all cases where the vessel is prevented from moving because it is stuck on the seabed, regardless of whether the vessel drifted ashore or was moving under its own power. The cause of the grounding is immaterial, as long as it is due to a peril covered under the policy, see 2 above, and the exclusions from cover in Chapter 3 do not apply. However, the Commentary to letter (a) underscores the following limitation on the perils covered:

"To say that the ship "has stranded" means that the stranding must be in the nature of a casualty, even though there is no requirement that the stranding resulted in damage. If, on the other hand, the stranding is a consequence of "ordinary use", for instance foreseeable stranding during navigation on a shallow river, cf. Cl. 10-3, the insurer is not liable for the loss of time"

It is difficult to imagine that this extension of cover will result in any significant payments from the insurer because if the grounding is so light that there is no damage to the vessel, the delay will seldom reach beyond the deductible period. If the unlikely should occur, i.e. that

the vessel is aground without any damage but the vessel cannot be moved, Cl. 16-2 will prevent the assured from recovering under the loss of hire insurance if the hull insurer pays out total loss compensation, see further under 4.3 below.

3.7.2 Loss of hire due to vessel being prevented from leaving due to physical obstructions (ice excluded)

Letter (b) may be described as civil or marine "blocking and trapping" cover. Such cover was developed in war risk policies both to provide total loss compensation if the vessel was blocked or trapped for an extended period (12 months usually) and to compensate loss of income during the period the vessel was delayed, see Cl. 15-12 and Cl. 15-16. On the latter provision, see under 16.1 below.

The blocking and trapping cover under Cl. 16-1, sub-clause 2 (b), is narrower than the cover under Cl.15-16. Only delays caused by *physical* obstructions are covered. Such obstructions may be another vessel blocking the entrance to the port after an accident, a collapsed bridge, fallen power lines, etc. The only obstruction excluded is ice. Delay caused by ice preventing the vessel from leaving the port is not covered. However, if ice was only one contributing cause of the delay, there may be partial cover if the other cause is covered under the loss of hire insurance, see further on causation under 3.2 above.

After the Deepsea Horizen catastrophe in the Gulf of Mexico, ports were temporarily closed due to extensive oil pollution in the port. Whether extensive pollution on the sea amounts to a "physical obstruction" is debateable. Oil on the sea will not physically prevent vessels from passing through, but if the port authorities in the port affected by the pollution do not prohibit vessels from passing through, port authorities at the next and subsequent destinations may well deny a vessel stained by oil entrance because of fear of pollution. Hence, the vessels that have to wait in port until the pollution is cleaned up are for practical and commercial reasons blocked. Thus, there are good reasons to treat extensive pollution equal to a physical obstruction in relation to Cl. 16-1, sub-clause 2 (b).

If the vessel is prevented from entering (as opposed to leaving) a port because the entrance is blocked, the ensuing delay, loss of freight or extra costs of discharging or loading the cargo elsewhere, is not covered under the loss of hire insurance. The market at this point of time is still not prepared to extend cover any further than to vessels blocked in port or similar limited areas. A vessel prevented from entering a port may, of course, move freely in the physical sense, but from a legal standpoint its movements may be restricted because of its contractual obligations which may oblige the assured to keep the vessel waiting for a certain period to see whether the hindrance disappears and prevents him from taking any action to mitigate the loss until after a considerable time. Thus there is no doubt that if the vessel cannot enter a port because of a physical obstruction, the assured may suffer losses worthy of being covered by loss of hire insurance but which losses are nevertheless uninsurable under the generally available loss of hire insurance conditions.

The words "similar limited area" are not commented on in the Commentary to Cl. 16-1, sub-clause 2 (b), other than by reference to Cl. 15-12 (war risk blocking and tapping). In 16.1 below, it is explained that the whole Arabian Gulf is deemed a "similar limited area" to a port or harbour for the purpose of Clauses 15-12 and 15-16 and it is suggested, in opposition to the Commentary that the same may apply to other gulfs and bays etc. The same extremely wide interpretation of the words "similar limited area" can not be applied in relation to Cl. 16-1,

sub-clause 2. To the contrary Cl. 16-1, sub-clause 2 (b), must be read more in line with the York-Antwerp Rules' concept as a place where the vessel can be safely moored similar to when in port.

It is probably of no importance to carry this analysis any further as the "physical obstruction" requirement will be the most important one in practice. If the whole Arabian Gulf should be considered as a "similar limited area" per Cl. 16-1, sub-clause 2 (b), it is hardly conceivable that the entrance to the Gulf, the Hormuz-Strait, could be blocked by a physical obstruction caused by a marine peril. If there is a physical obstruction caused by a marine peril preventing the vessel from leaving an area, that should suffice for the purpose of applying Cl. 16-1, sub-clause 2 (b), and there is no need to restrict the cover further by introducing a narrow interpretation of the words "similar limited area".

3.7.3 Loss of hire as a consequence of measures taken to salvage or remove damaged cargo

Letter (c) of Cl. 16-1, sub-clause 2, was new in 1996. Time lost in removing or salvaging damaged cargo is covered by the loss of hire insurance. It does not matter whether the assured is liable under the contract of affreightment towards the cargo owner for the damaged or lost cargo, or whether he is covered under his P & I policy for such liability. But, if the assured is privy to the cargo damage in such a way that the exclusions from cover under Chapter 3 of the Plan apply, he may also have forfeited his cover under the loss of hire policy. However, this evaluation must be made separately for the loss hire insurance and, in principle, it has nothing to do with the assured's right to limitation of liability, if any, or to recovery under his P & I policy.

3.7.4 Loss of hire as a consequence of an event that is allowed in general average pursuant to the 1994 York-Antwerp rules

Letter (d) was added in the 2003 version and extends cover to include delay resulting from a general average situation that does not lead to damage to the ship, for instance caused by cargo shifting in bad weather. If the vessel seeks a port of refuge to avoid loss of or damage to the vessel and cargo, the deviation to the port of refuge is a general average act. The time lost due to this deviation and the time in the port of refuge used to reload or restow the cargo or take other measures to enable the vessel to continue the voyage safely will be covered under the loss of hire insurance. This corresponds with the solution under English loss of hire conditions. It may be that measures taken to salvage or remove damaged cargo go further than general average acts covered under letter (d). If so, cover may be sought under letter (c) if the condition for cover under this letter is satisfied.

In the 2010 Commentary, the piracy example was also discussed as pirates operating from Somalia at the time hijacked a number of vessels in the Gulf of Aden and the Indian Ocean. As piracy is a war peril according to Cl. 2-9, sub-clause 1 letter d, loss of hire cover for such attacks will be discussed in 16 below.

4. TOTAL LOSS CLAUSE 16-2

Clause 16-2 reads:

> *The insurer shall not be liable for loss of time resulting from a casualty which gives the assured the right to compensation for total loss under Chapter 11 of the Plan or under the corresponding conditions in the hull insurance that applies to the ship pursuant to Cl. 16-1, sub-clause 1, second sentence.*

The effect of Cl. 16-2 is that there will be no recovery under the loss of hire insurance if the vessel is a total loss or a constructive total loss, see further under 4.2 and 4.3.

4.1 The need for loss of hire insurance

If the vessel is lost, the assured should, theoretically, not suffer any loss of income. Either he can replace the vessel immediately, or the compensation from the hull insurer should furnish sufficient capital to generate the same income as the vessel had earned. If payment under the hull insurance is delayed for more than one month from the date the casualty was notified to the hull insurer, the assured is entitled to interest on his claim, Cl. 5-4 of the Plan.

However, real life does not always follow theory. In certain circumstances, a total loss may be to the benefit of the assured while, in other circumstances, a total loss may be most unwelcome and the assured may suffer not only loss of the investment cost of the vessel itself but also loss of income.

The valuation of the vessel under the hull insurance, as compared to the market value of the vessel at the time of the loss, is very important in this regard. It is also very important to take into account the assured's possibility of covering the so-called hull interest and freight interest insurance in addition to regular hull insurance. Hull interest insurance and freight interest insurance, which in English insurance terminology are more often called Disbursement and Increased Value insurance, are dealt with in Chapter 14 of the Plan[6]. The insurance market offers these types of insurances precisely to satisfy those losses that the assured suffers in case of a total loss which are not covered by the hull insurance, the purpose of which is merely to cover the market value of the vessel. Pursuant to the Plan such increased value insurance may be taken out for 25% of the hull valuation as hull interest insurance and, in addition, another 25% of the hull valuation as freight interest insurance. Thus, the assured should have ample cover for the additional expenses or loss of income he suffers as a result of the loss of the vessel.

Pursuant to Cl. 14-4, sub-clause 3, the assured may obtain freight interest coverage even in excess of 25% of the hull value, if he suffers a loss under an existing time charter or a contract for consecutive voyages, as a result of the total loss of the vessel. In order to protect his interests under such existing contracts, the assured may take out an open freight interest insurance policy. Any payment under such open cover policy will reduce payment under a regular freight interest insurance, see Cl. 14-4, subparagraph 3, last sentence. The idea is that

[6] See further on the concept of Hull Interest and Freight Interest insurance, Wilhelmsen & Bull, Handbook on Hull Insurance, page 334-335.

the assured shall not recover 25% of the hull value under regular freight interest insurance in addition to the recovery under the open freight interest policy. The payments under these two policies must be consolidated. However, this consolidation shall not apply to payments under hull interest insurance.

This means that in case of a total loss, the assured, who is fully insured, may recover the market value of the vessel under his hull insurance, plus 25% of the market value under his hull interest insurance and another 25% of the market value under his freight interest insurance, together 150% of the market value, provided that the insurable value and the sum insured correspond to the market value of the vessel. The recovery may be further improved if the vessel is fixed on long term contracts. Therefore, in the event of a total loss casualty, there is no need for any loss of hire insurance in addition to the hull insurance, hull interest insurance and freight interest insurance. For this reason, Cl. 16-2 provides that the loss of hire insurance does not cover loss of time resulting from a total loss.

4.2 Actual and constructive total loss

Cl. 16-2 provides that "The insurer shall not be liable for loss of time resulting from a casualty which gives the assured the right to compensation for total loss under Chapter 11 of the Plan." Chapter 11 deals with actual total loss (Cl. 11-1), unsuccessful salvage (Cl.11-2), constructive total loss (CTL) or, as the Plan calls it, "condemnation" (Cl. 11-3), and a missing or abandoned vessel (Cl. 11-7). Therefore, there can be no claim under the loss of hire insurance in all those cases where the assured is entitled to total loss compensation. It does not matter whether the assured actually makes use of his right to claim total loss compensation. It suffices that he has a right to do so.

In cases where there is a dispute concerning whether the vessel is a total loss pursuant to Chapter 11, the loss of hire insurer will usually follow the decisions made by the hull insurer. However, these decisions are not binding on the loss of hire insurer, cf. what is said in the Commentary to Cl. 16-1, sub-clause 1, about a parallel issue.

If the hull insurer pays the sum insured in accordance with Cl. 4-21, such payment cannot be equated with payment of total loss compensation in accordance with Chapter 11. The assured may be able to satisfy that the vessel was not a CTL[7] and, if so, would be entitled to loss of hire compensation. Should it later prove that the conditions for condemnation would have been fulfilled, Cl. 16-2 will be applicable. The same applies if the further development of the casualty results in the ship actually becoming a total loss, for instance where it has struck a reef and later sinks during the salvage operation or during the towage to a safe port or place.

If the ship's hull insurance has been effected on conditions other than those of the Plan, and the insurer has accepted those conditions, the question of the right to compensation for total loss shall be decided by the conditions of the hull insurance corresponding to Chapter 11 of the Plan, see also Cl. 16-1, sub-clause 1, second sentence which is expressly referred to in Cl. 16-2, see further under 3.6 above.

[7] Constructive Total Loss

4.3 Agreed or compromised total loss

The concepts "agreed total loss" and "compromised total loss" do not exist under the Plan, even though they are often used in practice. If the assured is not entitled to total loss compensation under Chapter 11, he was previously not entitled to any compensation unless the vessel was actually repaired, see Cl. 12-1. If the vessel was sold, the assured as seller could claim compensation for unrepaired damage, see Cl. 12-2. Cl. 12-2 was amended in the 2007 version so that the assured may opt for cash compensation for unrepaired damage at the expiry of the insurance period.

However, these provisions do not prevent the assured and the hull insurer from reaching an agreement on "total loss compensation" in cases other than when the assured is entitled to compensation pursuant to Chapter 11 or Cl. 12-2. Such agreement would, in reality, be an agreement for compensation for unrepaired damage. In certain circumstances, such an agreement may be to both parties' benefit. That may be the case if the vessel is not a constructive total loss but the sum of the estimated repair costs and the value of the damaged vessel exceed the market value of the repaired vessel. It would benefit both parties if the insurer paid the assured the difference between the market value of the repaired vessel and the value of the vessel in damaged condition. The insurer would save money as compared with paying the repair costs. On the other hand, the assured may recover the equivalent to the market value of the vessel in repaired condition if he sells it in damaged condition plus receives the aforementioned compensation from the insurer. It goes without saying that the assured will not accept such a compromise if he believes that he will earn more by trading the repaired vessel in the market. He will then benefit from getting the actual repair costs covered by the hull insurer.

4.4 Unrepaired damage

The assured may claim compensation for unrepaired damage from his hull insurer as per Cl. 12-2. There are no similar provisions of Chapter 16 whereby the assured may claim compensation based on an estimate of lost time. The loss of hire insurance will only cover time that has actually been lost. In line with this, the assured may not transfer his potential loss of hire claim to a new owner in connection with a sale of the vessel, cf. Cl. 16-15 sub-clause 3.

If the assured should get compensation from his hull insurer for unrepaired damage either by way of a compromise or pursuant to Cl. 12-2, the assured will still be entitled to compensation for actual loss of time caused by the casualty. If for example the vessel has grounded the time from the grounding to the vessel has been refloated and necessary temporary repairs have been conducted will be recoverable. If the assured does not carry out repairs, the loss of time may be so short that it does not exceed the deductible period, Cl. 16-7, see below under 6. Loss caused by the decision to postpone repairs will not be recoverable if the assured should elect at a later stage to repair the vessel, the actual time lost in connection with the repairs will be recoverable. When postponing repairs, Cl. 16-14 might limit the assured’s right to recovery, see below under 7.4.3.

5. AGREED VALUE – SUM INSURED – DAILY AMOUNTS

5.1 Calculation of the claim, Cl. 16-3

In commercial shipping and the off-shore industry, time is money or, more precisely, loss of time is loss of income. In order to recover loss of income under the loss of hire insurance, the assured must establish that the vessel has been deprived of income during a certain period - that is the loss of time (cf. also Cl. 16-4), and the loss of income per day - i.e. the daily amount (Cl. 16-5 and Cl. 16-6) and, finally, the assured must accept a reduction in his loss of time as per the agreed deductible period (Cl. 16-7).

The calculation itself does not usually give rise to any dispute. It is normally the determination of the time lost and sometimes the assessment of the daily amount that necessitates the adjuster's skilful navigation.

The main rule for calculation of the compensation is Cl. 16-3:

> *"Compensation shall be determined on the basis of the time during which the vessel has been deprived of income (the loss of time) and the loss of income per day (the daily amount). Loss of time arising before any of the events described in Cl. 16-1 shall not be taken into account."*

According to the first sentence, the compensation shall be calculated as the product of the loss of time (i.e. the period during which the vessel has been out of service) and the daily amount.

Clause 16-3 must be read in conjunction with 16-1 which states that "the insurance covers loss due to the ship being *wholly or partially* deprived of income….." Even though Cl. 16-3 does not contain the words "*wholly or partially",* it is clear that these words must be read into Cl. 16-3 as well. Cl. 16-4, sub-clause 1, second sentence is expressly dealing with the calculation of the loss for vessels which have been "*partially deprived of income",* see further below under 5.3.1.

5.1.1 The period out of service

The starting point is that the period out of service (the loss of time) corresponds to the period when the damage occurs until the vessel is ready to go back to service after completion of repairs.

The period during which the vessel has been deprived of income will usually include time lost during survey(s) of the damage, obtaining tenders, tank cleaning, deviation to the repair yard, waiting to commence repairs, docking and other measures necessary to carry out repairs and, not least, the time necessary for the repairs.

However, the time during which earnings are lost need not necessarily coincide with the period the vessel is actually out of service. The vessel may be on a time charter according to which the vessel shall be off-hire during the repair period and until she resumes service in a position not less favourable than where the casualty occurred. In such case, the vessel will be ready for service upon leaving the repair yard, however, without earnings until again being on hire as per the charterparty. It follows from Cl. 16-13 (a) that in such case, the insurer will be liable for time lost until the vessel can resume the voyage or the activity that it was engaged in

under the charterparty in force at the time of the casualty, see further on recoverable loss of time after completion of repairs under 7.4.2 below.

5.1.2 The commencement of the period

According to Cl. 16-3, last sentence, the loss of time period commences at the time of the casualty. This provision was introduced to simplify the computation of the claim under the loss of hire policy.

It is conceivable that the vessel may suffer loss of income prior to the time when the damage occurred. For example, a vessel staying in Port A is fixed for a voyage with cargo from Port B to Port C. The ballast voyage from port A to port B is normally estimated to take five days while the loading in Port B and the voyage to Port C and subsequent discharge, will take 25 days. The freight, USD 300,000, is payable at destination, i.e. USD 10,000 "per day", totally 30 days including the ballast voyage. The vessel suffers a casualty the first day after departure from Port B in loaded condition and has to return to Port B for discharge and repair. The estimated repair time gives the charterer the right to cancel the contract of affreightment, and the assured cannot claim freight or distance freight. However, one may say that the vessel has been deprived of income both under the ballast voyage, during loading in Port B and the voyage up to the casualty, but such loss is not covered under Cl. 16-3. Neither is the loss of the charterparty covered under Cl. 16-3[8].

So, under the loss of hire insurance, only the loss of income per day (the daily amount) multiplied by the number of days from the casualty occurred until completion of repairs[9], less the deductible period, is recoverable.

5.1.3 Sum Insured and insurable value

The sum insured under a loss of hire insurance, according to Cl. 16-4, sub-clause 2, is normally simply the product of the daily amount multiplied by the maximum number of days insured. If the daily amount is stated in the insurance contract to be USD 20,000 and the maximum number of days insured are stated to be 180 days, the sum insured is USD 20,000 x 180 days = USD 3,600,000, which constitutes the maximum liability for the insurer, cf. Cl. 4-18.[10] See also under 5.3.2 where Cl. 16-4, sub-clause 2 is discussed in more detail.

The insurable value under a loss of hire insurance based on the Plan is not defined in Chapter 16, but Cl. 2-2 in Part One of the Plan applies also to loss of hire insurance. Cl. 2-2 provides:

> *The insurable value is the full value of the interest at the inception of the insurance.*

According to the Commentary to Cl. 2-2, the full value is the market value of the interest, which means, in loss of hire insurance, the market rate for the vessel in question. For practical

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[8] What is recoverable under the loss of hire insurance must not be confused with what may be claimable in tort against a third party. If the damage was caused by a collision with another vessel, it may well be that the total net freight under the voyage charterparty frustrated due to the collision may be claimable against the owner of the other vessel.

[9] Cf. Cl. 16-13 on extension of the loss of hire period beyond completion of repairs in certain instances.

[10] Cf. also Cl. 4-19 which provides that the insurer is liable for interest on the compensation and certain other expenses even if the sum insured is exceeded.

purposes, according to Cl. 16-5, the daily amount constitutes the insurable value. See further on Cl. 16-5 under 5.4.

In theory, the daily amount or the insurable value may not be insured in full. Such under-insurance may, of course, be deliberate by the assured but it may also occur by accident, in the sense that the daily amount stated in the insurance contract may, due to market fluctuations, be lower than the current market rate for the vessel. This is mere theory because, if the daily amount is stated in the insurance contract, Cl. 16-6 provides that this is a strong presumption that this amount is an agreed[11] daily amount. Therefore, the daily sum insured by stating the daily amount in the insurance contract will usually also be the agreed daily insurable value, so that the daily sum insured and the insurable value are one and the same amount. Hence Cl. 2-4 on under-insurance will normally not apply unless the assured deliberately under-insures his interest by stating a daily amount of, e.g. USD 20,000, and a daily sum insured of USD 10,000. See further on Cl. 16-6 under 5.4 below.

5.2 Loss of time

5.2.1 The extent of the loss of time

The calculation of the time during which the vessel has been deprived of income is one of the most important factors to the assured. Neither Chapter 16 generally, nor Cl. 16-4 in particular, give any guidelines for determining the period the vessel has been deprived of income due to the casualty. Before commenting on Cl. 16-4, and although Chapter 16 contains other provisions relevant to the calculation of loss of time (e.g. Clauses 16-12, 16-13 and 16-14), we elaborate below on some typical charter clauses in calculating the extent of loss of time. Such a calculation will depend upon whether the vessel is on a time charterparty, a voyage charterparty or is unchartered.

Loss of hire insurance was previously aimed mostly at time chartered vessels. Indeed, this explains the close connection between the term "off-hire" in time charters and the insurance term "loss of hire". If the vessel is off-hire, the shipowner loses hire during such period (the loss of time). Time chartered vessels are still the vessels most frequently entered for loss of hire insurance, but this insurance is also frequently used by shipowners who trade their vessels in the spot market, as well as for various vessels which are usually not fixed under any charters (e.g. fishing vessels). As stated above, the calculation method for the extent of the loss of time will vary depending upon the vessel's type of employment.

5.2.1.1 Time charters

First, if the vessel is employed under a time charter, the assured may not receive hire for the periods during which the vessel does not, wholly or partly, provide the agreed services as per the relevant time charter. Following certain circumstances specified in the charter, the vessel will be considered off-hire and no hire shall be payable to the assured during such off-hire periods. The off-hire clause thereby operates as an exemption to the charterer's primary obligation to pay hire continuously throughout the charter period. Thus the burden is on the charterer to show that the off hire clause operates in the relevant circumstances.[12]

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[11] The terminology was changed in the 2016 version of the Plan both in Cl. 2-3 and 16-6. The previous term "assessed insurable value" and "assessed daily amount" was replaced by "agreed insurable value" and "agreed daily amount".

[12] *The Mareva A.S.* [1977] 1 Lloyd's Rep. 368

The calculation of the off-hire periods is usually fairly well described in the charter. There are several circumstances which may render the vessel off-hire but which do not fall within the scope of Cl. 16-1. On the other hand, if the assured is "wholly or partially deprived of income as a consequence of damage to the ship which is recoverable under the conditions of the Plan", this will almost always result in the vessel becoming off-hire under the most frequently used time charters. While an off-hire calculation under a charter will be of interest to a loss of hire insurer, the two calculations are not necessarily co-extensive; see also 5.2.2below.

Typically, off-hire clauses are described as 'net loss of time' or 'period' clauses depending upon whether they provide for the vessel to be off-hire during the time actually lost or for the whole of a defined period. Also, within that broad division, off-hire clauses differ from charter form to charter form both as regards what is an off-hire event and the period during which the vessel will be off-hire. Set out below are the off-hire clauses from some of the main charter forms and a brief description of how those provisions are applied. The below is based upon English law and therefore another reason as to why an off-hire calculation will be interesting to but not binding upon an insurer under the Plan.

NYPE

The NYPE 1946 and NYPE 1993 differ regarding both the off-hire events that will trigger the vessel being off-hire and also as regards the period during which the vessel off-hire. The NYPE 1946 provides:

"…in the event of the loss of time…..or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost.."

NYPE 1993 contains "similar" before "cause" and also provides that overtime, if any, shall not be payable. Reference can be made to the clauses for the differing hire events and which are not material to the present discussion.

Both are referred to as 'net loss of time' clauses though, if it is the full working of the vessel that is affected, rather than partial, the vessel will be off-hire for the same period as if the clause were a 'period' clause. The NYPE off-hire clauses are consistent with section 392, subparagraph 1, of the Norwegian Maritime Act (1994) in providing a logical and reasonable calculation of the time lost. There are essentially three separate components to the vessel being off-hire and the obligation to pay hire ceasing:

1. the full working of the vessel must be prevented by an off-hire cause;
2. there must be an interruption or delay in the service immediately required; and
3. as soon as full working is resumed, the vessel goes back on hire.

The vessel is thus off-hire for the net loss of time. The effect of, for example, one crane out of four being ineffective is that a complicated analysis needs to be carried out to calculate the actual loss of time. This would need to take into account, for example, whether all four cranes were needed at all times, which holds were being worked and whether the damaged crane worked those holds or not etc. The courts approach may be seen from the judgment of Lord Halsbury, L.C. in Hogarth v. Miller [1891] A.C. 48 (HL) in which he stated:

"…an off-hire clause in the terms of [clause 15] is concerned with the service immediately required of the vessel, and not with 'the chartered service' as a whole or the entire maritime

adventure or adventures which may be undertaken in the course of the chartered service. The clause concentrates on the period during that which the full working of the vessel is prevented…"

The NYPE 1993 off-hire clause also provides:

"Should the Vessel deviate or put back during a voyage, contrary to the orders or directions of the Charterers, for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, the hire is to be suspended from the time of her deviating or putting back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom."

To this extent therefor the NYPE 1993 differs from the NYPE 1946 in providing that the vessel will be off-hire for the entire period of deviation.

Baltime 1939

The Baltime 1939 form also contains a net loss of time off-hire provision:

"In the event of….either hindering or preventing the working of the vessel and continuing for more than twenty-four consecutive hours, no hire shall be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required."

By stating that no hire is to be paid during the period the vessel is unable to perform the service immediately required makes it clear that, as soon as full efficiency is resumed, the vessel will go back on hire.

Previous versions of the Baltime charter contained period off hire clauses.

Shelltime

The Shelltime 3 is an example of a period clause and provides:

"In the event of loss of time (whether arising from….hire shall cease to be due or payable from the commencement of such loss of time until the vessel is again ready and in an efficient state to resume her service in a position not less favourable to Charterers than that at which the deviation commenced."

The clause is thus making it clear that hire will not be payable during a period defined by commencement of the loss of time and concluding with the vessel again being in an efficient state, irrespective of whether or not she was in a position to carry out the service immediately required. The vessel will be off-hire as long as any off-hire event persists regardless of whether the charterer or inded whether the vessel is in a position to resume the service required. In Smailes v. Evans [1917] 2 K.B. 54, the off-hire clause provided "in the event of loss of time from damage preventing the working of the vessel for more that twenty-four running hours, the payment of hire shall cease until she is again in an efficient state to resume her service". The vessel grounded on the northern coast of Newfoundland. The vessel discharged part of her cargo in the vicinity and proceeded to St. John for repairs. Repairs were completed on 18 October, after which the vessel reloaded her cargo and, on 30 October,

recommenced her voyage. The court found that the vessel resumed her service on 18 October, from which date hire again became payable.

However, it would appear that, as with the earlier Baltime clauses, those who used the Shelltime 4 preferred the fairness of a net loss of time clause, as the Shelltime 4 states after listing those events which will result in a loss of time:

"….provided, however, that any service given or distance made good by the vessel whilst off-hire shall be taken into account in assessing the amount to be deducted from hire"

5.2.1.2 Voyage charters

Unlike time charters, voyage charters do not contain off-hire provisions. Under a voyage charter, the freight is payable as a lump sum per voyage. A claim for freight usually depends on the performance of the voyage. The main rule set out in § 344 of the Maritime Act is that freight is collectible only if the cargo arrives at the destination. However, it is not unusual to have contractual stipulations requiring the freight to be prepaid, whether or not the ship and/or cargo is lost. In such a case, the assured will not have suffered any loss of income if the vessel is ready for resuming service within the estimated time for the voyage. Clause 3 No. 3, second sentence of the 1972 and 1993 conditions contained an express provision to the effect that even if such prepaid freight would give him compensation for the non-performed part of the voyage, this should not reduce his right to compensation under the loss of hire insurance. The 1996 Commentary to Cl. 16-4 stated that this provision was no longer necessary and hence it was not included in the Plan. The intention under the 1996 Plan was clearly that no such deduction should be made.

If the vessel resumes the voyage under the charter (in ballast or loaded) after repair of damage to the vessel, the assured is entitled to compensation for the loss of time corresponding to the time with which the voyage has been prolonged due to the deviation to the repair facility, surveys, collecting of and considering tenders, slow steaming, if any, until the vessel is in a position at least as favourable to the assured, as the position at the time of the casualty.

If a casualty causes cancellation of the charter, then the calculation of the loss of time becomes more complicated. Although the freight is paid for the transportation of the goods from the loading port to the discharging port, it also covers the owner's ballast voyage to the loading port, as well as the waiting and loading time spent there. A casualty during the loaded voyage may thus leave the assured with a claim for distance freight only, sometimes less. To the extent the vessel is unable to complete the voyage, one may argue that the vessel has been unserviceable throughout the whole period, including time spent during the ballast voyage. However, as described above under 5.1.2 in respect of Cl. 16-3, second sentence, any loss of time arising before the casualty (any event described in Cl. 16-1) shall not be taken into account. In other words, the freight at risk is not covered on a per voyage basis under a loss of hire insurance. Any time lost after the repairs will be covered as per Cl. 16-13, see below under 7.4.2

5.2.1.3 Unemployed vessel

The third and last scenario arises when the vessel is unemployed at the time of the repairs, either due to not having been fixed for employment at the time the casualty occurred or due to a cancellation of the employment because of the casualty. A similar situation arises if the repairs are deferred until after the vessel has completed performance of any existing charter.

The loss of time must be calculated only to the extent that the vessel actually lost income. If the vessel would have been unserviceable regardless of the damage and related repairs (e.g. if the vessel would have been laid up in any event), the assured will have no claim under his loss of hire insurance, see the comments in 3.1 above.

5.2.2 The insurance cover

The difference between the different off-hire clauses in the time charters described above and others will have a bearing upon the assured's claim under a loss of hire insurance. Provided the circumstances which puts the vessel off-hire pursuant to the time charter fall within the scope of Cl. 16-1, the off-hire period will usually be the same period as the loss of time covered by the loss of hire policy.

The above will also apply if the off-hire period includes the time after the repairs and until the vessel is back in the same position where the casualty occurred or a position not less favourable to the charterer.

The fact that the vessel is serviceable upon leaving the repair yard is therefore not decisive. The off-hire calculation between the assured and the charterer will frequently be applied between the assured and the insurer. The off-hire statement will be important to the insurer in such circumstances, who is entitled under Cl. 5-1, sub-clause 1, to receive it from the assured.

The assured's rights under the loss of hire policy regarding the calculation of loss of time will also be governed by Cl. 16-13. This section extends in some instances the insurer's liability for loss of time after completion of repairs.

As has been seen, the insurer must be prepared for large variations in different off-hire clauses, but one further qualification must be made - the insurer does not cover any increase in the loss of time due to contractual terms which are unusual or prohibited in the customary trade of the vessel, Cl. 4-15 of the Plan.

The various off-hire clauses referred to in 5.2.1 above may all be considered as being within the customary terms of worldwide time chartering. The risk for the assured and the exposure for the insurer nevertheless vary greatly.

Although the applicable off-hire clauses will determine much of the loss of time calculation and the insurer's exposure under the policy, they will usually have no influence on the insurer's assessment of the premium as per insurance practice today.

If the insurer considers an off-hire clause too permissive with respect to the calculation of the loss of time, Cl. 3-28 of the Plan permits him to require that certain terms be included or excluded in contracts concerning the operation of the vessel, including contracts for a specific trade. However, because this provision calls for advance approval of the vessel's contract of affreightment by the insurer, it is rarely used.

The off-hire calculation will often raise difficult issues. If the owner/assured settles the off-hire calculation by amicable settlement with the charterer or, if a settlement cannot be reached, by arbitration or court litigation, an issue arises on the extent to which such a settlement, arbitration award or judgement is binding on the insurer. The Commentary to Cl.

16-4 states that Cl. 4-17, No. 2, and Clauses 5-9 to 5-11 must be applied by analogy because the wording of these provisions relates to liability towards third party.

5.3 Calculation of the loss of time

Cl. 16-4 regulates the calculation of loss of time and reads:

> *"Loss of time shall be stipulated in days, hours and minutes. A period of time during which the vessel has only partially been deprived of income shall be converted into a corresponding period of total loss of income.*
>
> *The insurer's liability for loss of time resulting from any one casualty, and for the total loss of time resulting from all casualties occurring during the insurance period, shall be limited to the sum insured per day multiplied by the number of days of indemnity per casualty and altogether stated in the policy."*

The wording does not give extensive guidance for calculation of the loss of time. The provision applies only after the loss of time has been determined according to the principles described in 5.2 above.

5.3.1 Loss of time, Cl. 16-4, sub-clause 1

According to the first sentence, the loss of time is to be calculated in days, hours and minutes. It follows quite clearly from this that the assured may also claim loss of hire for any loss of time less than a full day. This calculation principle mirrors similar rules found in time and voyage charters provisions regarding the calculation of off-hire and demurrage respectively. The level of precision called for in loss of time calculations is justifiable in light of the large daily amounts which are often at stake in connection with vessels insured for loss of hire.

The second sentence similarly reflects customary off-hire and demurrage calculations. The point with the second sentence is to make it clear that, if the vessel's speed is reduced to half due to an engine damage and the vessel is proceeding at half speed for 40 days, the number of days consumed under the insurance is not 40 days, but 20 days which is the actual delay, see also the discussion under 3.3 above.

The Commentary to Cl. 16-4 is discussing the problem of the assured postponing repairs unduly and states:

> *"However, the provision has given rise to certain problems in practice in cases where the cause of the ship's being partly deprived of income is not reduced speed, but a fault in the ship's equipment, holds or tanks. If, in such a situation, the assured allows the ship to continue operating with the defective equipment for a period of time, and subsequently carries out repairs when this is convenient in relation to the ship's charterparties, the result is first a partial time loss linked to the ship's reduced operations, followed by a full loss of time during the period of repairs. In principle, however, the insurer should not be liable for a loss of time that is greater than what would have occurred if the ship had been repaired immediately. In connection with the 2003 revision, therefore, the Committee considered limiting the conversion provision to situations where the reason for the ship's being partly deprived of income was reduced speed, and giving more limited cover if the reduced income was*

due to other causes. In this respect, however, it suffices to refer to Cl. 3-30 and Cl. 3-31 of the Plan which state that the shipowner has a duty to limit his loss. Under Cl. 3-30, second sentence, the assured has a duty to consult the insurer if there is an opportunity to do so. If, for commercial reasons and without consulting the insurer, the assured chooses to postpone making repairs that could have been carried out immediately, and this inflicts a loss on the loss-of-hire insurer, the latter must therefore be able to invoke these rules."

5.3.2 Sum insured, Cl. 16-4, sub-clause 2

The insurer's maximum liability is calculated as the product of the daily amount and the number of days of indemnity per casualty.

The insurer's liability is normally limited to a fixed period per casualty and throughout the insurance period. In the policy, this would be described, for example, as "14-90-180 days"; 14 days being the deductible period, see 6 below; 90 days being the maximum number of days covered in one casualty and the last 180 days being the total number of days covered through the term of the policy, regardless of the number of casualties. In many policies, the number of days covered for one casualty is the same as the number of days covered throughout the term of the policy (e.g. 14-60-60).

Since the number of days per casualty may be consumed early on in the insurance period if there is a major incident, the assured may find himself without further cover during the remaining term of the insurance. In such event, the loss of hire insurer may offer, at additional premium, an extension of the cover, usually referred to as "reinstatement". If an automatic reinstatement clause is incorporated into the insurance contract, the effect is normally that the insurance is automatically reinstated, including the original limits of liability, immediately. If a new casualty occurs, the assured will have full cover within the agreed number of days. The re-instatement premium will be calculated and invoiced after the claim has been calculated (adjusted).

The maximum number of days covered per casualty or in total for the insurance period are, in accordance with Cl. 16-4, sub-clause 1, second sentence, to be understood as days covered in full. It is therefore not the number of days itself which constitutes the maximum liability of the insurer but rather the product of the amount insured per day and the agreed number of days in full. This product must be seen as the sum insured, i.e. a maximum monetary limit on the insurer's liability (per casualty and altogether during the period of insurance). This interpretation was adopted by the arbitrator, Professor Dr. Juris Sjur Brækhus, in the arbitration award he rendered in the "Ranhav", ND 1967 page 269 deciding the issue on the basis of the conditions applicable at the time. See, on this award, also under 6.3 below.

5.4 Daily amount

The daily amount is the assured's loss of income per day and is an important factor in calculating the insurer's liability. The determination of the daily amount raises several difficulties - to some extent similar to those involved in calculating the loss of time.

The loss of hire conditions operate with two different systems: either establishing the loss of hire as an agreed daily amount at the time of taking out the insurance, see under 5.4.2 or,

alternatively, a so-called "open policy", where the daily amount is determined at the time of the loss of income, see under 5.4.1. The former alternative is the most frequently used.

5.4.1 Open policy - Cl. 16-5

Cl. 16-5 reads as follows:

> *"The assured's loss of income per day (the daily amount) shall be fixed at the equivalent of the amount of freight per day under the current contract of affreightment less such expenses as the assured saves or ought to have saved due to the ship being out of regular employment.*
>
> *If the ship is unchartered, the daily amount shall be calculated on the basis of average freight rate for vessels of the type and size concerned during the period in which the ship is deprived of income."*

The open policy method will usually only apply pursuant to 16-14, sub-clause 2, according to which loss of time resulting from a stay at a repair yard commencing after the expiry of the insurance period is recoverable in accordance with the rules in Cl. 16-5 regardless of the agreed daily amount, if the actual loss of income per day is lower than the agreed daily amount.

The daily amount under an open policy will be equal to the gross freight income per day, less savings caused by the vessel being out of service (e.g. bunkers, pilotage, port dues etc.). Expenses which the assured should have saved will also be deducted, regardless of whether they were, in fact, saved.

If the vessel is unemployed at the time of the repairs, the daily amount shall be calculated on the basis of the average freight rate for vessels of the same kind and during the same period. The reason for this rule is to avoid speculation as to the employment the assured would have sought for the vessel had it not been for the repairs - a short term contract at a very favourable hire or a longer term contract at a reduced hire. Since the assured may find it difficult to prove either of these alternatives and, in order to avoid hindsight speculation as to how the vessel would have been employed, this rule contains an objective element - the daily amount may be determined without any need to consider how the assured would actually have employed the vessel. Therefore, this rule means that the assured is not necessarily indemnified for his actual loss.

Nevertheless, some problems may arise. A reference to "average freight rates" leaves open whether one should calculate the average freight rate throughout the total repair period or whether one should also take into consideration the length of time during which the various freight rates maintain almost the same level - the so-called "weighted average". In our opinion, the latter procedure should be adopted, if possible. Moreover, if the hire under a long term charterparty differs from the freight under a voyage charterparty (calculated on a time charter basis), which is often the case, the average of these two types of employment should apply.

For an insured ship in liner trade, the daily amount must be based upon obtainable information regarding the freight earned by the particular vessel and other vessels in the same types of trade at the time of the casualty and the subsequent repairs.

The rule in Cl. 16-5, sub-clause 2, offers satisfactory solutions both to the insurer and the assured, even though it could be improved by distinguishing between short and long term contracts of affreightment. Nevertheless, by opting for an open policy, the assured has chosen uncertainty.

5.4.2 Agreed daily amount, Cl. 16-6

Since the determination of the daily amount under an open policy may entail certain difficulties discussed above, an assured who prefers a more predictable assessment of his loss of income in case of a casualty to his vessel, may fix the daily amount in advance, as a so-called agreed daily amount.

Cl. 16-6 reads as follows:

> *"If it is stated in the insurance contract that loss of income shall be compensated by a fixed amount per day, this amount shall be regarded as an agreed daily amount unless the circumstances clearly indicate otherwise."*

The agreed daily amount is not decided unilaterally by the insurer. The agreed insurable value is, according to Cl. 2-3, fixed by agreement between the parties. This practice is well known in hull insurance, where it has been considered advantageous to fix the insurable value at the inception of the insurance, see Cl. 2-2, because the market price of ships can vary greatly and make it difficult to assess the actual value of a ship from time to time. The same reasoning lies behind the use of agreed daily amounts in loss of hire insurances as freight rates will also fluctuate.

The agreed daily amount for a time chartered vessel will normally equal the daily hire under the charterparty. If the vessel is not employed under a time charterparty, the agreed daily amount must be based on an estimate of future income for the vessel.

A loss of hire insurance should clearly state that the daily amount is agreed. However, the insurance contract refers normally only to an amount payable by the insurer per day. This may be understood as an agreed daily amount or as the agreed insured value per day. These two alternatives may be different - it is not necessary that the agreed daily amount is insured 100%, although that is the most common practice. Such uncertainties are solved by Cl. 16-6 which provides that unless the circumstances clearly indicate otherwise, the daily amount mentioned in the insurance contract shall be regarded as an agreed daily amount. This means that there is a presumption that the daily amount stated in the insurance contract is an agreed daily amount. If by express agreement or by implication of the facts this presumption does not apply, the daily amount stated in the policy is merely the daily sum insured, but the recoverable amount must be calculated pursuant to Cl. 16-5. The sum insured per day constitutes the maximum amount payable by the insurer but, if the actual loss per day is lower, only the lower amount will be recoverable under the loss of hire insurance in these cases.

The use of an agreed daily amount is a benefit to the assured, as he will not need to substantiate his loss of earnings throughout the relevant period. This enables him to predict his earnings regardless of any major casualty to the vessel. Furthermore, he may then often

obtain more favourable conditions for the financing of the vessel. An owner will usually assign the earnings and payments under a loss of hire insurance to the institutions financing the vessel or the financiers may be co-insured pursuant to Chapter 7 and 8 of the Plan. (see also under 10 and 11 below).

6. DEDUCTIBLE PERIOD, CL. 16-7

6.1 General

A deductible is common in all kinds of insurances. However, while the hull insurance refers to an amount expressly stated in the policy, see, for example, Cl. 12-18, the loss of hire conditions refer to a deductible period counted in days. The principle is that the insurer is only liable for the agreed number of days exceeding the deductible period.

The loss of time applicable to the deductible period will be determined in accordance with the provision in Cl. 16-4. The rule in Cl. 16-7 reads as follows:

> *"Each casualty shall be subject to a deductible period which shall run from the commencement of the loss of time and last until the loss of time, calculated in accordance with the rule in Cl. 16-4, sub-clause 1, second sentence, is equivalent to the deductible period stated in the insurance contract. Loss of time in the deductible period is not recoverable.*
>
> *Damage caused by heavy weather or navigating in ice which has occurred during the period between departure from one port and arrival at the next one shall be regarded as one casualty.*
>
> *If a separate deductible period for damage to machinery has been agreed on, Cl. 12-16 shall apply correspondingly."*

Sub-clause 2 was shortened and simplified in the 2003 version, and sub-clause 3 was added in the 2007 version.

Sub-clause 1 contains the basic rule - any loss of hire during the deductible period is unrecoverable from the insurer. The assured may recover loss of hire during the deductible period from a tortfeasor, e.g. in case of a collision with another ship. Alternatively, the assured may recover loss of hire during the deductible period from a contracting party subject to the terms of the contract. If no recovery from any third party is available or possible, the assured will have to accept that the loss of hire during the agreed deductible period is for his own account. The same goes, incidentally, for any loss of hire during an excess period, if any, not covered by the loss of hire insurance.

Cl. 16-7, sub-clause 1, refers expressly to Cl. 16-4, sub-clause 1, second sentence. The point in this context is that the agreed deductible period must be adjusted correspondingly, if a vessel is only partially out of service. If a vessel can only operate at half speed after an engine damage, so that it takes 28 days instead of 14 days to remove the vessel to a repair yard, the deductible period of 14 days is only consumed after 28 days unless the vessel is 100% off-hire pursuant to the charterparty. In this example, the assured will therefore only receive compensation under the loss of hire policy from the commencement of the repairs if there was no loss of time other than the sailing period before repairs were commenced.

The number of days constituting the deductible period is agreed in the policy. For practical and economic reasons, the insurer will normally require a deductible period of minimum 14 days in particular to avoid a large number of minor loss of hire claims that would lead to

costly and time-consuming claims handling. In order to save premium, the assured will often choose a longer deductible period, e.g. 30 days or, in some cases, even up to 60 days. Even though 14, 30 or 60 days deductible periods are the ones most common in practical use, the parties are, of course, free to agree any deductible period they wish in consideration of a reduction or increase in the premium, as appropriate, in each individual case.

6.2 One or more casualties

Each casualty will be subject to one deductible period. A casualty, in this respect, is a set of circumstances, which, pursuant to Cl. 16-1, give rise to a claim under the policy. Thus, if a casualty is followed by several separate periods of delays, for example in connection with the subsequent surveys or during temporary and subsequent permanent repairs, there shall be only one deductible period.

The term "casualty" is not defined in the Plan. In the context of loss of hire insurance, a casualty constitutes the circumstance which gives rise to a new claim under the loss of hire policy - i.e. the event which the assured is insured against.

However, it is usually not difficult to determine whether there has been more than one casualty. Section 16-7, sub-clauses 2 and 3, deals with possible disputes regarding heavy weather damage and damage caused by the vessel passing through ice.

Judgements on deductible or sum insured under hull insurance may be of interest also in relation to loss of hire insurance. Judgements on limitation of liability may also provide some guidance, as there is one limitation amount available for each event or accident.

In the Norwegian Supreme Court case in respect of the "Vestfold I", ND 1977 page 38 NH, the engine gear was damaged during grounding. About two months after the repair of the damage, the gear broke again. A misalignment was discovered on the crankshaft that had not been discovered during the first repairs. In addition to misalignment, the crankshaft had been wrongly mounted. It was found that the damage to the gear was caused either by misalignment in the crankshaft or wrongful installation, or a combination of these factors. The insurer's liability in respect of the damage to the machinery, including the gear, was subject to the damage being the result of the grounding. The question in dispute was whether the new gear damage should be attributed to the original grounding, in which case it would be covered under the insurance policy, or whether it should be considered a new casualty caused by error in workmanship, in which case it would not be covered by the insurance. The Supreme Court held that the insurer was liable according to the rule concerning the combination of perils and who should therefore pay 2/3 of the new damage to the gear. The court stated that the chain of causation from the original grounding was not broken when the yard made errors in connection with the repairs.[13]

[13] Even though this judgment is often cited and used in relation to discussion of one or more casualties, it is important to bear in mind that the Supreme Court did not decide on whether one or two deductibles should apply, but whether there was any cover at all under the limited cover provided under the special conditions for insurance of coastal and fishing vessels. In order to secure some cover for the insured, the Supreme Court did not deem a clear error in workmanship by the repair yard as breaking the chain of causation between the grounding and the subsequent gear damage that occurred only after insufficient and erroneous repairs were carried out. In order to secure part cover for the insured, the court went so far as to expressly state that it was a foreseeable consequence of the grounding that the yard might make an error in workmanship. This statement is in itself at best very dubious, if not manifestly wrong, and it must be queried whether the court would have stretched the law to this extent, if the subject matter for the court had been the far less serious issue for the assured of whether

The "Sunvictor", ND 1974, page 103 NH, dealt with the question of the number of deductibles under an Anglo-American deductible clause. The hull policy incorporated the 1964 Plan, but contained a special deductible clause providing for a deductible of USD 100,000 for claims "arising out of each separate accident". It was further provided "that a sequence of damage arising from the same accident shall be treated as due to that accident". The "Sunvictor" grounded in the St. Lawrence channel and sustained bottom damage. Further bottom damage occurred when the vessel was pulled off the ground. In addition, the vessel was damaged by ice while aground and during towage to the nearest port or place of refuge. Finally, the vessel sustained further ice damage during removal to the repair yard in Quebec. The hull insurer argued that all damage occurring during removal of the vessel from the port or place of refuge to Quebec was a new "separate accident", so that two deductibles should apply. The Norwegian Supreme Court did not agree. The court held that there was causative connection between the grounding and all the subsequent damage, and that there was a "sequence of damage" so that only one deductible should apply.

The proper interpretation of the words "one and the same event" for limitation of liability purposes was considered in the "Tønsnes" case, ND 1984, page 129, in which the vessel caused damage to several fishing nets during approximately one hour. The court held this to be “one and the same event“. The same expression was considered in connection with the "Ny Dolsøy", ND 1987 page 160, which delivered contaminated bunkers to two different ships during 24 hours, resulting in damage to the engines of both vessels. This was also considered as being "one and the same event" in relation to limitation of liability.

On the basis of these judgements it is impossible to formulate any simple test giving guidance in evaluating whether there is one or more casualties. Nevertheless, the following factors seem to be of importance: (i) distance in location and time between the incidents, (ii) causation; could the assured have avoided the last incident and to what extent and (iii) was the last incident a consequence of an increased risk due to the first incident?

The above discussion is for practical purposes of limited, if any, interest under a loss of hire insurance. Whether there are one or more casualties, is potentially of great importance for the parties in the other cases mentioned above. Whether one or more global limitation amounts shall apply, may have dramatic consequences for the parties concerned. The same may apply to the sum insured, in particular if the assured should end up in the unfortunate situation that one court decides that two or more global limitation amounts are available to the third parties having suffered damage as a result of the casualty, while another court decides that there is only one sum insured available to cover the liability towards third parties. The claim in tort by the third parties may well be subject to the jurisdiction of a court different from the court deciding the assured's claim under his insurance policies. The courts may even be located in different countries.

Even the question of one or more deductibles under a hull policy may be of significant importance, depending on the amount of the deductible. In principle, the same may be said with regard to the deductible under a loss of hire policy. Deductible periods of 30 days or more are not uncommon, and with daily loss of income in the range of USD 10,000 or more, there may be amounts at stake of some importance to the parties. The daily income may be

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one or two deductibles should apply. The writer suggests that an error in workmanship by the repair yard must be deemed as a new incident so that the costs of repair and loss of time due to such errors must be subject to a new deductible.

several times higher than the amount agreed in the policy depending on the state of the market and, in the off-shore sector and passenger trade (namely large cruise vessels and/or ferries), income may well be several hundred thousand dollars per day increasing dramatically the importance for the parties of whether one or more deductible periods should be applied.

Under the loss of hire conditions there is no basis for aggregating the deductible periods if they run parallel for the casualties covered under the loss of hire policy. That will normally be the case in those borderline cases where there may be doubt as to whether there are one or more casualties.

The example of a vessel being out of control in port after an engine breakdown may illustrate the point. The vessel may sustain damage at several places at different times while striking other vessels in port before ending its uncontrolled navigation firmly aground or stuck at a quay. Even if one should conclude that each striking is a separate casualty, no loss of time will occur until the vessel is stopped one way or another. Only then will the deductible period or periods start to run, see below at 6.3. A possible solution could have been that, if the series of events was deemed to be two or more casualties, two or more deductible periods should be applied. However, the Commentary to Cl. 16-7 expressly states that, as long as the deductible periods run parallel, they shall not be cumulative, but shall be exhausted at the same time. In other words: in this situation, it does not matter whether the series of events is deemed to be one or more casualties. The same solution was adopted in the 1972/1993 conditions, see the 1972-Commentary, page 34. This solution was apparently considered self-evident by the authors of the 1972-Commentary and was repeated without discussion in the 1996 revision of the Plan.

6.3 The commencement of the deductible period

Before the 2003 version, Cl. 16-7 sub-clause 1 provided that the deductible period should commence "from the beginning of the casualty". If the vessel was not delayed immediately after a casualty, adjustment practice invariably counted the deductible period from the initial time lost until the agreed number of days had been reached, so that the insurer's exposure commenced only after such time. On this basis, the wording of Cl. 16-7 on this point was inaccurate. The wording was therefore changed in the 2003 version and now provides that the deductible period "shall run from the commencement of the *loss of time*".

The deductible period may be interrupted or consumed in stages. Some delay may occur immediately after the casualty and later on in connection with surveys, temporary repairs, tenders and final repairs. In theory, the deductible period could be apportioned over the various periods the vessel is out of service, but as is explained in the following case, the deductible period runs from the commencement of the loss of time.

In the "Ranhav" award, ND 1967, page 269, the arbitrator decided a dispute under the loss of hire conditions in use at the time. He adopted the solution explained above which was then adopted in adjustment practice after the "Ranhav" case was decided and was incorporated in to the 1972/1993 conditions and maintained in Cl. 16-7.

The principle of always reckoning the deductible days from the commencement of the loss of time has several consequences:

Firstly, in connection with common repair time of casualty repairs and work not covered under the loss of hire insurance which are repaired simultaneously, the loss of hire insurer shall, in accordance with Cl. 16-12, pay only 50% of the compensation which would otherwise have been due under the insurance. Consequently and to the extent that the assured considers it necessary or advantageous to carry out any repairs not covered by the insurance, the assured will benefit from having such repairs carried out during the deductible period which, in any event, would not be covered by the loss of hire insurance.

Secondly, in relation to the daily amount, if it is not the same for the whole period that the insurer shall compensate. If during permanent repairs, the daily amount is reduced pursuant to Cl. 16-14, sub-clause 2, the assured cannot opt for the deductible period to be the period during which the daily amount is reduced, thus enabling him to benefit from the higher daily amount during the earlier temporary repairs.

Thirdly, in connection with recoveries from third parties. Pursuant to Cl. 5-13, cp. also Cl. 16-16, recoveries from third parties shall be apportioned between the assured and the insurer in proportion to their respective interests.

The 1997 version of the Commentary to Cl. 16-16 introduced a new principle of top/down apportionment, but this principle was abolished altogether in the 2003 version of the Commentary, see further under 9.4.

The Commentary to Cl. 16-7, also mentions Cl. 4-12, sub-clause 2 and Cl. 16-11, sub-clause 3 in this context. Cl. 4-12 deals with costs of preventive measures in general, and Cl. 16-11 contains some special rules related to the cost of preventive measures which are most relevant under the loss of hire insurance – costs incurred in order to save time, see further under 12.

6.4 Heavy weather, ice and shallow waters

Cl. 16-7, sub-clause 2, was simplified in the 2003 version and is now identical to Cl. 12-18 in respect of hull insurance. Heavy weather damage encountered during a voyage between two ports shall be considered one casualty. The reason for this rule is that it is difficult to assess and separate each and all of the heavy weather damage sustained during the same voyage. This clause is of less importance under a loss of hire insurance than under a hull insurance for the same reasons as explained above under 6.2.

The previous second sentence in Cl. 16-7, sub-clause 2, deals with heavy weather damage when the insurance period expires while the vessel is on a voyage between two ports. This sentence was not carried forward as the revision committee wanted the language of Cl. 16-7, sub-clause 2 to be identical with Cl. 12-18 which does not have any language to this effect. However, the 2003 Commentary expressly states that adjustment practice should continue as before, so, for all practical purposes, the amendments made to Cl. 16-7, sub-clause 2 should not have any substantive consequences.

The meaning of the now deleted provision is best explained by the following example from the Commentary to Cl. 16-7 (dates reflect the fact that the example originates from the 1997 version):

> *"On a voyage which lasts from 20 December 1995 to 10 January 1996, the ship sails in heavy weather for six days before and three days after the new year, resulting in a*

total loss of time of 60 days. The 1995 insurance contract has a 30-day deductible and covers 180 days per casualty, while the 1996 insurance contract has a 15-day deductible and covers 90 days per casualty. The 1995 insurance contract thus covers 6/9 of the 60 days of lost time, i.e. 40 days, subject to a deduction of 2/3 of the deductible period of 30 days, i.e. 20 days; hence 20 days of loss of time is recoverable. The 1996 insurer covers 1/3 of the loss of time, i.e. 20 days, subject to a deduction of 1/3 of the 1996 deductible period, i.e. five days; hence 15 days are recoverable. The maximum number of recoverable days under the 1995 insurance contract is 2/3 of 180 days, i.e. 120 days, and under the 1996 insurance contract 1/3 of 90 days, i.e. 30 days. Thus, in our example limits would have no relevance."

Sub-clause 2 of Cl. 16-7 expressly applies also to damage caused by ice during one voyage, so that all ice damage occurring during the voyage between the departure and arrival ports shall be deemed as one casualty. Prior to the 2003 revision, this was provided for in sub-clause 3 of 16-7. The above example relating to apportionment between two insurance periods is equally relevant for ice damage.

The pre-2003 sub-clause 3 of Cl. 16-7 also expressly provided that the then sub-clause 2 should apply correspondingly to damage caused by navigation in shallow waters. For the reasons explained above, the current Cl. 16-7, sub-clause 2 does not refer to how damage due to navigation in shallow waters shall be treated in connection with deductible periods. There is still every reason to treat this type of damage as equal to heavy weather and ice damage. The 2003 Commentary to Cl. 16-7 therefore expressly emphasises that damage occurring during one voyage due to navigating in shallow waters shall also continue to be treated as one casualty. In addition, the apportionment between two insurance periods shall be treated the same way as for heavy weather and ice damage.[14]

6.5 Separate deductible period for machinery damage

The new sub-clause 3 to Cl. 16-7, which was added in the 2007 version, deals with a matter that previously had not been dealt with. This is because it is only in recent years that a practice has developed to agree a separate deductible period for machinery damage different from the deductible period for other damages, such as damage to the hull and equipment other than machinery. It complicates matters considerably to introduce different deductible periods for different parts of the insured object, but the market has developed this practice for commercial reasons. By, for instance, agreeing longer deductible periods for damage to older machinery for which spare parts are no longer readily available and, in many instances, have to be produced individually, the premium can be reduced as the exposure for the insurers is reduced. However, the individually drafted clauses providing for a separate deductible period for machinery very often leaves two important questions unanswered, and the revision committee thought the time was ripe for dealing with the problem by an express provision in Cl. 16-7.

[14] In hindsight one may query whether there really was any benefit in making § 16-7, sub-clause 2 identical with § 12-18 and thereby deleting relevant express provisions which accurately provided for solutions the revision committee wished to maintain. Instead of getting the solutions directly from the text, users of the Plan must now read the Commentary very carefully in order to find out that what may seem from the outset as important substantive amendments are, in reality, not intended to entail any amendment at all. In the writer's opinion, such legislative technique is not commendable.

The two most important questions that arise are:

1. What is machinery damage? That is to say, what is the borderline between the two, separate, deductible periods provided for in the individual insurance contract?
2. Should the deductible period for machinery damage apply regardless of the cause of the machinery damage?

These two questions are answered in Cl. 16-7, sub-clause 3 simply by providing that Cl. 12-16 shall apply correspondingly. Cl. 12-16 deals with a similar problem related to hull insurance, namely when a separate machinery deduction is agreed.

The effect of the reference to Cl. 12-16 is that, for the purpose of the separate deductible period, machinery is not only the propulsion engine with propellershaft, bearings and propeller, but also all auxiliary engines and accessories, pipelines and electrical cables outside the machinery, see further the Commentary to Cl. 12-16.

In the modern type propulsion system, known as diesel/electric propulsion, propulsion engines are really electric motors located near the propellers or rather more often in the azimuth units each containing one propeller. These electric motors with all cabling must be deemed part of the machinery and subject to a separate deductible period. The same goes for the diesel engines running the generators providing the electric power to run the electric propulsion motors. The same diesel engines and generators may also produce electric power converted for other consumers on board, such as electrical driven pumps, electronic navigational equipment on the bridge, various appliances in the galley, lights etc. and thus serve the same functions as mere auxiliary engines on conventional vessels. All the diesel engines, generators, converters etc. must be deemed part of the machinery subject to a separate deductible period, regardless of whether one may define them as auxiliary engines or part of the propulsion system or both.

Whether the reference in Cl. 16-7, sub-clause 3 to Cl. 12-16 is intended to comprise also Cl. 12-16, sub-clause 1, second sentence, is not expressly commented on in the Commentary to Cl. 16-7, sub-clause 3. Since there is no exception made for application of this part of Cl. 12-16, the effect must be that this provision shall apply correspondingly to any separate deductible period for machinery. If so, the separate deductible period for machinery shall be cumulative with the generally agreed deductible period in the loss of hire policy, unless the wording of the policy suggests that the general deductible period shall not be applied in addition to the separate deductible period for machinery.

However, the Commentary expressly states that Cl. 12-16, sub-clause 2 shall apply correspondingly to any separate deductible period for machinery, which means that, if any machinery damage is caused by any of the causes listed in Cl. 12-16, sub-clause 2, any separate deductible period for machinery damage shall not apply. The thinking behind Cl. 12-16, sub-clause 2 is that machinery damage caused by external causes outside the machinery itself shall be subject to the general deductible. The three most practical external causes that may also result in machinery damage are expressly listed in Cl. 12-16, sub-clause 2 letters (a) to (c). In the event of these three causes, a separate deductible period for machinery shall not apply, if the machinery damage is a consequence of;

a) the ship having been involved in a collision or striking
b) the engine room having been completely or parted flooded

c) a fire or explosion originating outside the engine room

Cause (a) should not normally cause any difficulties, but the Commentary to Cl. 12-16 points out that it shall be deemed to be a striking if the propeller strikes drifting timber, drifting ice[15] or other floating objects. The same applies if a plastic bag or ice sludge is blocking the cooling water intake, or a fishing line or other similar lines or ropes entangle the propeller shaft, resulting in damage due to overheating or leakages etc. These are all external causes and the damage to the machinery is not due to any defect or inherent vice within the machinery itself.

However, striking pre-supposes that the vessel or any of its parts or equipment is struck by a foreign object, as distinct from an object which originates from the vessel itself. The Commentary to Cl. 12-16 mentions, as an example that the rudder is falling off or brought out of position without any external impact, so that the propeller is "striking" the rudder and becomes damaged. Such damage will be subject to any separate deductible period for machinery. Not so if the vessel is striking its own fishing lines or nets or other equipment outside the vessel such as e.g. a streamer towed after a seismic vessel.

Cause (b) may overlap with cause (a) in the sense that, as a result of a collision or striking, the hull may be punctured or damaged so that seawater has flooded the engine room. Because the previous versions of the Commentary categorised Cl. 12-16, sub-clause 2 as nautical exceptions, a discussion arose whether flooding of the engine room caused by error of the engine crew in, for example, closing a valve would come within cause (b). This is because such error can hardly be deemed nautical, in the sense that it has nothing to do with the navigation of the vessel. Nevertheless, since such error is an external cause outside the machinery, the revision committee concluded that such flooding should come within cause (b) as the wording clearly is wide enough to comprise flooding caused by errors of the engine crew. This is also expressly pointed out in the Commentary.[16]

Cause (c) also clearly comprises external causes unrelated to any defects or inherent vice within the machinery To be on the absolute safe side, it is even expressly provided that the fire or explosion must have originated outside the engine room. The Commentary to Cl. 12-16 seems to define the engine room as the room where the propulsion engine is located. Pump rooms and other rooms forward of the engine room bulkhead are then outside the engine room. This definition presupposes that the engine room is located aft, which is most common on modern vessels. Any further partition of the engine room aft of the engine room bulkhead is of no importance to the application of cause (c) unless the rooms are separated by similar safety bulkheads as the engine room bulkhead.

This definition of the engine room in relation to cause (c) may cause some difficulties in modern diesel/electric driven vessels as the discussion above shows. The room where the diesel engines are located must, in this context, be deemed as the engine room for the purpose

[15] If the vessel is operated in the excluded or conditional trading areas or any other actually ice infested areas in violation of § 3-15, any and all damage resulting therefrom may be wholly or in part excepted from cover.
[16] Even though the third paragraph of the Commentary to § 12-16, touches on this discussion by pointing out that the previous versions erroneously list cause (b) as a nautical exception, the corresponding correction is not made in the sixth paragraph. This slip will not have any bearing on the fact that the revision committee made a conscious choice as explained above.

of application of cause (c). However, should rooms or spaces where electric propulsion motors are located, if separate from where the diesel engines are located, be deemed to be an engine room within the meaning of cause (c)? Loss of time due to damage caused by a fire occurring in or originating from the electro motor should really be subject to a separate deductible period for machinery, as such fire is not external but is directly connected to the machinery.[17]

[17] This discussion shows that the criteria "outside the engine room" is not particularly adequate in this context. The distinction should be whether the fire or explosion occurred or originated from the machinery. If so, a separate machinery deductible period should apply. If the fire is unrelated to the machinery, but spreads so that machinery is damaged, only the generally applicable deductible period shall be applied. The whole discussion also shows that it should be carefully considered whether it is worthwhile to introduce a separate deductible period for different parts of the vessel or different types of damages or losses.

7. THE AVERAGE

7.1 Survey of damage, Cl. 16-8

7.1.1 Purpose and principles

Cl. 16-8 of the Plan reads as follows:

> *"The provisions of Cl. 12-10 shall apply correspondingly to this insurance."*

This section is identical to Cl. 5 of the 1972 conditions and corresponds to Cl. 5, Nos. 3 to 8, of the 1993 conditions and imposes upon the assured an obligation to notify the loss of hire insurer in ample time before repairs commence so that the loss of hire insurer can appoint his own surveyor. Some assureds seem erroneously to believe that notification to the hull insurer is enough, and present a claim under the loss of hire insurance well after completion of repairs. There are several examples in practice where the claim under the loss of hire insurance has been rejected on the ground of time bar due to late notification of the claim, cp. Cl. 5-23 of the Plan.

During the revision of the Norwegian loss of hire conditions in 1993, it was decided to include provisions concerning the assured's duty to notify the insurer of casualties, the time-limit for notification, the duty to avert or minimise the loss and apportionment of costs in connection with settlements of claims, in spite of the fact that such provisions were already incorporated into the conditions by way of reference to Part One of the Plan. During the 1996-revision of the Plan it was agreed that, to the extent possible, the general terms and conditions of the Plan should also apply to loss of hire insurance. It was thus decided to go back to the approach of the 1972 conditions and to leave out Cl. 5 of the 1993 conditions.

The reference to Cl. 12-10 means that when the vessel has suffered damage, the assured must notify not only the hull insurer, but also the loss of hire insurer of the casualty in order to enable also the loss of hire insurer to provide for a survey. Cl. 12-10, sub-clause 1, provides that before any damage is repaired, *"it shall be surveyed by a representative of the assured and a representative of the insurer."* Therefore, the assured is not allowed to commence repairs before the loss of hire insurer's surveyor has also completed his survey on behalf of the loss of hire insurer.

The main purpose of the surveys is to establish the cause of the damage to the vessel, the time of its occurrence and the period the vessel is deprived of income as a consequence of the subject damage, see Cl. 16-1, sub-clause 1.

The success in accomplishing these objectives depends to a large extent upon the experience and efficiency of the surveyor. With regard to loss of hire surveys, the appointed surveyor should be familiar with the principles and conditions of this kind of insurance so that the necessary information is given in his survey report. Otherwise the insurer will have to ask for further clarifications from the surveyor before settling the claim, thereby causing delay. It is also of great importance that the assured's superintendent attending the repairs is sufficiently briefed about the reason why the loss of hire surveyor is coming onboard asking questions and that the respective persons co-operate adequately.

According to Cl. 12-10, sub-clause 2, the representatives shall submit survey reports, *"in which they describe the damage and state their opinions as regards the probable cause of*

each individual item of damage, the time of its occurrence and the costs of repair." This is a rather brief description of what a survey report should contain and is addressed only to survey reports in connection with hull insurance. A loss of hire insurer would need additional information, see 7.1.2 below.

The Plan is based on the assumption that the final survey reports may be submitted after the repairs of the vessel have been completed. However, if the assured is in doubt as to whether it will pay to repair the vessel, it may be in his interest to receive a more detailed description of the damage before the repairs commence. Sub-clause 3 of Cl. 12-10 therefore gives both parties the right to demand that preliminary reports be submitted with approximate estimates of the repair costs. Since each of the parties is free in any event to instruct its own surveyor to submit a preliminary report, the provision can only be understood as giving each of the parties the right to request a preliminary report from *the other party's* surveyor.

Whilst the 1930 Plan required a judicial survey to be conducted unless the parties in each case agreed on a private survey, the 1964 Plan introduced a private survey as the normal procedure, which procedure has been maintained in the previous Norwegian 1996 Plan (all versions) and the current Nordic Plan, 2013 and 2016 versions. A public survey ("judicial or other legal valuation") of the damage may only be conducted where mandatory rules of law of the relevant country make this necessary, see sub-clause 5 of Cl. 12-10.

The conclusions drawn in the survey reports are not binding on the parties in the claims settlement, but they will obviously be of great significance. The surveyors' opinion as to when and how each item of damage occurred will, therefore, for practical purposes be decisive for the question of compensation unless there are good reasons to contest the conclusions in the survey reports.

If the two appointed surveyors cannot reach an agreement regarding specific questions, the parties may appoint *"an umpire who shall give a reasoned opinion of the questions submitted to him,"* see sub-clause 4 of Cl. 12-10. Like the parties' surveyors, the umpire shall make no binding decision regarding the matters in question, but his opinion will obviously carry great weight as evidence in the event of subsequent litigation. If the parties fail to reach an agreement as to the appointment of an umpire, he shall be appointed by one of the Nordic average adjusters, compare also Cl. 5-5.

As opposed to the 1930 Plan, the right to claim compensation is not considered waived if the assured has the damage repaired without a prior survey. Sub-clause 6 of Cl. 12-10 provides that this will only affect the assured's burden of proof.

If the assured, without compelling reasons, has the ship repaired without any survey being held or without notifying the insurer of such survey, he has (in addition to the burden of proof under Cl. 2-12) the burden of proving that the damage is not attributable to causes excluded from the cover by specific exceptions (e.g. inadequate maintenance etc., see. Cl. 12-3) or that the damage did not arise during an earlier insurance year. The Commentary to Cl. 12-10, sub-clause 6 emphasises that the assured is required to notify the insurer, i.e. also the loss of hire insurer, well in advance of the time and place of the repairs so that he can take appropriate measures to survey and assess the damage and the ensuing period of loss of hire. Late

notification must be "*equated with making repairs without giving the insurer the opportunity to survey the damage".*

Far too often, the assured fails to notify the loss of hire insurer of the damage and carries out repairs without complying with his duties according to Cl. 16-8, cf. Cl. 12-10. Apart from the "sanction" of the burden of proof shifting under Cl. 12-10, sub-clause 6, the assured may also risk that his claim under the loss of hire insurance is barred pursuant to Cl. 5-23 if more than six months has elapsed since the damage or casualty occurred before the claim under the loss of hire insurance is made. For one reason or another assureds tend to believe that notification to the hull insurer is sufficient with the result that their claim under the loss of hire insurance may be barred.

Another potential disadvantage for the assured by failing to notify also the loss of hire insurer about the casualty is that his claim for interest pursuant Cl. 5-4, sub-clause 1, last sentence may be suspended according to Cl. 5-4, sub-clause 2 if the adjustment of the claim under the loss of hire insurance is delayed due to the failure to notify the loss of hire insurer.

7.1.2 Survey reports

According to Cl. 16-1 of the Plan, see under 3.4 above, it is a basic condition for the loss of hire insurer's liability that the loss of income is a consequence of damage to the vessel which is recoverable under the specified hull conditions or which would have been recoverable if no deductible had been agreed. This means that when the vessel has suffered damage, hull survey reports will normally be submitted. Nevertheless, the loss of hire insurer will normally obtain separate loss of hire survey reports, hence it is essential that he is notified in time.

Hull survey reports will normally contain: information about the nature of the casualty and the voyage; the time of occurrence; reference to the relevant documents and other information which has been available to the surveyor; a description of the casualty which, in the surveyor's opinion, gave rise to the damage; a description of the damage attributable to the casualty; reference to any disputes with regard to the damage; a detailed specification of all repairs effected and the actual cost of each item (including information about deferred repairs and temporary repairs); information about the use of spare parts, overtime, work not concerning the insurer; common expenses; and such other information as the nature of the casualty makes it natural to include.

Loss of hire survey reports must in addition provide necessary details regarding the time lost due to *"the vessel being wholly or partially deprived of income as a consequence of damage to the vessel."*

Time lost at the place of the accident, slow-steaming, removal to/from the repair yard, tank cleaning, waiting time, engine- and sea trials etc. must be specified individually and separately from the repair time. The time required for the damage repair, if carried out separately, must be stated. The time lost must be specified in days, hours and minutes, see Cl. 16-4. If assureds' repairs are carried out simultaneously with damage repairs, it is necessary to state the total time required for all assured's repairs, if carried out separately, and the time required for such assured's repairs which were either carried out to fulfil classification requirements (due or not due), or necessary to meet technical and operational safety requirements for the vessel including cargo carrying ability, or associated with reconstruction, see Cl. 16-12.

The main concern for the loss of hire insurer is to get a detailed picture of the cause of the casualty, the extent of the repair period and other periods lost due to the casualty, in order to be able to assess whether the loss is covered under the insurance.

In order to accomplish this, the loss of hire insurer would normally have to require the assured to provide some particulars and documents in addition to the survey reports. The assured is obliged to provide the insurer with such information and documents as are available to him and are required by the insurer for the purpose of settling the claim, see Cl. 5-1, sub-clause 1.

In most cases the following documents/information will be required in support of the assured's statement of claim:

a) the Master's and the Chief Engineer's reports on the casualty.

b) the report of the assured's Superintendent, if any.

c) extracts of the deck and/or engine log books.

d) if the ship is on time charter, a copy of the charterparty and the charterer's off-hire statement showing the period off-hire and the corresponding charterer hire deduction.

e) the Class Surveyor's report.

In the event of an open policy or if the case is complicated, additional documents and information may be required by the insurer.

If the assured, intentionally or through gross negligence, fails to fulfil his duties to provide particulars and documents, the insurer is only liable to the extent he would have been liable if the assured had fulfilled his duty, see Cl. 5-1, sub-clause 2. If the assured has acted fraudulently, the insurer is free from all liability and may terminate the insurance contract, see Cl. 5-1, sub-clause 3.

7.1.3 Time lost during survey

Subject to the rules concerning the sharing of common time with the assured or other damage repairs, the time lost for surveys will be included in the calculation of the total indemnity.

Sub-clause 3 of Cl.16-10 provides that time lost to carry out surveys is to be treated in accordance with the rules regarding time lost during removal to a repair yard, set out in sub-clauses 1 and 2 of Cl. 16-10, see 7.3 below. This means that time lost to carry out surveys shall be attributed to the category of work that necessitated the surveys. It also means that, if surveys were necessary for more than one category of work, the apportionment rule in sub-clause 2 shall be applied.

7.2 Choice of repair yard, Cl. 16-9

7.2.1 The potential conflict of interest between the loss of hire insurer and the hull insurer

The loss of hire insurer normally wants repairs to be performed as fast as possible. If tenders from alternative repair yards have been obtained, he will therefore be interested in choosing the tender which offers the shortest time for repairs, even if it is not the cheapest.

The hull insurer is not liable for the loss of time and therefore wants the costs of repairs to be as low as possible, provided the quality is up to standard.

Since a yard that can offer a short repair period is often more expensive than a yard offering a longer repair period, there may be a conflict of interest between the loss of hire insurer and the hull insurer. This conflict ought to be resolved in a manner which, to a reasonable extent, takes into consideration the assured's interest in averting an uncovered loss.

Similar conflicts of interest may occur in relation to costs incurred in expediting the repairs etc. The assured and the loss of hire insurer may want to use methods which speed up repairs, such as overtime, air transport of spare parts etc., whereas the hull insurer wants the cost of repairs to be as low as possible. The assured may further be interested in temporary repairs of the damage, if this makes it possible to postpone the final repairs to a more convenient time, whereas the hull insurer may prefer that the ship's damage is permanently repaired immediately. These conflicts are discussed in 7.2.2 and 12 below.

7.2.2 Solutions to the conflict of interest between the hull insurer and the loss of hire insurer

Problems related to the co-ordination of the hull cover and the loss of hire cover have a long history and have been discussed many times, both in relation to hull conditions and in relation to loss of hire conditions. A very thorough discussion is found in the Commentary to the 1972 conditions, pages 39-46 and 77-80. Reference is also made to pages 2-3 of the Commentary to the 1977 Amendments, to page 18 of the Commentary to the 1993 conditions and to the Commentary to Cl. 19-9 of the Plan.

One possible solution to the conflict of interest between the hull insurer and the loss of hire insurer could be to let the hull insurer's liability be restricted to the cheapest repair alternative, whereas the increased costs incurred by choosing a tender which offers a shorter time for repairs are considered as increased costs incurred in order to save time, for which the loss of hire insurer is liable. For historical reasons, this solution has not been adopted. The solution under the 1930 Plan was entirely to the advantage of the hull insurer since it at no time required the hull insurer to consider the assured's interest in averting a loss of time. This system was, however, modified to a certain extent in the hull policies used.

Another possible solution would be to choose the overall most economic repair alternative, taking into account both the repair costs, the costs of removing the ship to the repair yard and the repair period offered, and to let the respective insurer be liable for this alternative. This possibility was discussed in the Commentary to the 1972 conditions, page 42, but was not adopted.

The solution that has been settled on is a system whereby the hull insurer to some extent pays increased repair costs incurred in order to save time. During the 1964-revision of the Plan

there was general agreement that the hull insurer should be required to show a certain degree of consideration for the assured's interest in averting a loss of time in most of the situations where this could occur. One of the reasons for this general agreement was that not all shipowners take out loss of hire insurance. The tradition that hull insurer is liable for "loss of hire elements" has been maintained in the Plan, see Cl. 12-7, Cl. 12-8, Cl. 12-11, Cl. 12-12 and Cl. 12-13, see 7.2.3 below.

The remaining problem is to co-ordinate the loss of hire cover with the hull cover. This co-ordination has been dealt with in several ways in the course of time with regard to the choice of repair yard.

The original 1972 conditions and the 1993 conditions solved the co-ordination problem by a compromise between the interests of the loss of hire insurer and the assured. These conditions stated that the assured decided which yard was to be used, but the liability of the loss of hire insurer was limited to the loss of time under the tender which would have caused the shortest loss of time, plus half of the additional loss of time which arose by not choosing that tender, see Cl. 6 of the 1972 and the 1993 conditions. This was naturally a simple solution, but it was unfavourable to the assured if he did not choose the quickest repair alternative, because one half of the "additional loss of time" remained uncovered. The following example illustrates the point:

Yard	**A**	**B**	**C**
Repair/removal cost	1.8 mill.	1.2 mill.	1.0 mill.
Loss of hire USD 10,000 per day	0.3 mill	0.45mill.	0.75mill
Total	2.1 mill.	1.65mill	1.75mill

The loss of time at each yard would be:

Yard A: 30 days (USD 10,000 per day = USD 300,000 or 0.3 mill)
Yard B: 45 days (USD 10,000 per day = USD 450,000 or 0.45 mill.)
Yard C: 75 days (USD 10,000 per day = USD 750,000 or 0.75 mill.)

According to Cl. 6 of the 1972 and 1993 conditions the insurer's liability was limited to the time lost by the quickest tender, which means 30 days at yard A, with the addition of one half of the 15 days which is the difference between A and B, i.e. a total of 37.5 days, or USD 0.375 mill. The total compensation under this regime would accordingly have been USD 1.2 mill. + USD 0.375 mill. = USD 1.575 mill. This means that even if the assured chose the overall most economical alternative, namely alternative B, he would incur an uncovered loss of time of 7.5 days, i.e. USD 75,000. If the assured chose Yard C, he will recover 30 + 22½ = 52½ days = USD 525,000 from his loss of hire insurer. He will be uncovered for a loss of hire in the amount of USD 750,000 – USD 525,000 = USD 225,000. Thus, the best alternative for the assured was Yard B under the previous regime.

The 1977-Amendment of Cl. 6 of the 1972 conditions provided a solution that was more favourable to the assured. Said provision stated that the liability of the loss of hire insurer should be calculated on the basis of the tender which would have caused the shortest loss of time, plus full compensation of up to 30 days plus one half of any additional time lost due to the fact that another yard had been chosen.

In the above example, the result of the latter provision would have been that the 15 days which is the difference between alternative B and alternative A, would have been compensated in full by the loss of hire insurer, and under alternative C the assured would have recovered 67½ days.

During the 1996 revision of the Plan there was a general agreement to protect better the assured's interest than had Cl. 6 of the 1993 conditions.

It was decided to undertake a complete co-ordination of the hull conditions and the loss of hire conditions in the same way as for the War Risk Insurance, see Clauses 15-14 (b) and 15-19 of the Plan. Such co-ordination is for practical purposes very difficult, if not impossible, to achieve unless the same insurer covers 100% of both the hull insurance and the loss of hire insurance.

Furthermore, both the hull insurance and the loss of hire insurance must be covered on the basis of the Plan. This precondition is often not met because the Nordic market offers loss of hire insurance on the basis of Chapter 16 of the Plan to owners who have their hull insurance with foreign markets on foreign conditions. It was at the time found impractical to draw up alternative loss of hire conditions for which the scope of varied depending on the actual hull cover for the vessel. However, the revision committee reversed its view in this regard, when preparing the 2003 version of the Plan and reintroduced the 1972 solution for the assureds that have covered hull insurance on other conditions than the Plan, see further under 7.2.4 below.

It was agreed to improve the standard cover by introducing a solution that aimed at giving the assured an incentive to choose the quicker, but more expensive yard, at which repair costs would be covered in full by the hull insurer, i. e. Yard B in the example above. If the assured chose this yard, he will be covered in full by his loss of hire insurer, see Cl. 16-9, sub-clause 3, discussed under 7.2.4 below. But before we explain the solution contained in Cl. 16-9, we shall explain in more detail the hull insurer's cover of loss of hire elements.

7.2.3 Hull insurer's cover of loss of hire elements

As mentioned in 7.2.2 above, hull conditions on the basis of the Plan have traditionally also covered some elements of loss of time, and this tradition has been maintained in the Nordic Plan, see Clauses 12-7, 12-8, 12-11, 12-12 and 12-13.

The basic provision is Cl. 12-12, which deals with the choice of repair yard for hull insurance. Sub-clauses 1 and 2 thereof read as follows:

> *"The tenders received shall, for the purpose of comparison, be adjusted by the costs of removal being added to the tender amount.*
>
> *The assured decides which yard shall be used, but the insurer's liability for the costs of repairs and the removal is limited to an amount corresponding to the amount that would have been recoverable if the lowest adjusted tender had been accepted, with an addition of 20% p.a. of the agreed insurable hull value for the time the assured saves by not choosing that tender."*

Cl. 12-12 is identical to § 183 of the 1964 Plan and is based on the view that the hull insurer shall show a certain consideration for the assured's interest in having the ship repaired at a yard which is more expensive, but works fast, thereby reducing the loss of time.

Cl. 12-12 allows the assured to charge to the hull insurer the extra cost of more expensive but quicker repairs, up to an amount equal to 20% p.a. of the agreed hull insurable value for the time saved by the assured accepting the more expensive tender. This limit is equivalent to 0.55 per mille per day (24 hours). The 20% p. a. formula may seem rather arbitrarily chosen, but the daily amount or daily rate arrived at by this method was at the time deemed not to be widely off the earning capacity of the various types of vessel in a long term perspective. A vessel with a hull valuation of USD 20 mill. will pursuant to this formula be deemed to have an earning capacity of USD 11,000 per day (24 hours). Whether the 20% p.a. formula has been adequate during the period since 1964 has not to the writer's knowledge been subject to any research.

Under the rules of Cl. 12-7 concerning temporary repairs and Cl. 12-8 concerning costs incurred to expedite repairs, the hull insurer is liable for the entire cost of temporary repairs when permanent repairs cannot be carried out at the place where the ship is situated, while the cost of temporary repairs in other cases and cost incurred to expedite repair work are covered within the 20% p.a. formula for the time that is saved for the assured. These provisions are based on the assumption that any excess cost incurred to save time will be covered by the loss of hire insurance so that the assured can also recover those costs that are not covered by the hull insurer, see Cl. 16-11, which has been further addressed under 12 below. [18]

Cl. 12-11 (concerning invitations to tender in relation to hull insurance), sub-clause 2, reads:

> *"If the time taken to obtain tenders exceeds ten days as from the date the invitation to submit tenders is sent out, the insurer is liable to compensate the loss of time at the rate of 20% p.a. of the agreed insurable hull value during the excess period."*

[18] It is worth noting that the hull insurer in certain circumstances assumes all cost incurred to save time if the damage cannot be repaired within a reasonable time, so called "unrepairability". The Commentary to Cl. 12-1 has introduced the concept of "unrepairability" where it is stated:

"Regardless of whether the repairs are carried out with used or new parts, it is a prerequisite that the part is obtainable within a reasonable period of time. The question as to what is "a reasonable period of time" must be decided on a case-to-case basis depending on the type of ship and the place of repairs. If the part cannot be obtained within a reasonable period of time, this means that there is a situation of "unrepairability", and the insurer must cover new and/or more expensive parts to the extent that this is necessary. If the waiting time is not so long as to entail unrepairability, the use of new parts in order to save time may have to be regarded as a cost in order to expedite the repairs according to Cl.12-8."

In some cases there have been very long delivery times for required new parts. Delivery times of up to nine months have been experienced in some cases. However, by incurring extra expenses to the yard, manufacturers or other third parties, the delivery time has been shortened considerably. In some cases the manufacturer has, with or without justification, operated with a "flexible" price system. The earlier the delivery, the higher the price. Another creative solution may have been to take parts from sister vessels under construction or in operation and pay a compensation for this swap. There have also been cases where a competitor has possessed the required parts in storage and has charged a rent or hire for the part until it has been replaced by a new part as soon as this could be delivered. If the concept of "unrepairability" has been deemed satisfied, then hull insurers have paid such hire as part of the, under the circumstances, "reasonable costs of repair". It goes without saying that the borderline here is very difficult to draw, and a wide discretionary power is vested with those who draw up the adjustment or decide in the final instance, whether it be the courts, arbitrators or independent adjusters with whom the parties have left the final decision.

This is actually a true loss of hire compensation covered under the hull insurance, as opposed to cover of extra expenses and costs incurred to save time.

Even if an invitation to tender from several yards is primarily in the interest of the insurers, it is a normal and proper procedure to invite tenders in connection with the repair of major damage. The assured must thereby in any event accept a certain delay in connection with the submission of the tenders. For this reason, it has been established that the hull insurer's liability for loss of time due to invitation to tender takes effect only after 10 days as from the date the invitation is sent out. The hull insurer's liability is limited to the 20% p.a. formula during the excess waiting period. The Commentary to Cl. 12-11 emphasises that there must be causation between the fact that tenders are being invited and the loss of time. If all the relevant repair yards are busy so that the vessel will have to wait at any rate, the invitation to tender will not have caused the assured any loss.

Also Cl. 12-13, sub-clause 1, which deals with the costs of removal of the ship to the repair yard, establishes that the hull insurance provides a limited cover of the assured's loss of time. The removal of the ship to the repair yard constitutes part of the repairs. The hull insurer must therefore cover the costs of removal, including inter alia the cost of bunkers, any necessary towage, and canal and port expenses. However, the assured has also a limited cover of his loss of time during the removal, in that the hull insurer is liable for the wages and maintenance of the "necessary crew" during the relevant period of removal of the ship. "Necessary crew" means crew which are required for the removal of the ship and includes the maritime crew, whilst hotel and shop staff on a passenger liner will normally not be covered. It should also be noted that the wages and maintenance costs which the assured saves through the fact that the removal places an employed ship in a more favourable position, must be deducted, see Cl. 12-13, sub-clause 1, second sentence.

Otherwise reference is made to 7.3 below concerning the loss of hire insurer's cover of the time lost during removal to the repair yard.

7.2.4 The loss of hire insurer's cover, Cl. 16-9, sub-clause 3

Cl. 16-9, sub-clause 3 was as mentioned under 7.2.2 above amended in 2003 and deals with the complicated problems concerning the borderline between hull insurance and loss of hire insurance and reads as follows:

> *"The assured shall decide which yard is to be used. However, the liability of the insurer shall be limited to the loss of time under the tender that would have resulted in the least loss of time among the tenders for which the assured would have been able to claim compensation under the hull insurance. If the assured chooses this repair yard, the claim shall be settled on the basis of the actual time lost, even if this is greater than that specified in the tender. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the liability of the insurer shall be limited to the loss of time under the tender that would have resulted in the least loss of time plus half of any additional loss of time that may occur."*

The effect of Cl. 16-9 if the hull insurance is covered on the basis of the Plan is best illustrated by the same example used in 7.2.2 above, and for the sake of convenience repeated here. The example is also used in the Commentary to Cl. 16-9:

Yard	**A**	**B**	**C**
Costs of repair and removal	1.8 mill.	1.2 mill.	1.0 mill.
Loss of time at USD 10,000 per day	0.3 mill.	0.45mill.	0.75mill
Total	2.1 mill.	1.65mill	1.75mill

20% p.a. of the agreed hull value has been set to USD 10,000 per day. The loss of time at each yard would be:

Yard A: 30 days (USD 10,000 per day = USD 300,000 or 0.3 mill)
Yard B: 45 days (USD 10,000 per day = USD 450,000 or 0.45 mill.)
Yard C: 75 days (USD 10,000 per day = USD 750,000 or 0.75 mill.)

The daily amount under the loss of hire insurance is also USD 10,000 in this example.

According to Cl. 12-12 of the 1996 Plan the assured is entitled to recover from the hull insurer the lowest tender; i.e. Yard C - USD 1 million, with the addition of up to maximum 45 saved days, which is the difference between the time lost by choosing the lowest tender (75 days) and the time lost by choosing Yard A, i.e. USD 1 mill. + USD 0.45 mill. = USD 1.45 mill.

USD 1.45 mill. is thus the maximum repair cost recoverable from the hull insurer. This is not sufficient to pay for repair at Yard A, so if the assured chooses this yard, he will only recover USD 1.45 mill. from his hull insurer and USD 300,000 from his loss of hire insurer (the deductible period is presumed consumed by time lost prior to repairs).

If the assured chooses Yard B or C, he will recover in full the repair cost of USD 1.2 mill. alternatively USD 1 mill. from his hull insurer as he will never recover more than the actual repair cost from his hull insurer.

According to Cl. 16-9, sub-clause 3 related to hull cover on the Plan, the loss of hire insurer pays for the time lost under alternative B, i.e. 45 days or USD 0.45 mill. This means that if the assured chooses alternative B he receives a total of USD 1.65 mill., which means that he is covered in full.

The assured is free to decide which yard is to be used, but the recovery from the loss of hire insurer is limited to the loss of time which occurs if the assured chooses the more expensive alternative which falls within the hull insurer's liability, i.e. the alternative which gives the best total result. This situation reflects the general view that the hull insurance is the basic marine insurance and that other insurances, such as loss of hire, are supposed to be complementary to the hull insurance cover.

The second sentence in sub-clause 3 provides that if the assured chooses the more expensive alternative which falls within the hull insurer's liability (alternative B in the above example), he will be entitled to recover under the loss of hire insurance for the time actually taken to complete the repairs even though this is greater than specified in the tender. If the repairs require 55 days rather than the 45 days stated in tender B, the assured is entitled to recover 55 days, i.e. USD 550,000.

The reason for amending Cl. 16-9, sub-clause 3 and going back to the 1972 solution, if the hull insurance is covered on conditions other than the Plan, is that under the previous versions of the Plan prior to the 2003 version, it was not a condition for the loss of hire insurer's liability under Cl. 16-9 that the hull insurance was based on the Plan. Sub-clause 3 referred simply to the ship's hull insurance, without setting further requirements. If the actual hull policy only covered the cheapest repair alternative, the loss of hire insurer was obliged to cover the time lost under this alternative. In the above example this means that the loss of hire insurer did have to pay for 75 days. It was considered unfortunate for the promotion of the Plan as a whole that the effect of Cl. 16-9, sub-clause 3 in certain instances could induce the assured to elect foreign hull conditions, rather than the Plan hull conditions, in order to obtain a better loss of hire cover in such cases as referred to above. Hence Cl. 16-9 was amended so that the 1972 solution was reintroduced if the vessel was insured on foreign hull conditions. Even though the wording of the current Cl. 16-9 does not expressly provide that, if the assured has not obtained the loss of hire insurer's written acceptance of the foreign hull conditions, the adjustment must be made on the basis of Cl. 16-9, sub-clause 3 second and third sentence, this is expressly stated in the Commentary to Cl. 16-9 at the very end. The assured may not, in these situations, fall back on the solution adopted before the 2003 amendment of Cl. 16-9, sub-clause 3.

This amendment is not necessarily to the detriment of those assureds who have insured the hull on foreign conditions as compared with those who have the hull insured on the Plan.

If the assured elects Yard C in the above example, he will only be compensated the 45 days under alternative B as explained above if the hull is insured on the Plan. However, if the hull is insured on foreign conditions, he is compensated for 52½ days, see under 7.2.2 above.

Another example also shows that the amendment may provide those assureds with hull cover on foreign conditions a better loss of hire cover than those who insure the hull on the Plan.

Yard	A	B
Repairs	1.8 mill.	1.8 mill.
Loss of time	30 days = 0.3 mill.	25 days = 0.25 mill.

If Yard A is to be preferred, the assured with hull cover on the Plan will only recover 0.25 mill. under his loss of hire insurance, while the assured with hull cover on foreign conditions will recover 2½ days more (half of the extra time of 5 days).

There may well be other examples showing the same picture, but, by and large, the assured who has covered the hull insurance on the Plan has now a greater possibility than before to get "full" cover (deductible disregarded), but he must see to it that he makes the right decisions.

If the loss of hire insurer should leave it entirely to the assured to choose repair yard, without any limitation in the cover, it would be very tempting to the assured to elect the cheapest and slowest yard in periods where the freight market is low, in particular if the daily amount recovered under the loss of hire insurance should yield more than what the vessel could have earned in the market. When the market rate is high, the assured will shorten the off-hire periods as much as possible. The long term effect for the insurance market as a whole may therefore not be much affected, but this is apparently not sufficient ground for individual loss of hire insurers to let the assured have a free hand in choosing the repair yard.

7.2.5 Tenders

It is normal and proper procedure in the repair of a major damage to a ship to invite several repair yards to tender for the necessary work, so that the best technical solutions and commercial terms are obtained. The tenders will also indicate how quickly the damage can be repaired.

Although marine insurance based on the Plan allows the assured to decide where his ship is going to be repaired, most shipowners would probably invite several yards to tender for the work, even if the insurer involved did not interfere. In practice, tenders will normally be obtained after consultation between the assured, the hull insurer and the loss of hire insurer.

Nevertheless, competition between several yards will primarily be in the interest of the insurers and provisions have been included in the Plan in order to protect these interests. According to Cl. 12-11, sub-clause 1 (with regard to hull insurance) and Cl. 16-9, sub-clause 1 (with regard to loss of hire insurance), the insurer may require that tenders be obtained from repair yards of their choice. The insurer must advise the assured whether or not he will demand invitations to tender. If he fails to do so, he may not object if the assured commences repairs without further notice, and the insurer will be obliged to cover the time actually lost.

If, on the other hand, the insurer has demanded invitations to tender and the assured fails to comply with such demand, Cl. 16-9, sub-clause 1, second sentence, establishes the insurer's right to obtain tenders directly, possibly even after the repairs have been carried out. The same applies if the assured repairs the damage without having notified the insurer. Even if the assured and/or the hull insurer have obtained some tenders, the loss of hire insurer is entitled to obtain additional tenders independently, if he has reason to be dissatisfied with those already obtained.

The assured may sometimes refuse to have the ship repaired at a particular repair yard under any circumstances, inter alia due to the bad reputation of the yard or due to other more specific business factors. Cl. 16-9, sub-clause 2, which corresponds to Cl. 12-12, sub-clause 3 (concerning hull insurance), reads:

> *"If, due to special circumstances, the assured has justifiable objections to the use of a particular repair yard, he may require that the tender from that yard be disregarded."* [19]

Firstly, the assured's right to require that a particular tender be disregarded is subject to the assured objecting as soon as he becomes aware of the relevant circumstances. If the assured has already invited the yard to submit a tender, it is normally too late to raise objections concerning circumstances of which the assured was, or ought to have been, aware when he requested the yard to submit a tender.

[19] For reasons unknown to the writer, the English 2003 version of Cl. 16-9, sub-clause 2 has been amended so that the wording is no longer exactly identical to Cl. 12-12, sub-clause 3 in spite of the Commentary to Cl. 16-9 stating that the wordings are identical. There must have been some unauthorised initiative taken on this point, which though cannot have any substantive effect on the understanding and application of the two provisions. This little editorial discrepancy has not been corrected in any of the subsequent versions of the Plan.

Secondly, the assured may only demand that the yard be disregarded if "due to special circumstances" the assured has "justifiable objections" to the use of the yard. The following circumstances will normally be considered "justifiable objections":

- justifiable doubt as to whether the yard has sufficient technical capability,

- justifiable doubt as to whether the yard has sufficient financial capacity, and

- an actual threat of strike at the yard, or the yard has recently been involved in repeated strikes and there is reason to fear that the conflict has not been resolved.

The fact that the assured has had many disputes with a particular yard concerning earlier assignments is usually not relevant. However, the situation may be different if the assured can prove that the disputes have occurred due to dishonesty or due to a notorious unbusinesslike attitude on the part of the repair yard with regard to variation order requests.

7.3 Removal to the place of repair, ~~§~~Cl. 16-10

As mentioned under 7.2.3 above, the cost of removing the ship to the repair yard constitute part of the casualty repairs and are therefore covered by the hull insurer. This makes it natural that the time involved in removing the ship will be included in the calculation of the total indemnity under the loss of hire insurance, as will the time required for surveys, taking tenders, tank cleaning and/or gas-freeing, ordering replacement parts and similar measures necessary in order to carry out the repairs.

Cl. 16-10 deals with time lost during removal to a repair yard. The clause was edited in 2013 by amending the words “class of repairs” and “class of work” to “category of repairs” and “category of work”. Cl. 16-10 sub-clauses 1 and 2 read:

> *"Loss of time during removal to the repair yard shall be attributed to the category of repairs that necessitated the removal.*[20]
>
> *If removal to the repair yard was necessary for the repair of more than one category of work, the removal time shall be apportioned in accordance with the time that each category of work would have required if carried out separately. Removal time that falls within the deductible period shall not be apportioned".*

The solution under the previous conditions (Cl. 8, No. 4 of the 1972 and 1993 conditions) was that the removal time was apportioned over all categories of work, provided that the work in fact benefited from the use of the repair yard, see the "Ranhav" award, ND 1967 page 269, see also 6.3 above on this award. The 1996 Plan has departed from this solution.

Cl. 16-10 takes into account that removal to a repair yard can be necessitated by the following categories of repairs:

- owner's work,

[20] The 2003 Commentary to Cl. 16-10 expressly states that Cl. 16-10 is unamended, which is not formally correct because the previous second sentence of sub-clause 1 reading “*The same applies to time lost after completion of repairs to the extent that such time is covered under Cl. 16-13.*” was in 2003 moved to Cl. 16-13 for editorial reasons.

- damage repairs relevant to the particular loss of hire insurance, and
- damage repairs relevant to other loss of hire insurance.

Whether the time lost during removal to the repair yard will be covered under the loss of hire insurance now depends on which category of repairs necessitated the removal. Cl. 16-10, sub-clause 1 provides that removal time is to be allocated to the category of repairs that "necessitated the removal". Sub-clause 1 is based on the assumption that only one class of repairs necessitated the removal to the repair yard. Otherwise the provisions of sub-clause 2 will apply. It is therefore necessary to clarify which category of work was necessary to enable the vessel to continue trading. This evaluation must be made on the basis of the situation at the time the removal commenced.

If the casualty damage is so serious that the vessel must be repaired at once, the casualty repairs have "necessitated the removal" and the removal time is therefore to be allocated to those repairs. If so, the assured has the opportunity to have owner's work performed without having to bear any of the removal time.

On the other hand, if the ship has to be docked at once in order to carry out class surveys or other owner's work while repair of casualty damage could be postponed, the removal time will be for the assured's account even though casualty repairs are actually carried out simultaneously.

This means that if one particular category of repairs necessitated the removal, the removal time will be allocated to that category of repairs, regardless of the actual extent of the repairs or the time needed to complete them once the vessel arrives at the repair yard.

It has been discussed whether the vessel has arrived at the yard already upon dropping anchor at the yard's or port's anchorage, or only when she is securely moored alongside the yard's repair berth or has been dry-docked. When does Cl. 16-10 seize to apply and Cl. 16-12 on equal apportionment in case of simultaneous repairs take over? This borderline may have economic implications for the parties to the insurance contract. The writer believe the answer must be found Cl. 16-10, sub-clause 3 which expressly states that Cl. 16-10 sub-clauses 1 and 2 shall apply to loss of time during surveys, while obtaining tenders, during tank cleaning, while waiting to commence repairs or due to other similar measures that were necessary in order to carry out the repairs. Regardless of whether these measures are carried out before or after the vessel has "arrived" at the yard, time lost thereby shall be allocated or apportioned according to Cl. 16-10. Cl. 16-12 will then only come into play from the time when repairs are actually commenced. Cl. 16-12, sub-clause 4 first sentence also refers to "the time the work started". The next sentence may seem confusing reading: "*Unless the circumstances clearly indicate another point in time, all categories of work shall be deemed to have started on the ship's arrival at the yard."* However, even if the vessel have "arrived" at the yard, any waiting time to begin repairs must be allocated or apportioned according Cl. 16-10 and shall not be shared equally according Cl. 16-12.

Casualties occurring while the vessel is en route to the repair yard or unknown damage discovered while the vessel is at the repair yard will not affect the allocation of the removal time to any particular category of work. The situation existing at the time the removal commenced will be decisive.

Where the ship goes to a repair yard without it being possible to conclude that one particular category of work has necessitated the removal, the most natural solution is to apply the apportionment rule in sub-clause 2 of Cl. 16-10.

Where removal to the repair yard is made necessary by more than one category of work, sub-clause 2 of Cl. 16-10 provides that the apportionment shall be made on a pro rata basis according to the time that each class of work would have taken if carried out separately. This method of apportionment is different from what applies in the case of simultaneous repairs, see 7.4.1 below. That rule provides for equal apportionment, whilst in sub-clause 2 of Cl. 16-10 the apportionment is pro rata to the time needed for each separate repair. The pro rata method was also applied under Cl. 8, No. 4 of the previous conditions. The pro rata method of apportionment provides a reasonable and balanced solution where removal to a repair yard is made necessary by more than one category of work. The apportionment rule in Cl. 16-10, sub-clause 2 has been applied in cases of deferred repairs of casualty damage where the class has approved that these repairs may be carried out simultaneously with the next ordinary docking. Then the removal to the docking yard is necessitated both by the deferred casualty repairs and the ordinary docking and other work necessary to satisfy the requirements of the class.

It has been discussed whether apportionment according to Cl. 16-10, sub-clause 2 will apply if the class has not imposed a Condition of Class that casualty repairs must be carried out not later than at the next docking. If not, the assured has an option to defer repairs to a later stage. All the same, if the assured avail himself of the opportunity to carry out casualty repairs at the first docking after the casualty occurred, in the writer's opinion apportionment according to Cl. 16-10, sub-clause 2 should apply. The same goes for non-classed items such as cranes. If the crane is out of operation due to damage or wear and the assured postpone repairs to a convenient time when the vessel for other reasons is taken out of service, apportionment according to Cl. 16-10, sub-clause 2 is in the writer's opinion appropriate.

An example will illustrate the difference between the two apportionment methods:

A ship uses 10 days to move to a repair yard where casualty repairs and owner's work are carried out for 80 and 20 days respectively. If the equal apportionment method in Cl. 16-12 had been applied, half of the removal time, i.e. 5 days, would have been allocated to each of the two categories of work. Under the pro rata apportionment rule of Cl. 16-10 sub-clause 2 , 80/100 of the removal time, i.e. 8 days, is allocated to the casualty work and 20/100, i.e. 2 days, to the owner's work.

The second sentence of sub-clause 2 states that removal time occurring during the deductible period shall not be apportioned. Where the deductible period has not been exhausted, it is considered to be unreasonable to make the assured bear a portion of the removal time. This means that the deductible period runs in the ordinary way, each day counting in full during the removal time even in cases where the time is in principle to be apportioned. The common removal time during the deductible period has to be disregarded. Apportionment is not to be applied until the deductible period is over. If the agreed deductible period in the above example had been 14 days, no removal time would have been apportioned. If the agreed deductible period had been 7 days, only 3 days would have been apportioned, on a pro rata basis.

Sub-clause 3 of Cl. 16-10 extends the rules in the first and second sub-clauses to time lost during surveys, see 7.1.3 above, obtaining tenders, see 7.2.5 above, tank cleaning, waiting to commence repairs and to "other similar measures which were necessary in order to carry out the repairs." Even if the removal to the repair yard is to be attributed to damage repairs covered by the insurer, it may be that it is the owner's work that necessitates, for instance, tank cleaning (classification works in dirty tanks not affected by the damage). Time lost for tank cleaning will then be for the assured's account.

7.4 The repair of the vessel

7.4.1 Simultaneous repairs, Cl. 16-12

Substantive amendments were made to Cl. 16-12 in 2003, and a mere editorial amendment was made in 2007 as a consequence of the abolition of the seaworthiness concept in the previous Cl. 3-22, which from 2007 contains the definition of safety regulations, see further the Commentary to Cl. 3-22. In 2013, the words "class of work" was replaced by "category of work". A new sentence was added to sub-clause 4 in 2016 and the word "policy" was replaced by "insurance contract" in line with the general change of terminology introduced in the 2016 version of the Plan, see the Commentary to Cl. 1-2.

Simultaneous repairs mean that two or more categories of work are carried out at the same time. The situation may be that repairs covered by the loss of hire insurance are carried out simultaneously with the owner's work, or that repairs resulting from two casualties covered by the same loss of hire insurance are carried out simultaneously, or that repairs covered under one loss of hire insurance are carried out simultaneously with work covered under another loss of hire insurance, or various more complex permutations of the above.

Cl. 16-12 of the Plan deals with simultaneous repairs and reads:

> *"If repairs covered under this insurance are carried out simultaneously with work which is not covered under any loss of hire insurance, but which:*
>
> *(a) is carried out to fulfil classification requirements or*
>
> *(b) is necessary to enable the ship to meet technical and operational safety requirements or perform its contractual obligations, or*
>
> *(c) is related to the reconstruction of the ship,*
>
> *the insurer shall pay compensation for half of the time common to both categories of repair in excess of the deductible period.*
>
> *If repairs resulting from two casualties, both of which are covered under this insurance, are carried out simultaneously, the rule in sub-clause 1 shall apply correspondingly for the time that is within the deductible period of one casualty, but not within the deductible period of the other casualty.*
>
> *If repairs covered under this insurance and work covered under other loss of hire insurance are carried out simultaneously, the insurer shall pay compensation for half of the repair time common to both categories of work in excess of the deductible period. This also applies where repairs under the other insurance contract are*

carried out within the deductible period under this insurance contract. Furthermore, if work which is not covered under any loss of hire insurance, but which falls within the scope of sub-clause 1, is carried out simultaneously, the insurer shall only pay compensation for one fourth of the common repair time which exceeds the deductible period.

When applying the rules set out in sub-clauses 1-3, each category of work shall be deemed to have lasted for the number of days the work would have required if each category of work had been carried out separately, reckoned from the time the work started. Unless the circumstances clearly indicate another point in time, all categories of work shall be deemed to have started on the ship's arrival at the yard. Any delay which might occur due to several categories of work being carried out simultaneously shall be attributed to all categories in proportion to the number of days each category would have required if carried out separately, reckoned from the time the work started. However, the insurer's liability shall not exceed the amount which would have been payable if the category of work for which he is liable had been carried out separately."

Where casualty repairs are carried out simultaneously with owner's work, the time lost will in reality be a result of a combination of causes, to which the main rules concerning causation in Cl. 2-13 would have applied in the absence of any specific rules. Specific apportionment rules have been provided in the loss of hire conditions in order to simplify the adjustment process. 16-12 supersedes the causation rules in two respects; with regard to when apportionment shall take place and with regard to the calculation of the apportionment in different types of situations.

It has sometimes been asked whether an apportionment is necessary at all. One solution could be to let the insurer be liable for all the time lost during the repair of casualty work, regardless of whether other work is carried out at the same time. However, such an extension of the cover would have resulted in an increase of the premium. While the 1999 Commentary, page 401, states that most shipowners would probably not be interested in paying for the extra benefit of being able to carry out their own work in parallel with casualty work, this assumption may be questioned. As will be explained below, the deletion of the previous letter (c), has developed the Plan a further step in the suggested direction.

The substantive amendment to sub-clause 1 in 2003 consisted of deleting the previous letter (c) and splitting letter (b) into two, the latter part of which was moved to letter (c). Sub-clause 1 provides for the apportionment between casualty work and owner's work within the following three categories of repair for owner's account:

1. Repairs required to fulfil classification requirements.

2. Repairs which are necessary for the technical and operational safety requirements of the vessel, or for the performance of the vessel's contractual obligations.

3. Repairs which are related to the reconstruction of the vessel.

Other repairs for the owner's account, which were previously listed under letter (c), no longer deprive the assured of full compensation under the loss of hire insurance, even if such other work for his account is carried out simultaneously with casualty repairs.

The provisions are based on two fundamental propositions. First, the fact that when two categories of repairs are carried out simultaneously, the total repair time will be less than if the repairs were carried out separately. Second, the view that any time saved by simultaneous repairs shall benefit both the assured and the loss of hire insurer. This is demonstrated by the following example:

Repair of casualty…….. 40 days
Classification repairs…… 40 days
Time for both repairs, if carried out simultaneously……. 40 days
Deductible period…… 14 days

If the two categories of repair are carried out separately, the loss of hire insurer would pay 40 – 14 = 26 days for the repair of the casualty. The assured would have to carry the time lost during the deductible period for casualty repair and the time lost during the classification repair (i.e. a total of 54 days).

Sub-clause 1 provides that if both categories of repairs are carried out simultaneously, the loss of hire insurer will pay for half of the time lost in excess of the deductible period i.e., the half of 26 days = 13 days. The assured must carry the deductible period of 14 days and half of the last 26 days, that is 13 days, all in all 27 days. This means that both parties have saved time and money by carrying out their repairs simultaneously.

The principle of equal division is based on the assumption that both parties will use the time equally efficiently, and if so, it is reasonable for them to share the time lost. However, the most important reason for this rule is probably that equal division is easy to apply in practice.

Letter (a) requires apportionment to be made when casualty repairs are carried out simultaneously with work for the owner's account done in order to fulfil class requirements. The only prerequisite for applying this rule is that the classification society has made the completion of the work a class requirement. A recommendation by class is clearly a class requirement within the meaning of letter (a). The same goes probably for a memo by class. On the other hand, it is not necessary for the class requirement to have been given in connection with a periodic survey or that the requirement is due immediately. Work done on mere suggestions of class will not be sufficient to apply letter (a), but it is conceivable that such suggestions may be relevant to applicable technical and operational safety requirements so that letter (b) may be applied.

Letter (b) deals with apportionment when casualty repairs are carried out simultaneously with work necessary to comply with technical and operational safety requirements or to enable it to perform its contractual obligations.. The reference to the ability of the vessel to perform its "contractual obligations" covers not only contracts of carriage of cargo and/or passengers, but any other contracts e.g. regarding research of all kinds such as geological services, salvage and towage contracts, stand-by service etc. Any repairs needed to perform under any type of contracts will fall under letter (b).

Letter (c) applies to all kinds of reconstruction of the vessel. The borderline between repairs/maintenance for owner’s account and reconstruction may be blurred in those cases where the owner needs to strengthen the construction of the vessel. Damage experiences related to the insured or other vessels may necessitate improvements of the construction of the

vessel by e.g. increasing the steel thickness on certain frames or plates of the hull. If imposed by the class letter (a) will apply. Letter (b) may also be applicable on such work. If neither letter (a) or (b) is applicable on such work, the question is whether such strengthening of the vessel must be deemed to be reconstruction of the vessel so that letter (c) will apply. The previous letter (c) which was deleted in 2003 expressly listed strengthening work among other owner's work which should be apportioned if exceeding 30 days'. Reconstruction was then listed in letter (b), so that strengthening work was clearly deemed different from reconstruction work. Therefore, mere strengthening work cannot now be treated as reconstruction work subject to apportionment pursuant to letter (c), but must be treated as owner's work which is no longer within Cl. 16-12, subsection 1 in the same way as other owner's work previously listed in letter (c).

The apportionment rules set out in sub-clause 1 are based on the assumption that the common repair time relates to work which is covered in its entirety by the loss of hire insurance and to work that is not covered at all. If the damage has been caused by a combination of perils not all of which are covered by the insurance, the apportionment rules in Cl. 2-13 to Cl. 2-15 must be applied in addition to the rules in Cl. 16-12. If so, one must first calculate the liability of the loss of hire insurer on the basis that the damage is fully covered by the perils insured against. Thereafter one must reduce the liability of the loss of hire insurer in accordance with the rules in Cl. 2-13 to Cl. 2-15.

This has been illustrated by the following example in the Commentary to Cl. 16-12

Repair of casualty	80 days
Insured's work falling under letter (a) or (b)	60 days
Time for both repairs, if carried out simultaneously	80 days
Deductible period	20 days

If both of repairs are carried out simultaneously, and if the damage were solely due to marine perils, the loss of hire insurer would have been liable for half of the common repair time in excess of the deductible, i.e. the half of 40 days = 20 days, plus further time to complete the casualty work = 20 days, i.e. a total of 40 days. The assured would have had to bear the deductible period and half of the common repair time (i.e. a total of 40 days).

However, if the casualty were the result of a combination of marine and war perils under such circumstances that Cl. 2-14 applies, only half the loss falls upon the insurer against marine perils, i.e. 20 days.[21]

If the casualty were the result of a combination of perils mentioned in Cl. 2-13, the 40 days shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss.

So far we have only considered how the common time of casualty repairs and owner's work will be treated. What will be the position when work is effected simultaneously to repair two (or more) casualties caused by separate accidents?

[21] The remaining 20 days set out in the marine peril loss of hire adjustment, would be covered under the war peril loss of hire insurance which is part of a standard war risk insurance covered on the basis chapter 15 of the Plan, in particular Cl. 15-2 letter (e), cp. Cl. 15-16. The same would be the case if the marine loss of hire insurance is expressly extended to comprise war risks, see further the introduction to chapter 16 below.

If both casualties are covered by the same loss of hire insurance, no problems arise as long as the deductible period for both casualties runs parallel. Since the two casualty repairs are effected simultaneously, the deductible period is common to both of them and incur only one deductible period. Furthermore, it is only the time lost in excess of the common deductible period that is recoverable under the loss of hire insurance. When casualty repairs are effected simultaneously, the total claim cannot exceed – but neither can it be less than – the period of the time expended on the longest–running repair in excess of the deductible period. The assured cannot recover time lost in excess of the deductible period more than once.

If the deductible period for one casualty expires before that of the other, the situation is dealt with by sub-clause 2[22], which states that the apportionment rule in sub-clause 1 is to be applied to the time that falls within the deductible period of one casualty, but not within that of the other. The provision may be illustrated by the following example given in the Commentary to Cl. 16-12:

"A ship suffers machinery damage in February and must call at a port of refuge to carry out temporary repairs. The prolongation of the voyage and the stay at the port of refuge amount to 14 days, which also happens to be the deductible period. In March of the same year the ship suffers heavy weather damage, the extent of which is determined during a stay at a repair yard in June. During this stay, permanent repairs of both casualties are completed. Carried out separately, the repair of the machinery damage would have required 40 days and the repair of the heavy weather damage 20 days."

The common repair time is thus 20 days. The deductible period for the machinery damage was consumed during the temporary repairs and had accordingly expired when the permanent repairs commenced. In the absence of any specific rules the time required for permanent repairs of the machinery damage would have been recoverable in full under the loss of hire insurance.

Under the same conditions, only six days would have been covered with regard to the heavy weather damage because the first 14 days of the permanent repairs would have consumed the deductible period.

However, sub-clause 2 provides that equal apportionment must be applied to the first 14 days of the permanent repairs, which means that the insurer is only liable for half of the time lost as long as the deductible period for the second casualty continues to run.

The liability of the loss of hire insurer will be as follows in the above example:

	Machinery damage	**Heavy weather damage**
Temporary repairs	14 days	-
Less deductible	- 14 days	-
	0 days	
Permanent repairs 40 days		
The first 14 days	7 days	0
26 days		
The next 6 days	3 days	3 days

[22] The wording of sub-clause 2 was edited in 2003, but this amendment has no bearing on the substantive content of this paragraph.

The last	20 days	20 days	0 days
Recoverable		30 days	3 days

The apportionment problem which arises where damage covered by two different loss of hire insurances are carried out simultaneously is dealt with in sub-clause 3. A typical situation is that one damage is covered under the 2015 policy while the other damage is covered under the 2016 policy. However, sub-clause 3 also applies if damage covered by the insurer against marine perils and damage covered by war insurance are repaired simultaneously.

The first sentence of sub-clause 3 provides that the rule of equal apportionment shall be applied. The following example will illustrate the point. The policy period is 1st of January – 31st of December, and loss of hire insurances have been taken out for both 2015 and 2016 but with two different insurers, and the deductible period is 14 days under both insurances. The ship suffers a machinery damage in December 2015 and a heavy weather damage in January 2016. During a stay at a repair yard in June 2016, repairs of both casualties are completed. Carried out separately, the repair of the machinery damage would have required 20 days and the repair of the heavy weather damage 30 days. The common repair time in excess of the deductible period is thus 6 days, which shall be apportioned equally between the two insurances. The last 10 days must be allocated to the heavy weather damage. This means that 3 days will be compensated under the 2015 policy, while 13 days will be compensated under the 2016 policy.

The rule of equal apportionment is also to be applied to common repair time which is within the deductible period for one insurance, but not within the deductible period for the other, see the second sentence. The assured will thus only be covered for half of the time lost while the latter situation lasts.

Where damage covered by two different loss of hire insurances is carried out simultaneously with owner's work of the type mentioned in Cl. 16-12, sub-clause 1, the third sentence of sub-clause 3 provides that the assured must carry half of the common time and the insurer shall divide the other half equally between them, i.e. ¼ each. The Commentary to Cl. 16-12 also states:

> "*In accordance with practice, the rule must be interpreted as meaning that the maximum the assured must cover is half the common repair time, and he must not have to bear a further 1/4 for the period during which the deductible period runs under one of the insurances but not the other. The insurer whose deductible period has expired must then pay compensation for half of the common repair time until the deductible period under the other insurance has expired."*

The Commentary l.c. continues with an impractical example which is not dealt with in the text of Cl. 16-12:

> *"The conditions do not address the conceivable, but hardly practical situation in which repairs relating to three different loss-of-hire policies are carried out simultaneously, but an analogy from the rule applicable to two insurances quite clearly leads to the conclusion that each insurer must only carry 1/3 of the common time in excess of the deductible period for the insurance contract in question. Furthermore, if owner's work of the type mentioned in Cl. 16-12, sub-clause 1, is*

carried out, the analogy would require that each of the three insurers must bear 1/6 of the loss of time, while the assured must bear 1/2."

In applying the rules set out in sub-clauses 1 - 3, it is necessary to establish the number of days that each category of work has lasted, in accordance with the provisions in sub-clause 4. The main rule in the first sentence is that each class of work shall be deemed to have lasted for the number of days the work would have required if the different categories of work had been carried out separately, counting from the moment the work commenced. This means that one must investigate how long each class of work would have taken if carried out separately. It could very well be that the work would have been completed sooner if performed separately, and, if so, this shall be taken into account. The fewest number of days that would have been required if the work had been carried out separately is to be used instead of the actual time used.

This is illustrated by the following example given the Commentary to Cl. 16-12:

"During a stay at a repair yard, both extensive casualty repairs and various work for owner's account are carried out. The total time spent at the yard is 98 days. The casualty repairs continue during the entire stay, while the owner's work is completed after 50 days. It would appear, therefore, that there are 50 days of common repair time, and if a deductible period of 14 days has been agreed, pursuant to the rules in the first paragraph the owner himself should have to carry the loss of time for 14 + 1/2 (50-14) days = 32 days."

However, if it turns out that owner's work would only have taken 30 days if carried out separately, while the casualty work would have taken 98 days in any event, then the assured must only carry 14 + ½ (30-14) days = 22 days.

It is further necessary to fix the starting points for the relevant periods, inter alia in relation to the deductible period, simultaneous repairs and the amount of the daily indemnity (Cl. 16-5).

The natural solution is to assume that the work was performed continuously from the time it was started until the expiry of the number of days that would have been used if the work had been carried out separately. However, the second sentence of sub-clause 4 contains an important supplementary rule. It is presumed that all classes of work are commenced at the same time, i.e. on the arrival of the vessel at the repair yard. This presumption must prevail even for work which has been postponed in the overall plan for the progress of the work and which has not been started at all during the initial period at the yard.

Different starting dates must be applied for casualty repairs where the ship suffers a casualty whilst in dock to carry out class surveys. The starting date will here be the time the casualty occurred. Where unknown damage is discovered after repair of another casualty has commenced, the starting date (for example in relation to a new deductible period) will be the time the damage was discovered.

Where each class of work would have taken less time if carried out separately than the total number of days that the vessel was at the repair yard, the third sentence of sub-clause 4 provides that the delay shall be apportioned over all classes according to the number of days each would have been required, if carried out separately, counting from the time the work started.

If we amend the above example and assume that the two classes of work would, if carried out separately, have required 30 and 90 days respectively and 98 days when carried out simultaneously, the repair time has been increased by 8 days, as a result of the simultaneous repairs.

The 8 days must be divided in the proportion 30:90, which means that 3/12 = 2 days are allocated to owner's work and 9/12 = 6 days to the casualty work. These shares must be carried by each group in full. They do not fall within the apportionment to be made in accordance with sub-clauses 1 and 2.

The total time to be borne by the assured would in this example be:
(14 + ½ (30-14) + 2) days = 24 days.
The casualty work would be charged with:
½ (30-14) + (90-30) + 6 days = 74 days.

In 2016 the principle of apportionment of delays was modified by adding a new fourth sentence to sub-clause 4 of Cl. 16-12 reading:

> *"However, the insurer's liability shall not exceed the amount which would have been payable if the category of work for which he is liable had been carried out separately."*

In the above example there will not be any change. The casualty work would have taken 90 days if carried out separately. Less deductible 14 days would give 76 days compensation, which is more than the 74 days that actually falls on the insurer after apportionment of the 8 days delay. If the example is modified so that the deductible period is e.g. 30 days, then the insurer would only compensate 90-30 = 60 days if the casualty work had been carried out separately. Hence, under the 2016 amendment, the insurer will limit his compensation to 60 days, so that the 8 days delay will have to be born by the assured.

7.4.2 Loss of time after completion of repairs, Cl. 16-13

Time may often be lost also after the repairs have been completed, for example, where the vessel is normally engaged in a particular limited geographical area or in a strictly local trade. In such cases, time will obviously be lost when the vessel proceeds from the repair yard to its normal place of operation. It is reasonable that the assured can recover this loss of time under his insurance policy.

Under the main calculation rule in Cl. 16-3, the insurer would, subject to the apportionment rules in Cl. 16-13, sub-clause 2, cf. Cl. 16-10, be liable in full for the loss of time after completion of repairs to the extent that such loss of time resulted from the casualty. In the absence of special rules, the insurer would have to cover time lost until the vessel was again able to earn freight, as well as any loss of income lost due to a cancellation of the charter party.

However, the loss of hire insurer's liability that would follow from Cl. 16-3 in respect of time lost after repairs have been completed, has been limited in Cl. 16-13, which reads:

> *"After repairs have been completed, the insurer shall only be liable for loss of time:*

(a) until the ship can resume the voyage or activity that it was engaged in under the contract of affreightment that was in force at the time of the casualty,

(b) until ships which are employed in liner trade or in another way follow a fixed route or operate in a defined geographical area can resume their activity,

(c) while the ship sails to the first port of loading under a contract of affreightment that was entered into with binding effect prior to the casualty.

(d) until passenger ships can resume their activity, but for a period not exceeding fourteen days.

Cl. 16-10 shall apply correspondingly to loss of time after completion of repairs."

Letter (b) was edited in 2013 by replacing the word "limited" with "defined".
Letter (d) and sub-clause 2 was added in 2003, but the provision in sub-clause 2 was not new but merely an editorial change, as the, in reality, same provision previously was found in Cl. 16-10, sub-clause 1, second sentence, see also on this point footnote 11.

According to Cl. 16-13, the insurer is not liable for time lost after the repairs have been completed except in the cases specifically mentioned in letters (a) – (d).

If the insurer is liable according to Cl. 16-13, the apportionment rule in Cl. 16-10 regarding time lost during removal to the repair yard shall be applied correspondingly to time lost after the completion of repairs, see 7.3 above.

This means that time lost after completion of repairs shall be attributed to the category of repairs that necessitated the removal to the repair yard. If removal to the repair yard was necessary for the repair of more than one category of work, the time lost after completion of repairs shall be apportioned in accordance with the time that each class of work would have required if carried out separately.

Cl. 16-13, letter (a), is based on the assumption that the ship was under a contract of affreightment in force at the time of the casualty and that the ship, after completion of the repairs, continues to trade under the same contract. In such cases, the insurer is liable until the vessel is again able to resume its voyage or the activity it was engaged in at the time of the casualty. The provision applies regardless of the type of contract of affreightment. Furthermore, the Commentary to Cl. 16-13, states that contractual obligations which are not contained in a contract of affreightment "must be regarded as equivalent to such contract". The provision could thus also apply to oral agreements.

If the contract in force at the time of the casualty is cancelled as a result of the casualty, the insurer will only be liable for the time lost up to the completion of the repairs.

Letter (b), deals with loss of time for vessels in liner trade or similar. In such cases the loss of hire insurer covers the time lost until the vessel is again able to earn income by resuming its normal activities.

Letter (c), is based on the assumption that a binding contract has been entered into prior to the casualty, but that the vessel had not yet started to operate under the contract at the time of the casualty. If the contract is cancelled because of the delay caused by the casualty, the insurer is only liable for the time lost up to the completion of the repairs. If the contract is not cancelled, the insurer is liable for the extra time needed to sail to the first port of loading. Letter (c) presupposes that the vessel is not earning freight until she commences to operate under the contract by arriving at the first port of loading. Letter (c) does not apply to a vessel already operating under e.g a voyage charter with cargo on board, see under 5.2.1.2 above.

Letter (d), was added in 2003 because it was felt that passenger vessels did not fit squarely into the categories in letters (a) to (c), but should be entitled to the same cover for loss of hire after completion of repairs if they were operated in a regular scheduled service or route or similar trading pattern where the passengers book in advance for specific tours leaving at certain pre fixed dates. In this kind of operation, the owner will not easily be able to fill up the vessel with passengers on short notice immediately after the vessel is back on the terminal ready for departure, but will have to wait at the terminal until the next scheduled departure. However, the cover pursuant to letter (d) is limited to 14 days after the completion of the repair because only in few instances would a passenger vessel perform longer round trips than 14 days. It is conceivable that some operators offer longer round trips, such as round the globe service or other longer tours, but if so the assured must arrange for necessary mitigation to secure income for a longer period than 14 days after completion of repairs on his own account. Passenger vessels comprises also cruise vessels and ferries carrying both passengers and cars and/or other roll/on roll off cargo. There are hardly any left of the old type of combined general cargo and passenger vessels, where the carrying capacity was first and foremost designed for the cargo and the passenger facilities were limited to a few passengers. To the extent such vessels are still in operation, they may be covered for loss of time pursuant to letter (b) if they are operated in a liner trade.

Time is sometimes lost after repairs have been completed due to the vessel being unable to find employment immediately thereafter. Such loss of time will not be covered by the insurance, even if the loss can be seen as a consequence of the stay at the repair yard and therefore of the damage to the ship.

7.4.3 Repairs carried out after expiry of the insurance period, Cl. 16-14

Cl. 2-11 of the Plan contains rules relating to causation and the occurrence of the loss (i.e. the time of the casualty). According to sub-clause 1 of Cl. 2-11 the insurer is liable for loss incurred when the insured interest has been "struck" by an insured peril during the insurance period. If the peril struck during the insurance period, the loss of hire insurer is liable also for loss which is sustained later. For example, if the insured ship grounded just before the insurance year expired on 31st of December 2015, the 2015 insurer will be liable for the loss of time even if most of the loss of time occurred in 2016. On the other hand, if a ship suffers a machinery casualty in 2016 as a result of cracks in the machinery foundation from the preceding year, the 2016 insurer will not be liable for the time lost. If the assured had loss of hire insurance for 2015, the assured must turn to that policy for cover.

However an important reservation must be made as a consequence of the rule set out in sub-clause 2 and 3of Cl. 2-11. If the cracks were unknown at the commencement of the 2016 policy, they shall then be regarded as a marine peril which struck the ship when the cracks started to develop in 2015. If so, the 2016 insurer must cover the lost time relating to the

repair of the consequential damage, whilst the 2015 insurer must cover the lost time relating to the repair of the original cracks.

Where the damage does not affect the vessel's technical and operational standards required to meet the safety requirements, the assured may decide when the loss of time shall occur (i.e. when he will put the vessel in for repairs). However, with regard to the insurance cover, the loss of hire insurer has a justified interest in requiring that a time limit be set to the assured's right to postpone repairs. This is dealt with in Cl. 16-14, which reads as follows:

> *"The insurer is not liable for loss of time resulting from a stay at a repair yard that commences more than two years after expiry of the insurance period.*
>
> *Loss of time resulting from a stay at a repair yard which commences after the expiry of the insurance period is recoverable in accordance with the rules in Cl. 16-5, even if the daily amount is an agreed amount pursuant to Cl. 16-6, if this results in lower compensation."*

Sub-clause 1 provides that repairs must have been commenced not later than two years after the expiry of the insurance period, otherwise the loss of hire insurer will not be liable. The reason for using the commencement of repairs as the cut-off time is that the extent of the loss of time cannot be established until the repairs have been carried out.

If a multi-year policy has been entered into, the two year period will not commence only at the end of the multi-year contract. This was a debateable point until 2003 because the Plan tacitly pre-supposed that the insurance period was one year. In periods where the premium increases there may be demand for multi-year policies, and in 2003 a new sub-clause 4 was added to Cl. 1-5 dealing with insurance periods. This new paragraph expressly provides that in relation to i.a. Cl. 16-14 the insurance period shall be deemed to be one year, even if the insurance attaches for a longer period than one year. Thus, for instance a five year insurance period must, for the purpose of Cl. 16-14, be split up into five one-year periods, commencing at every anniversary date of the agreed date of inception of the insurance. If the one-year periods follow the calendar year with the first inception date 1st of January 2015, the two-year time limit pursuant to Cl. 16-14 will expire at 31 December 2017 for any damage that occurred in 2015, 31st of December 2018 for any 2016 damage etc.

This time limit is an extension of the one-year limit given under Cl. 11 of the 1972 and 1993 conditions. During the 1996 revision of the Plan, there was discussion as to whether the time limit should be extended even further than two years in order to bring it in line with the five-year time limit allowed under the hull conditions in Cl. 12-6. However, the conclusion remained in favour of a two-year time limit, mainly because loss of hire insurance has traditionally been considered as short-tail business.

The stay at the repair yard shall be considered to have commenced the moment the voyage to the yard begins. If the repairs are carried out during several separate visits to repair yards, the time limit must be applied to each separate stay. The assured cannot circumvent the rule by commencing a temporary repair or repairing only part of the damage within the two-year limit.

Sub-clause 2 provides that if a stay at a repair yard is commenced after the policy period has expired, the agreed daily amount is the maximum limit of the insurer's liability. Within that

limit, the assured is only entitled to recover in accordance with the rule in Cl. 16-5. This means that the daily indemnity for repairs carried out after the expiry of the insurance period shall be calculated as if the insurance contract were an open policy. However, the daily indemnity will always be limited to the agreed daily amount, see Cl. 16-6, and this may well result in a lower compensation per day than the actual loss. The reason for sub-clause 2 is that when postponement of repairs is chosen, for instance when the vessel is trading at an especially favourable rate, the basis for the original assessment may no longer apply.

8. CHANGE OF OWNERSHIP, Cl. 16-15

8.1 General

The purpose of Cl. 16-15 is to regulate the liability of the insurer when the vessel is transferred to a new owner. Sub-clause 2 of the 1996 and subsequent versions prior to 2003 were deleted in 2003. The previous sub-clause 3 became sub-clause 2 in 2003 and later versions. The now sub-clause 2 was amended in 2010. The provision reads as follows:

> *"When damage to the ship is repaired in connection with a transfer of ownership, the insurer shall not be liable for time that would in any event have been lost in connection with the said transfer. If the transfer has to be postponed due to repairs covered by this insurance, the insurer shall be liable for the assured's loss of interest in accordance with the rules of Cl. 5-4, even though the ship would not have earned income during the postponement.*
>
> *The insurer's liability pursuant to sub-clause 1 shall not exceed the compensation calculated on the basis of the sum insured per day and:*
>
> - *the period of time by which the transfer was postponed, or*
> - *the time it must be estimated that the buyer will take to repair the ship,*
>
> *less the agreed deductible period. The deductible period is calculated in consecutive days even if the loss of interest differs from the sum insured per day. No compensation may be claimed under Cl. 16-13 in these cases.*
>
> *The assured's claim against the insurer may not be transferred to a new owner."*

Cl. 16-15 has its parallel in Cl. 12-2 of the hull conditions. Somewhat surprisingly, while claims for known damage under the hull insurance may be transferred to the new owner, claims under the loss of hire insurance may not, see further under 8.4 below.

8.2 Repairs carried out in connection with the transfer

SALEFORM[23] 2012, one of the often-used standard-form agreements for the sale and purchase of second-hand tonnage, illustrate the context in which Cl. 16-15 will apply in respect of repairs carried out in connection with the transfer of a vessel to a new owner (the buyer).

It follows, inter alia, from Clause 6 (a) (i) of SALEFORM 2012 that unless otherwise *agreed* "*the Buyers shall have the option at their cost and expense to arrange for an underwater inspection by a diver approved by the Classification Society prior to the delivery of the vessel."*

[23] Norwegian Shipbroker's Association's Memorandum of Agreement for sale and purchase of ships. Adopted by BIMCO in 1956. Code name SALEFORM 2012. Revised 1966, 1983 and 1986/87, 1993 and 2012

SALEFORM 2012 Clause 6 (a) (ii) goes on:

> *"If the rudder, propeller, bottom or other underwater parts below the deepest load line are found broken, damaged or defective so as to affect the Vessel's class, then (1) unless repairs can be carried out afloat to the satisfaction of the Classification Society, the Sellers shall arrange for the vessel to be drydocked at their expense for inspection by the Classification Society of the vessel's underwater part below the deepest load line, the extent of the inspection being in accordance with the Classification Society's rules (2) such defects shall be made good by the Sellers at their cost and expense to the satisfaction of the Classification Society without condition/ recommendation and (3) the Sellers shall pay for the underwater inspection and the Classification Society's attendance."*

Alternatively, under SALEFORM 2012 Clause 6 (b) the parties may agree to skip the diving inspection and drydock the vessel. This clause reads:

> *"The Sellers shall place the Vessel in drydock at the port of delivery for inspection by the Classification Society of the Vessel's underwater parts below the deepest load line, the extent of the inspection being in accordance with the Classification Society's rules. If the rudder, propeller, bottom or other underwater parts below the deepest load line are found broken, damaged or defective so as to affect the Vessel's class, such defects shall be made good at the Sellers' cost and expense to the satisfaction of the Classification Society without condition/ recommendation. ……"*

According to Cl. 16-15, sub-clause 1, when damage is repaired in connection with the transfer of ownership, the loss of hire insurer is not liable for time that would in any event have been lost in connection with that transfer. This provision recognises that the seller will usually take the vessel out of service for diving inspection and/or docking in order for the buyer to have it properly inspected prior to delivery. In the normal course of events, the vessel will be delivered to the new owner upon completion of the diving inspection or undocking of the vessel or shortly thereafter, depending on the terms of the sales contract. Thus, once the vessel is taken out of service by the seller for delivery to the buyer, there will no longer be a potential for loss of income on the part of the seller. If the delivery is delayed due to repairs of damage covered under the loss of hire insurance, the seller will not suffer a loss of hire, but he will suffer loss of interest on the purchase money since the buyer normally is entitled to withhold payment until the vessel is actually ready to be delivered.

The assured's loss of interest is recoverable under the policy pursuant to Cl. 16-15, sub-clause 1, second sentence, which states that if the transfer of ownership has to be postponed in order to repair damage relevant to the loss of insurance, the loss of hire insurer is liable for the assured's loss of interest "in accordance with the rules in Cl. 5-4" and regardless of whether the vessel would have earned income for the assured during such delay.

The words in inverted commas above quoted from Cl. 16-15 means that the rate of interest applicable for the insurance year in question shall be applied. The insurance compensation for the assured's loss of interest is thus on an assumed rather than actual basis. On the rate of interest see under 13 below. This calculation method will usually reflect the level of interest applicable at the time and will often, but not always, give the assured full compensation for the loss he suffers because of delayed delivery of the vessel to the new owner.

On the other hand, the linking of the assured's loss to the interest rate as per Cl. 5-4 is not supposed to provide a higher compensation that which what would follow from the daily amount insured, multiplied by the time for which transfer was postponed or the estimated time necessary for the new owner to complete the repair, see Cl. 16-15, sub-clause 2. The deductible period as per Cl. 16-7 will, of course, apply also in cases where the vessel is transferred to a new owner. This means that the insurer may draw up an ordinary particular average adjustment and compare the net payment to the seller (assured) with payment of interest as previously mentioned and the assured is only entitled to the lower of these two amounts.

How to apply the deducible period if the daily amount of interest on the purchase price was different from the sum assured per day was somewhat debatable before 2010. The Commentary to Cl. 16-15 explains in detail the two different methods that were applied. In 2010, this debate was brought to an end by adding a new second sentence to sub-clause 2 of Cl. 16-15 reading:

> *"The deductible period is calculated in consecutive days even if the loss of interest differs from the sum assured per day."*

Thus if repairs takes 30 days, and the deductible period is agreed at 14 days, 16 days shall be compensated. No conversion shall be made if the daily amount of interest is USD 5,000 while the sum assured per day is USD 7,500. The assured will be compensated in an amount of USD 80,000 under the loss of hire insurance, 16 days @USD 5,000.

8.3 Transfer of ownership with unrepaired damage

The seller/the assured and the buyer may agree that the vessel shall be delivered "as is" with the damage unrepaired, in which case the seller and the buyer will usually have agreed a reduction of the purchase price. Such reduction may not only reflect the repair costs, but also the buyer's loss of earnings during the repair period. Prior to 2003, the latter portion of the reduction of the purchase price was recoverable from the loss of hire insurer pursuant to the previous sub-clause 2 of Cl. 16-15 but with effect from 2003, this provision was deleted. This was because such delayed repairs normally would be carried out at the buyer's convenience so that he will in reality not suffer any loss of hire and consequently not claim any reduction of the price on account of future loss of income during the postponed repairs.

8.4 Assignment of insurance

One may ask whether, in cases where there is a change of ownership in the vessel, it might not be simpler to transfer the assured's claim under the loss of hire insurance together with the title to the vessel. The assured has the option to agree with the buyer that claims under the hull insurance are assigned to the buyer, see Cl. 12-2. However, according Cl. 16-15, sub-clause 4, the assured's claim under the loss of hire insurance cannot be transferred to a new owner. The insurer has assumed the obligation to insure the assured's loss of earnings, not the loss of earnings, which the new owner might suffer.

9 SUBROGATION, OTHER INSURANCE AND GENERAL AVERAGE, CL. 16-16

9.1 Subrogation and double insurance in general

Cl. 5-13 is the general rule that the insurer is subrogated to the rights of the assured against third parties. This rule is also applicable to the loss of hire insurance. The general rule is that the insurer is entitled to his proportion of such claims. The insurer's claim shall not take preference over the assured's claim against the third party. The assured may have suffered losses that are not covered by the insurer, such as deductibles, or he has not taken out insurance for the loss, it is uninsurable or he has lost his insurance cover for that particular loss. Regardless of the reason why the assured has suffered a loss on his own account, he is entitled to a proportion of the recovery from the third party.

Cl. 2-6, sub-clause 1, contains the general rule on double insurance. The general rules is that each insurer is jointly liable towards the assured. He may choose between them, and if one insurer does not pay wholly or in part, the assured may make a claim against the other insurer until he has received the full compensation to which he is entitled.

In some cases, insurance conditions expressly state that the insurance is subsidiary to any other insurance.

Pursuant to Cl. 2-6, sub-clause 2, the subsidiary insurer is only liable to the extent the primary insurer does not pay the claim. If all insurances are subsidiary, the rule in Cl. 2-6, sub-clause 1, shall apply which means that all of them are transformed to primary insurances with joint and several liability towards the assured.

Cl. 2-7 provides that the insurers are internally liable in proportion to the amount for which each insurer was liable and may seek recourse against each other if they have paid more than their share to the assured.

Cl. 2-6 and 2-7 are also applicable to the loss of hire insurance, but Cl. 2-7 is set aside by Cl. 16-16 as will be explained under 9.3 below.

9.2 Subrogation in claims against third parties

As explained under 9.1 above, Cl. 5-13 also applies the loss of hire insurer. He is therefore subrogated to the assured's claim for loss of earnings caused by a collision between the assured's vessel and a vessel belonging to a third party. The loss of hire insurer may also be subrogated to the assured's direct claim, if any, against the other vessel's insurer covering the liability for the collision.

Likewise, the loss of hire insurer is subrogated to the assured’s claim against a repair yard for faulty repairs and delayed re-delivery of the vessel from the yard after repairs subject to the terms of the contract between the assured and the yard. He may also be subrogated to the assured's claim for freight against a charterer. In all these cases, the apportionment principle of Cl. 5-13 will apply.[24]

[24] The Commentary to the versions prior to the 2003 version (1999 Commentary on page 414) introduced a so-called “top/down principle” which was not in conformity with Cl. 16-16 express reference to Cl. 5-13. Since the 2003 version of the Norwegian Plan the Commentary to Cl. 16-16 expressly states that the “top/down” principle

The Commentary to Cl. 16-16 provides an example to illustrate how apportionment shall be adjusted according to Cl. 5-13 (as opposed to the now obsolete and abolished "top/down principle". The Commentary states:

> *"An example will illustrate how the apportionment is to be carried out: the ship is insured for 90 days per casualty. The daily amount is USD 10,000 and the deductible period is 14 days. After a collision, the ship suffers a loss of time of 180 days equivalent to USD 1,800,000. The casualty is settled as follows: the assured must carry the first 14 days, after which the insurer covers the next 90 days, paying a total of USD 900,000 in compensation, and finally the assured covers the remaining 76 days. It is assumed that there are no simultaneous repairs. Blame in the collision settlement is apportioned on a 50/50 basis, and the opposite party accepts the loss of time of 180 days as the basis for the settlement. The insured ship then recovers 50% of USD 1,800,000 = USD 900,000. The recovery must be apportioned on a pro rata basis between the parties according to the time each of them has covered. The assured receives 50 % of (14 + 76) = 90 days of lost time, i.e. USD 450,000, while the insurer receives 50 % of the loss of time that he has covered (90 days), i.e. USD 450,000.*
>
> *The net result of this procedure is that the insurer only pays USD 450,000 despite the fact that the sum insured is USD 900,000. At the same time, the assured will have an uncovered loss of 50 % of the uninsured time, i.e. USD 450,000. When the loss-of-hire conditions of 1972 and 1993 were practiced, it was claimed that since the insurer's net payment did not amount to the full sum insured, he had to use his share of the recovery to "continue" to cover the assured's uncovered loss of time in excess of the deductible period. In actual fact, however, this would be reintroducing the "top-down" principle. The rule of pro rata apportionment pursuant to Cl. 5-13 must be applied consistently in all cases. Therefore the insurer must not be obliged to use the amount he recovers to compensate for further loss of time.*
>
> *As an extension of this issue, there has in practice been discussion as to whether the insurer is liable for use of the unused part of the sum insured – in the example above, USD 450,000 – to cover a subsequent casualty in the same insurance period. The answer to that question is no. In practice, it can take many years from the time of the casualty to which the refund applies until the refund is actually paid out. The possibility of transferring such a refund to a subsequent casualty will create uncertainty as regards the scope of the cover. Normally, the parties will also have agreed that cover is to be automatically reinstated. In such case the calculation of the reinstatement premium must be deferred until the time of refund or, if appropriate, adjusted once the refund is ready. This can take place many years after the insurance contract period has been "closed". The same approach must therefore be adopted for subsequent casualties as for the casualty to which the refund applies: in no case may the refund be used to cover the assured's uncovered losses.*
>
> *However, the apportionment principle in accordance with Cl. 16-16, cf. Cl. 5-13, only applies to recovery settlements. Other principles apply to apportionment settlements*

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shall no longer apply. This is maintained in the Nordic Plan Commentary to Cl. 16-16 in the 2013 version and the current 2016 version.

between the assured and the insurer in accordance with Cl. 16-11, sub-clause 3; see the Commentary on this provision."

9.3 Subrogation in claim against other insurers or general average

As explained under 9.1, Cl. 16-16 sets aside Cl. 2-7 and introduces the principle of Cl. 5-13 instead. Cl. 16-16 reads:

"The rules as to subrogation in Cl. 5-13 of the Plan shall apply correspondingly to:

(a) the assured's right to claim compensation for loss of time and operating costs during removal to a repair yard under Cl. 12-11 or Cl. 12-13 of the Plan, or equivalent provisions in other conditions applicable to the ship's hull insurance, and

(b) any right the assured might otherwise have to claim compensation for his loss from any other insurer or in general average."

This provision corresponds to Cl. 13 of the 1972/1993 conditions.

Under 7.2.3 above, it was explained that the hull insurance offers a true loss of hire cover for time lost in obtaining tenders. The hull insurance covers time so lost in excess of ten days. The same period of loss of time compensated by the hull insurer may also be covered by the loss of hire insurer. Letter (a) of Cl. 16-16 provides that the loss of hire insurer shall be entitled to full recourse against the hull insurer for loss of time which is payable by the hull insurer pursuant to Cl. 12-11, sub-clause 2. While the hull insurer's liability during the excess period is fixed at 20% per annum of the agreed insurable value, the loss of hire insurer may be liable to pay any loss of hire exceeding such amount, if recoverable pursuant to Clauses 16-5 or 16-6.

The same goes for the partial cover of operating costs compensated by the hull insurance pursuant to Cl. 12-13, sub-clause 1. The reason that the loss of hire insurer has full recourse against the hull insurer for these costs is that the assured will be compensated twice if he recovers both loss of hire and operating costs. The lost income compensated by the loss of hire insurer is not the net profit of the assured, but the gross income. It would be a windfall profit for the assured if the loss of hire insurer were not entitled to recover the operating costs compensated by the hull insurer.

However, it must be evaluated on a case by case basis whether there would in fact be any such windfall profit for the assured. If not, there is no reason for any recourse or deduction by the loss of hire insurer. In the most common cases where the daily amount is agreed at an amount without any specification as to which items are covered, the daily amount is normally intended to compensate the gross income less saved variable costs. If so, there will be a windfall profit for the assured, if he should both get the agreed daily amount and the compensation from the hull insurer according to Cl. 12-13, sub-clause 1 for costs of removal of the damaged vessel to the repair yard.

In some cases, the hull insurer compensates wholly or partly crew wages if they participate in the damage repairs. This is so, for example, under German hull conditions. According to Cl.

12-5 (a) of the Nordic Plan, ordinary crew wages are not covered during repairs unless otherwise specially agreed. Such special agreement is rather common these days as the insurer acknowledge that it may also be beneficial for the hull insurer to let the crew carry out repairs that do not need to be carried out at a yard or by expert repairers. Overtime paid to the crew participating in damage repairs is normally covered by the hull insurer. In many cases it may be difficult to distinguish between ordinary crew wages and overtime, which cause the hull insurer to agree to pay all the crew wages (ordinary as well as overtime) for those participating in the damage repairs. Also in these cases the loss of hire insurer will have recourse against the hull insurer according to Cl. 16-16 (a), if there will, otherwise, be a windfall profit for the assured. However, the hull insurer's compensation of mere overtime to the crew participating in damage repairs, will normally not entitle the loss of hire insurer to any recourse against the hull insurer, as overtime is not comprised within the daily amount unless expressly agreed.

Cl. 16-16 deals with recourse, not with priority[25]. The assured may thus always claim the total time lost from the loss of hire insurer and leave it to the loss of hire insurer to seek recourse from the hull insurer. However, to the extent that any loss of time has already been compensated by the hull insurer, such amount should be set off against the assured's right to compensation from the loss of hire insurer, see the Commentary to Cl. 16-16. The same follows from Cl. 2-6.

Letter (b) of Cl. 16-16 is probably superfluous insofar as the assured's claim in general average is concerned. Cl. 5-13 would have been applied on such claims at any rate, cp. the 1972 Commentary, page 71.

Operating costs such as victualling, crew wages may be allowable in general average and, if so, the loss of hire insurer should be subrogated to these claims for the same reason as explained above with regard to Cl. 12-13 claims on the hull insurer.

For all practical purposes, a loss of time claimable from insurers other than the hull insurer is a claim against a liability insurer. This may be the liability insurer of another vessel or another tortfeasor. Such claims would at any rate be subject to Cl. 5-13, se under 9.2 above, if there is a right of direct action.

However, in addition to a loss of hire insurance, the assured may have taken out separate, freight risk insurance covering a voyage freight. If so, there is a double insurance, and the loss of hire insurer will have full recourse pursuant to letter (b).

[25] Cl. 16-11, on the other hand, expressly provides in effect that for any overlap between the hull insurance and the loss of hire insurance with regard to costs of preventive measures covered by the loss of hire insurance, the loss of hire insurance is subsidiary to the hull insurance.

10. MORTGAGEE INTERESTS

10.1 How to protect the mortgagee's interests

The mortgagee may protect his interests in many different ways. Which alternatives or combination of alternatives he will choose, will depend on the mortgagee's evaluation of the borrower's creditworthiness. Usually, the loan is secured by a mortgage on the vessel covering the total outstanding principal amount at any given time, plus interest on the loan for an agreed period which may vary from six months to one and a half years. The mortgagee will also require that the value of the mortgaged vessel never fall below the outstanding principal amount plus interest as aforesaid, plus an additional margin usually set at 30% or 50 %. If the value of the mortgaged vessel falls below the required minimum value (and the borrower does not supplement the deficit by granting additional securities), the mortgagee will normally be entitled to terminate the loan and demand payment of the total outstanding amount together with interest and costs, if any. In many instances, the mortgagee will also require collateral security by way of a pledge of other assets, assignment of charter hire or a bank guarantee. Thus, the mortgagee's interests are generally well protected by the provisions of the loan agreement, the mortgage and the collateral security provided by the borrower.

One risk that the mortgagee faces is the ship's value falling below the minimum required under the loan agreement, in which case the loan will be partially unsecured. The collateral security may compensate for the fall in the vessel's market value, but the mortgagee will still be exposed because he will then have to depend solely on the collateral security for the portion of the loan that also used to be covered by the lost value of the vessel. However, the mortgagee always bears this commercial risk. Such commercial risk may be protected by a credit insurance, which is comparable with a bank guarantee.

10.2 Protection of the mortgagee's interests under property insurances

The mortgagee's interests may be protected in two different ways:

1. Independent cover of the mortgagee's interests under a so-called Mortgagee Interest Insurance (MII)

2. Protection of the mortgagee's interests under the owner's insurances
   - (a) Assignment of the owner's insurances to the mortgagee
   - (b) Co-insurance of the mortgagee under the owner's insurances, Chapter 7 of the Plan.
     - i) Dependent co-insurance, Cl. 7-1
     - ii) Independent co-insurance, Cl. 8-7

10.2.1 Mortgagee Interest Insurance

This insurance is taken out by the mortgagee himself, who is then the contracting party or, to keep with the terminology in Cl. 1-1 (b) of the Plan, the "person effecting the insurance". Financial institutions, such as banks, will often prefer to take out such insurance to cover the whole portfolio of vessels wholly or partly financed by the bank in order to facilitate the administration of the portfolio.

Mortgagee Interest Insurance is not covered under the Plan. It is covered on separate terms, most often on English conditions with some amendments or additions. The independent Mortgagee Interest Insurance covered on English conditions does not offer any protection for the mortgagee's interests in the vessel's earning capacity, only protection of the mortgagee's interests if the vessel is damaged or lost.

10.2.2 Protection under the owner's insurances

The loan agreements invariably require the owner to secure protection for the mortgagee under the owner's insurances. The mortgagee must see to it that he is protected in each individual case, which is part of the standard procedure followed by lenders in the so called «closing procedure» complied with before any funds are made available under a loan agreement. However, the mortgagee must also follow up on each renewal of the insurances and safeguard that the renewed insurances protect his interests as mortgagee. The loan agreements usually do not require the owner to renew with the same insurer throughout the term of the loan, hence the need for the mortgagee to follow up on the renewals. To the extent the owner enters into long-term contracts with the insurer, the mortgagee's interests may, of course, be correspondingly protected for the same period.

10.2.2.1 Co-insurance of the mortgagee

Co-insurance can either be independent of or dependent on the owner's cover. In the latter case, the mortgagee has no claim against the insurer if the owner has forfeited his right to cover.

10.2.2.1.1 "Dependent" co-insurance

Chapter 7 of the Plan contains provisions regarding the co-insurance of the mortgagee's interests under the owner's insurances.

Cl. 7-1 provides that the mortgagee be automatically co-insured "if the interest covered by the insurance is mortgaged". This means that the mortgagee is automatically co-insured under the loss of hire insurance only if the earnings of the vessel are assigned or pledged to the mortgagee. Thus, in theory, there is no need to notify the insurer about the assignment/pledge of the earnings, but this is nevertheless still done as a matter of routine so that the mortgagee obtains the further protection pursuant to Cl. 7-2 to 7-4.

Cl. 7-2 requires that the insurer give the mortgagee a specific prior notice of not less than fourteen days if the terms of the insurance policy are amended during the currency of the insurance or if the insurance is prematurely terminated (e.g. in the case of non-payment of premium, see Cl. 6-2).

Cl. 7-3 deals with claims handling and has been written with hull insurance in mind. However, neither the wording nor the Commentary suggest that Cl. 7-3 shall not apply to protection of the mortgagee's interests under a loss of hire insurance, so the claims handling and adjustment under the loss of hire insurance is done by the loss of hire insurer (in co-operation with the owner as required) without any interference by the mortgagee. Likewise, sub-clause 2 of Cl. 7-3 should be applied by analogy to loss of hire insurance so that the owner cannot waive his claim for loss of hire compensation without the consent of the mortgagee. This solution is consistent with Cl. 7-4, sub-clause 4 see further on this sub-clause below under 10.2.2.3.2. The combined effect of Cl. 7-3, sub-clause 2 and Cl. 7-4 is that any cash payments not covering repair of the vessel may not be made to the owner without the

consent of the mortgagee as such cash payments from the insurer should primarily be paid to the mortgagee as down payment of the loan. Exception is made for smaller amount defined as up to 5% of the sum insured, cf. Cl. 7-4, sub-clause 2. Total loss compensation is, of course, the most relevant example of cash payment that must be secured for the mortgagee, as the security for the loan by way of mortgage in the vessel literally is lost. Cash payments for unrepaired damage according to Cl. 12-1, sub-clause 4 and Cl. 12-2 may not be paid to the owner without the consent of the mortgagee, cf. Cl. 7-4, sub-clause 3. The same goes for any payments under the loss of hire insurance, cf. Cl. 7-4, sub-clause 4 provided the mortgagee has actually secured a pledge or mortgage on the freight income of the vessel, see further under 10.2.2.3.2. It would be inconsistent if the owner could waive his claim for payment in advance under the loss of hire insurance to the detriment of the mortgagee. Hence, Cl. 7-3, sub-clause 2 must be applied by analogy to payments under the loss of hire insurance.

10.2.2.1.2 Independent co-insurance

Cl. 8-7 offers the mortgagee an optional independent co-insurance at an additional premium to be agreed in each case. If the mortgagee avails himself of this option, the insurer is barred from invoking any of the defences they otherwise could have invoked under Chapter 3 of the Plan. Such independent cover will protect the mortgagee under the individual insurance it applies to nearly to the same extent as Mortgagee Interest Insurance taken out in his name. However, the mortgagee must also follow up on the renewal of the owner's insurances, in the case of such independent cover. Independent co-insurance of the mortgagee's interests cannot replace the Mortgagee Interest Insurance for the two reasons pointed out above.

10.2.2.2 Assignment of insurance

Under English insurance practice, it is unusual to co-insure the mortgagee under the owner's insurances. However, much the same effect is obtained by an assignment of the insurances. Based on the general rules of assignment of claims, cp. ~~§~~ S. 25 of the Norwegian Promissory Note Act, the mortgagee will not get any better rights towards the insurer than he had towards the owner. In other words, the mortgagee stands in the shoes of the owner exactly as if he had been co-insured pursuant to Chapter 7 of the Plan. Assignment of insurances also takes place in Norway, even though the mortgagee is co-insured based on the Plan.

For the assignment to be valid and protected, if the owner should become insolvent and/or placed under bankruptcy proceedings or the like, the insurer must be notified in writing.[26] A notice of assignment is a condition for the assignment to be valid.

Otherwise, the assignment will also provide that the owner and insurer are deprived of their respective right to agree amendments of the insurance terms, and early termination of the insurance must be notified to the assignee (the mortgagee).

It is noteworthy that under English insurance law and practice, the insurer is normally not entitled to terminate the insurance due to the non-payment of premium. This may be explained in part by the fact that the broker is liable for the payment of premium, which is not the case under Norwegian law.[27]

10.2.2.3 Loss payable clauses

[26] Law of property Act S. 136
[27] Discussions are ongoing whether to amend English law on this point.

10.2.2.3.1 Assignment

Regardless of whether the mortgagee is co-insured under the owner's insurances or whether the insurances are assigned to him, it is necessary to determine when the mortgagee is entitled to payment under the policies. This is normally done by the so-called "loss payable clause" included in the assignment of the insurances. Where the insurance is assigned to the mortgagee, it follows logically that the mortgagee is the only one entitled to payment under the insurances. However, this conclusion may go too far in two ways:

1. Third parties may be entitled to a direct action against insurer in conflict with the rights of the mortgagee.

2. The owner may need the insurance money to carry out repairs.

The first point is very often overlooked by the standard loss payable clauses in use, while the second point may be taken care of by allowing the insurer to pay out minor amounts in order to facilitate matters for all three parties to the assignment. The amount is usually fixed or expressed as a small percentage of the sum insured.

The two issues raised above will not be a problem in relation to loss of hire insurance because third parties will hardly have any right of direct action under a loss of hire insurance and the vessel's hull insurer is the one, who provides the means for repair of the vessel. Therefore, it is justified to make an assignment of payments under the loss of hire insurance without limitations. This is, of course, clear in cases where the earnings of the vessel are pledged in favour of the mortgagee, but the same should apply in cases of a simple assignment of the loss of hire insurance to the mortgagee.

Another important point, especially under English law, is the result of The Angel Bell award,[28] which states:

> *"A loss payable clause gives no rights to the loss payee unless it also constitutes or evidences an assignment of the assured's rights under the policy or evidences the fact the designated person is an original assured".*

A loss payable clause is therefore not valid unless there is an assignment, and the assignment is not valid unless there is a notice of assignment. In the practical world the notice of assignment is often considered as an unimportant formality, but as The Angel Bell Award proves, the notice of assignment is a condition for all the other documents to be valid, and may even constitute a breach of the loan agreement.

10.2.2.3.2 Co-insurance

Special loss payable clauses, similar or identical to those used in relation to an assignment of insurances, will be used when the mortgagee is co-insured under the owner's insurances. Such clauses are not necessary if the vessel is insured based on the Plan because Cl. 7-4 contains the provisions necessary both to protect third party interests and to enable the owner and insurer to deal smoothly with minor repairs up to 5% of the sum insured.

Cl.7-4, sub-clause 4, provides that compensation for loss of time may not be paid out without the consent of the mortgagee "who has a mortgage on the ship's freight income". This is consistent with Cl. 7-1, which provides that the mortgagee will not be automatically co-

[28] The Angel Bell [1979] Lloyd's Rep. 491, quote from page 497.

insured under the loss of hire insurance if he does not have a pledge in the income of the vessel. The reason for this limitation is that the loss of hire insurance is irrelevant for a mortgagee who has no interest in the earnings of the vessel. However, the parties may agree to give the mortgagee the same benefits also in cases where he has not obtained a pledge on the income of the vessel, in which case the mortgagee must either have the loss of hire insurance assigned to him or be expressly included as a co-assured under the loss of hire insurance.

11. CO-INSURANCE UNDER THE LOSS OF HIRE INSURANCE

11.1 The need for co-insurance

In principle, there is no reason to restrict or prevent co-insurance of interests other than the mortgagee's under the owner's insurances. In many instances there will be no need to co-insure such other third parties under the owner's loss of hire insurance, but in special circumstances such co-insurance serves a useful purpose. It may well be that the parties are better served by arranging a separate and independent loss of hire insurance for each individual interest.

A charterer who operates the vessel to serve his own transport needs will hardly need loss of hire insurance because the vessel will normally be off-hire under the off-hire clauses commonly included in charterparties, alternatively no freight will accrue until the voyage is performed. If the freight is at risk, a separate freight insurance may be placed. Such freight insurance must not be confused with freight interest insurance pursuant to Chapter 14 of the Plan. Chapter 19 of the 1964 Plan contained conditions for freight insurance, but this chapter was not maintained in the 1996 Plan. The demand for this type of insurance was considered so small that it was left to the insurers interested in this segment of the market to develop their own conditions.

For parties who charter vessels in order to trade them in the market (or sublet them on time charterparty or comparable terms), it is probably preferable to take out a separate loss of hire insurance than to be co-insured under the owner's loss of hire insurance. Nevertheless, in principle both the owner's and the charterer's interests in the earning capacity of the vessel may be insured under the same policy. The owner's interest will be the charter hire and the charterer's interest will be the balance between the freight he earns in the market and the charter hire payable to the owner.

The company structure of a shipowning and operating group may also make it desirable to effect one loss of hire insurance for the whole group and co-insure the interests of the various companies in the group under the same policy.

11.2 Co-insurance pursuant to Chapter 8 of the Plan

11.2.1 The co-insurance agreement

Chapter 8 of the Plan governs the co-insurance of third parties (other than mortgagees). This chapter was substantially edited and re-written in the 2016 version. Unlike the automatic protection given to mortgagees pursuant to Cl. 7-1, Cl. 8-1 provides:

> *"If the insurance is explicitly effected for the benefit of a third party, the insurance also covers this party's interests within the scope and overall limits of the insurance."*

The word "named" was deleted from Cl. 8-1 in 2016. This deletion has significant implications. In the previous versions of the Plan, there was no co-insurance of third parties unless they were expressly named. The intention was that each co-assured should be identified by the name of the company (or individual) stated to be a co-assured under the insurance. If not, there was no co-insurance in place. Thereby, the insurer got full control over the extra risks that a co-insurance may entail.

However, in particular in the offshore industry, the practice was to define the co-assured in more generic terms, cf. the waiver of subrogation and co-insurance clause in Cl. 18-1 (i). This practice spread to individual co-insurance clauses in insurance contracts for trading vessels. It was considered too burdensome to name each company that should be co-assured if there were many. Therefore, it is now common with co-insurance clauses to list a number of entities as co-assured in a generic manner by general non-specific reference, e.g. affiliated, associated or subsidiary companies of a named assured. Wordings like "as their interests may appear" are occasionally used. This kind of generic references will, under Cl- 8-1 as amended from 2016, also activate the rules in Chapter 8. Cl. 8-7, on the other hand, will not apply so that independent cover is not provided unless the third party is expressly named.

The legal effect of such generic co-insurance clause was never really considered or debated under the previous versions of the Plan nor tested by any court. The insurer probably would be bound by the clause he had agreed in spite of the previous requirement that the co-assured should be expressly named. Let that be as it may, as the matter is no longer causing any legal issue under the 2016 Plan.

In a similar way to Cl. 7-1, Cl. 8-3, sub-clause 3 provides that the co-assured stands in the shoes of the "owner", that is to say that the co-insurance offered under Chapter 8 is so called "dependent co-insurance". The co-insurance may, however, be made independent by effecting cover pursuant to Cl. 8-7, see above at 10.2.2.1.2 and below under 11.2.7.

11.2.2 Protection of the co-assureds against subrogation claims from the insurer

Clause 8-2 of the Plan is new in the 2016 version and governs the insurer's right to be subrogated to claims against the co-assureds. The clause expressly provides that "*the insurer does not have any right of subrogation against the co-insured third party unless and to the extent that such right is specified in the insurance contract or the co-insured third party has undertaken an express contractual obligation to an assured to remain liable for losses of the kind otherwise covered by the insurance."*

The effect of Cl. 8-2 is that, if the insurer at the time he accepts to co-insure a third party does not expressly reserve the right to seek recourse against the co-assured third party, he will be deemed to have waived any right of subrogation against him, subject, of course, that the co-assured has not forfeited his right to recover or be protected under the insurance, see further below and Cl. 8-3, sub-clause 2 discussed under 11.2.3. The burden is on the insurer to reserve any such right of subrogation against the co-assured unless the co-assured has expressly agreed to remain liable in spite of the fact that he is co-insured.

An example may illustrate the latter point. Very often the charterer under a time charterparty warrants that the ports he order the vessel to go to are safe for the vessel. Thus, if the vessel is damaged or lost due to an unsafe port, the charterer must compensate the owner for the damage and loss. The hull insurer having compensated the owner for e.g. cost of repairs under the hull insurance will normally be subrogated to the owner's claim against the charterer. However, if the charterer is co-insured under the hull insurance there will be no right of subrogation into any claim against the charterer unless the hull insurer has expressly reserved such right of subrogation according to Cl. 8-2.

Alternatively, it is conceivable that the charterer is prepared to compensate the owner and his hull insurer for damage to or loss of the vessel due to an unsafe port, but that he wishes to

remain protected under the co-insurance for any liability, e.g. collision liability, or any other claims covered under the hull insurance. Therefore, the charterer may agree to include in the charterparty a clause to the effect that he shall remain liable according to the unsafe port clause, in spite of the fact that he is co-insured under the hull insurance. Such an express clause will suffice to give the hull insurer a right of recourse against the charterer for damage to or loss of the vessel due to unsafe port, even if the hull insurer has not himself reserved a right of subrogation against the charterer. Cl. 8-2 requires that such clauses are expressly incorporated into the contract (charterparty). The antithesis is clear and intended. Any implied terms to the same effect will not suffice to secure any recourse from the insurer.

If the loss of hire insurer has compensated loss of income due to the damage to the vessel caused by ordering the vessel to an unsafe port, he may also seek recourse against the charterer either according to express clauses in the loss of hire insurance contract or in the relevant charterparty, provided, of course, that the law governing the charterparty allows also indirect losses such as loss of income to be claimed.

Even though Cl. 8-2 is new in 2016, it may be said that it only confirms what would follow from the background law. The background law may of course vary from country to country and may not necessarily be settled law. No comparative study on this point is warranted for the purpose of this handbook but, in so far as Norwegian law is concerned, it may be said that the background law is not settled, as the matter has not been considered by any known published judgement or arbitration award. However, Hans Jacob Bull (Professor Emeritus of the Nordic Institute of Maritime Law at the University of Oslo) wrote his doctor thesis on Insurance Cover of Third Parties, published by Sjørettsfondet 1988. He wrote his monography in Norwegian, but with a rather comprehensive summary in English at the end of the book. In section 4.9 (pages 317-320), he discusses that co-insurance works also as an indirect liability insurance. On page 318, he concludes that in effect a co-insurance implies also a waiver of subrogation against the co-assured and refer to other academic's supporting this view. On page 530 in the English summary he wrote:

> *(4.9) Although none of the provisions examined contain specific rules on the point, it is generally assumed that status as coinsured affords the third party protection against subrogation claims from the insurer. By including the third party as coinsured, the insurer thus waives his right of subrogation. It is argued that the coinsured is also in a position to claim compensation directly from the insurer in a case where the insured has elected to claim compensation for his loss from him instead of from the insurer. It is pointed out that the indirect liability cover provided through the insurer's waiver of subrogation, is not absolute protection: the ordinary rules as to breach of duties contained in the insurance contract will also apply to this cover.* (Emphasis added)

11.2.3 Co-assured's' duty of disclosure

The person effecting the insurance, i.e. the contracting party, see Cl. 1-1, letter (b), will usually have an interest in the subject matter insured and will take out the insurance for his own benefit. However, he may also enter into the insurance contract for the benefit of a third party who may have an interest in the subject matter insured. Typically, the owner effects an insurance to protect his own interests and at the same time names the charterer as assured as well. Any party whose interests are assured by the insurance contract is defined as an assured, see Cl. 1-1, letter (c). The assured who has not effected the insurance is referred to as a "co-assured".

According to Chapter 3, Section 1, the duty of disclosure is vested in the person effecting the insurance. If the person effecting the insurance fails to comply with his duty of disclosure, the insurer may invoke this failure against any co-assured parties, see Cl. 3-38.

Cl. 8-3, sub-clause 1, extends the scope of the duty of disclosure set out in Chapter 3, Section 1, to any co-assured, other than a co-assured mortgagee, see the Commentary to Cl. 8-3 , who is aware of having been named as co-assured under the policy. If one such co-assured party is in breach of his duty of disclosure, the insurer may only invoke this breach against the other assured parties if the co-assured in breach had the overall decision-making authority for the operation of the vessel, see Cl. 8-3, sub-clause 3, and Cl.3-37. The co-assured in breach of the duty of disclosure may, of course, have forfeited his own cover even if he was not in charge of the operation of the vessel.

Sub-clause 2 governs the third party's breach of the rules relating to duty of care. The provision gives the insurer the right to invoke the rules in Chapter 3, Sections 2 to 5 or Cl. 5-1 against the third party. A co-assured charterer who has the duty to comply with safety regulations related to, for example, dangerous goods carried onboard, may forfeit his protection under the co-insurance if the breach is in violation of Cl. 3-22, cf. Cl. 3-25 causing loss of or damage to the vessel. Thus, the protection offered to the co-assured according to the new Cl. 8-2, see further on this clause under 11.2.2, will not apply and the hull insurer who has paid the loss or damage may seek recourse against the charterer. The same will apply to the loss of hire insurer who has compensated the owner for loss of time due to the damage.

It may be argued that the provision in sub-clause 2 is superfluous, since the rules relating to the duty of care are aimed directly at "the assured" and the third party as a co-assured party is covered by this expression. However, for the sake of clarity, it was decided to introduce an express provision to this effect.

11.2.4 Amendments to and termination of the insurance contract

Cl. 8-4 does not protect the co-assured third party from the person effecting the insurance amending or terminating the insurance contract to the detriment of the co-assured. As opposed to a co-assured mortgagee duly recorded with the insurer, the co-assured is not entitled to any specific notice of amendments or early termination of the policy. In theory, the co-assured may obtain the insurer' agreement that he shall be notified, but that is rarely, if ever, done. The better alternative is for the co-assured to take out an insurance in his own name if he does not trust his contracting party to maintain the insurance as originally agreed. Clause 8-4 will apply also to independent co-insurance pursuant to Cl. 8-7.

11.2.5 Claims handling and set off

Cl. 8-5 provides:

> *Decisions required in respect of casualties, adjustments or claims against third parties may be made without the participation of any co-assured third party.*

The Clause was new in 2016, but corresponds to the provision found in Cl. 8-1, sub-clause 2, of the 2013 Plan which contained a reference to Cl. 7-3, sub-clause 1.

The provision states that a co-assured third party is not entitled to participate in claims handling in respect of casualties, adjustments or claims against a third party. All decisions in this respect may be taken without the co-assured third party's agreement. This is the same rule that applies to a co-assured mortgagee, cf. Cl. 7-3, sub-clause 1. It would be inexpedient and bothersome to involve a third party in the settlement of a claim. If the party effecting the insurance wants to secure a better position for the co-assured third party, this must be agreed with the insurer.

11.2.6 Other insurance

Clause 8-6 was new in 2016.

The clause prescribes that the insurance is subsidiary to another insurance that the co-assured third party has taken out. Consequently, the insurer shall only be liable to the extent that the co-assured third party has not obtained cover under the other insurance, cf. Cl. 2-6, sub-clause 2. If the other insurance also has a subsidiary provision, Cl. 2-6, sub-clause 1, shall prevail, cf. Cl. 2-6, sub-clause 3, with the effect that the co-assured third party is free to claim under any of the two insurances.

11.2.7 Independent co-insurance of mortgagees and named third parties

Clause 8-7 reads:

> *"If it has been explicitly agreed that the interest of a mortgagee or a named third party shall be independently co-insured, the insurer may not plead that he has no liability due to an act or omission from the person effecting the insurance or another assured under the rules contained in Chapter 3 and Cl. 5-1."*

The Clause was new in 2016 and corresponds to Cl. 8-4 of the 2013 Plan. The heading was amended to clarify that the Clause applies both to mortgagees and to named third parties. Certain modifications were also made in the text itself.

The provision gives extended protection to a mortgagee and a third party compared to the rules found in Chapter 7 and in Clauses 8-1 to 8-6. The extended cover can only be activated by an explicit agreement stating that the rules in Cl. 8-7 shall apply to the co-insured mortgagee and/or third party. Contrary to other clauses in Chapter 8, in order to receive the protection given in Cl. 8-7, the co-insured third party must be explicitly named in the insurance contract, see also above 11.2.1.

The independent cover implies that the co-insured mortgagee or named third party is not identified with the person effecting the insurance or with other assureds if found in breach with their duties under the contract. This means that the insurer can neither plead breach of duty of disclosure on the part of the person effecting the insurance, nor any failure to meet the duty of care on the part of other assureds, e.g. the breach of a safety regulation. On the other hand, those clauses in Chapter 3 that objectively limit or exclude cover, e.g. Cl. 3-17 and Cl. 3-19, will also apply to the co-insured mortgagee or named third party if granted independent cover under Cl. 8-7.

Cl. 8-7 does not protect the independent co-insured mortgagee or named third party in the case of loss of cover resulting from a failure of the person effecting the insurance to pay the premium. In that event, the insurance will lapse according to the ordinary rules in Chapter 6, unless the co-insured mortgagee or named third party is willing to pay the outstanding premium as a means of keeping the insurance in force. The independent co-insurance under Cl. 8-7 will have no influence on the rule set out in Cl. 8-4, which provides that any amendment or cancellation of the insurance contract shall also apply to the co-insured third party under Chapter 8. The question does not arise under the comparable provision in Cl. 7-2, since this provision already gives an ordinary co-insured mortgagee better protection than a co-insured third party under Cl. 8-4.

An obvious but important limitation of the cover provided by Cl. 8-7 is that it only applies to the insurance to which it is attached. Therefore, it cannot be a full substitute for a so-called Mortgagee Interest Insurance. This type of insurance is a separate insurance, which is taken out by the mortgagee bank on either a portfolio, fleet or individual basis. Such insurance protects the mortgagee if his position is prejudiced due to the acts or omissions of an assured resulting in a loss of cover under the core insurances, including P&I-insurance and war risks insurance.

12. COST OF MEASURES TO AVERT OR MINIMISE THE LOSS

12.1 General

The Plan requires the assured to incur expenses to reduce the insurer's liability.

This means that the assured is under an obligation to incur extra expenses in order to minimise the loss of hire insurer's liability. As mentioned in 7.2.1 above, there may well be a possible conflict of interests between the hull insurer and the loss of hire insurer in this context. For example, the extra cost of overtime for repairs to the vessel may not only have reduced the time needed to complete the repairs (to the advantage of the loss of hire insurer), but might also have resulted in costs-savings which would otherwise have been for the hull insurer's account, for example, saved dock rental. Even though Cl. 12-8 of the Plan applies to the time saved, practice is that when overtime has resulted in saved dock rental, the overtime costs have been covered under the hull insurance up to the saved rental amount. The loss of hire insurer will not pay for the cost of overtime or any other additional expense that can be shown to have produced savings in repair costs. Under the Norwegian conditions, only the remaining extra expenses which are not compensated by the hull insurer under Cl. 12-8 will be considered by the loss of hire insurer. This is demonstrated by the following example:

Extra cost of overtime	:	NOK 50,000
Saved dock rental covered by hull insurer	:	" 10,000
		" 40,000
Cl.12-8: Covered by hull insurer	:	" 32,000
Remaining extra expenses	:	NOK 8,000

Only the remaining extra expenses of NOK 8,000 will be considered by the loss of hire insurer.

Temporary repairs also fall within this category.

Under the Plan, the loss of hire insurer pays for the extra cost of temporary repairs which are not recoverable from the hull insurer, see Cl. 12-7. However, the loss of hire insurer will not pay beyond the amount that he would have paid had permanent, instead of temporary, repairs been effected.

Also, other measures taken for the purpose of preventing loss of time may be compensated under the loss of hire insurance.

12.2 Extra costs incurred in order to save time, Cl. 16-11

Cl. 16-11 of the Plan corresponds to Cl. 7 of the 1972 and 1993 conditions. The heading and sub-clause 1, first sentence was edited in 2003. A new second sentence was added to sub-clause 1 at the same time. The effect of the latter amendment is commented under 12.2.3 below. The Commentary was amended in 2013 by adding two new sentences. One on enhanced voyage expenses and another on the assured's duty to minimise the loss rather than unnecessarily keep the vessel idle waiting for repairs. Both are incorporated into 12.2.4 below.

Cl. 16-11 reads as follows:

"The insurer shall be liable for extra costs incurred in connection with temporary repairs and in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance, insofar as such extra costs are not recoverable from the hull insurer. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules of Cl. 16-1, sub-clause 1, second sentence, shall apply.

The insurer shall not, however, be liable for such costs in excess of the amount he would have had to pay if such measures had not been taken.

If time is saved for the assured, he shall bear a share of the extra costs that is proportionate to the time saved for his account".

12.2.1 Overview

Cl. 16-11 regulates the liability of the loss of hire insurer for costs incurred in order to save time and must be read in conjunction with Cl. 4-7 concerning the insurer's liability for costs incurred to prevent or minimise loss. If costs are incurred to prevent or minimise loss that would be covered by the loss of hire insurance, they must be borne by the loss of hire insurer in accordance with the rules in Cl. 4-7 et seq. Cl. 16-11 is a continuation of the rules in Cl. 4-7 in that it specifies, in relation to a specific area of practical importance, the costs that the loss of hire insurer must cover.

The insurer's liability under Cl. 16-11 is more extensive than his liability under the general rule in Cl. 4-7 et seq. The insurer may be liable for costs incurred to save time, even though the measures taken do not satisfy all the general conditions for recovery of sue and labour and similar expenses. For example, it is not a requirement that the measures taken were reasonable.

Sub-clause 1 of Cl. 16-11 was edited to make it clear that all extra costs of temporary repairs in order to avoid loss of time to the benefit of the loss of hire insurer is covered, regardless of whether temporary repairs may be described as extraordinary measures or not. In all normal circumstances, temporary repairs are ordinary as opposed to extraordinary measures. The previous wording was at best ambiguous in this regard.

Any other measures than temporary repairs must be extraordinary measures and must also be taken for the purpose of saving time. Any extraordinary measures taken for this purpose are covered under Cl. 16-11. The cover is not limited to measures taken to speed up repair work.

12.2.2 Cl. 16-11 cover is subsidiary to the hull cover

Sub-clause 1 of Cl. 16-11 provides that the loss of hire insurance does not cover costs which are recoverable from the hull insurer.[29] This provision must be seen in connection with Cl. 12-7 concerning temporary repairs and Cl. 12-8 concerning costs incurred to speed up repairs. Under Cl. 12-7, the hull insurer is liable for the entire cost of temporary repairs when permanent repairs cannot be carried out where the ship is situated. The cost of temporary

[29] Ibid note 47, where it is explained that Cl. 16-16 does not apply to any overlap between the hull insurance and the loss of hire insurance for extra costs covered pursuant to Cl. 16-11.

repairs in other cases and the costs incurred to speed up repair work are covered within 20 % p.a. of the agreed insurable hull value for the time saved for the assured, cp. 7.2.3 above. These provisions are based on the assumption that any excess costs incurred to save time will be covered by the loss of hire insurer. This means that the loss of hire insurance will be supplementary and subsidiary to the hull insurance in this respect. The decisive element for the liability of the loss of hire insurer is the extent to which costs incurred to save time are recoverable from the ship's actual hull insurer. The liability of the loss of hire insurer is, however, not increased if the costs are not recoverable from the hull insurer because they fall below the deductible. The decisive criterion is whether the costs are of a kind that are recoverable under the ship's actual hull insurance.

12.2.3 Hull cover other than the Plan

Before 2003 it was irrelevant to the cover pursuant to Cl. 16-11 whether the hull insurance was covered on the Plan or other hull conditions. If the assured's hull insurance did not cover costs incurred to save time, the loss of hire insurer was liable for the costs of temporary repairs and extraordinary measures within the limits mentioned in Cl. 16-11, sub-clause 2.

However, the 2003 version introduced a new second sentence to sub-clause 1 in line with the corresponding amendment in Cl. 16-1, sub-clause 1, second sentence, requiring that, if hull conditions other than those of the Plan triggered the loss of hire cover, such other conditions should be approved in writing by the loss of hire insurer.

The Commentary to Cl. 16-11 makes it explicitly clear that if the loss of hire insurer has approved such other hull conditions in writing, and those conditions do provide cover similar to the cover of Cl. 12-7 and 12-8, Cl. 16-11 will supplement such similar provisions, even if they are not providing exactly the same cover as the said Plan provisions. If there is no such cover at all under the other hull conditions, costs as mentioned in Cl. 16-11 will be covered by the loss of hire insurer as was the case before 2003.

If, however, the assured fails to obtain from the loss of hire insurer the approval in writing of other hull conditions, the intended effect of the reference in Cl. 16-11, sub-clause 1, second sentence to Cl. 16-1, sub-clause 1, second sentence is that the cover of extra costs pursuant to Cl. 16-11 will be restricted to what would have been covered if the hull insurance had been covered on the basis of the Plan.

12.2.4 Temporary repairs and extraordinary measures

The phrase "temporary repairs and in connection with extraordinary measures" not only covers the measures which according to Cl. 12-7 and Cl. 12-8 activate the hull insurer's liability, but also a wider range of measures. Under Cl. 16-11, it is not required that the temporary repairs be "necessary", which is a requirement under Cl. 12-7, sub-clause 1. While Cl. 12-7, sub-clause 2 applies only to temporary repair of "the damaged part", no such limitation has been mentioned in Cl. 16-11. Cl. 16-11 applies therefore to any temporary repairs. This includes all measures of a non-permanent nature taken to enable the vessel to be removed to a repair yard or to continue trading and includes, inter alia, replacement of parts of the ship or hire of equipment, such as generators. New equipment or parts which are installed and which later are to be removed are also regarded as an extraordinary measure.

Cl. 16-11 requires that the purpose of the temporary repairs and/or extraordinary measures taken must be to save time. If the purpose is to reduce the total cost of complete repairs, the

costs are to be paid in full by the hull insurer according to Cl. 12-7. If a ship that has suffered a casualty at A carries out sufficient temporary repairs to enable it to sail to B, where complete repairs can be carried out at lower costs than at A, the cost of the temporary repairs are to be paid in full by the hull insurer.

The increase in the loss of time which arises from the removal to B must be dealt with by reference to the rule in Cl. 16-9, see under 7.2.4 above. The temporary repairs at A plus permanent repairs at B must be regarded as an alternative to permanent repairs at A. The loss of hire insurer's liability is limited to the alternative that gives the least loss of time of the two (A and A + B), provided the assured can recover the repair costs in full from his hull insurer.

In the same way as Cl. 12-8, Cl.16-11 is based on a distinction between "ordinary" and "extraordinary" measures. The dividing line is, however, not necessarily the same in relation to the two provisions. As stated in Brækhus and Rein: Kaskoboken, page 493, it is not clear-cut to draw the dividing line between "ordinary" and "extraordinary" measures. The interpretation opens for discretionary evaluations, where the individual solutions may vary in accordance with technical developments. Nowadays, it is common practice to carry out certain types of work by means of mobile repair teams, which are thus considered "ordinary", while sending spare parts by charter plane is still considered "extraordinary".[30]

The most common extraordinary measure is probably the payment of overtime to repair workers.

In practice, the distinction between ordinary and extraordinary measures has particularly caused problems in connection with what has traditionally been described as "increased ordinary voyage expenses" or "enhanced voyage expenses". These are expenses that must be anticipated from time to time during the voyages of a ship, e.g. due to problems relating to weather and currents, or minor technical problems regarding the ship. A typical example is extra consumption of oil where there is an oil leakage. These increased voyage expenses have to be paid by the assured according to his duty to minimise the loss, cf. Cl. 3-30. If the assured chooses to keep the vessel idle waiting for repair, the insurer shall not be liable for greater loss than that for which he would have been liable if the duty of the assured according to Cl. 3-30 had been fulfilled.

Based on a theory which appears to have its roots in general average law and practice, adjustment practice of loss of hire adjustments has been fairly restrictive. This is demonstrated by the following example:

> The vessel is equipped with three generators, one turbine driven, and two which are driven by diesel engines. The turbo generator is damaged and repairs must be deferred until spare parts can be delivered. In order to keep the vessel trading while waiting for spares, the assured decides to hire and install a package diesel generator set onboard the vessel. Operation of the vessel during the period waiting for spares requires extra consumption for the vessel's diesel generators and consumption of gas oil and lubrication oil for the hired generator. The damage is considered recoverable under the vessel's hull insurance.

[30] The Commentary to Cl. 16-11 is now vague on this point referring to a case by case evaluation considering what may be covered under the hull insurance in accordance with the “unrepairability” concept introduced in the Commentary to Cl. 12-1, see footnote 9.

There is no doubt, pursuant to adjustment practice, that the necessary hire of a mobile generator and the installation/removal costs concern the loss of hire insurance not the hull insurance. Such costs are considered "extraordinary" and are thus recoverable under the loss of hire insurance. Such costs would be recoverable both under Cl. 4-7 and Cl. 16-11.

On the other hand, average adjusters have considered the extra consumption of oil as "enhanced voyage expenses", which the assured must bear himself. This can hardly be a correct interpretation of the Plan. If the hire of a mobile generator is accepted as an extraordinary measure, the same must apply to the extra consumption. There is no valid reason why these expenses should be treated differently. Both the rental costs and the extra consumption are incurred to keep the vessel trading and are therefore "measures taken for the purpose of preventing loss of time".

To sum up, the loss of hire insurance supplements the hull insurance in the following two ways:

1. It covers costs which in principle fall within Cl. 12-7 and Cl. 12-8, but which exceed the 20% limit mentioned in these provisions.

2. It covers costs incurred to save time by way of measures taken which are of a character different from those covered under Cl. 12-7 and Cl. 12-8.

12.2.5 Cl. 16-11, sub-clause 2

The loss of hire insurer's liability for extra costs is limited to the amount by which the compensation otherwise due under the loss of hire insurance is reduced as a result of the measures taken, see sub-clause 2 of Cl. 16-11. This will normally be equal to the number of days saved multiplied by the daily indemnity that the insurer would otherwise have had to pay.

If the time saved falls within a period when other work is also carried out so that Cl. 16-12 applies, then the time saved is only that which would have been for the insurer's account. If the measures taken reduce the repair time to a level that is less than the deductible period, one cannot take into account time that is saved within the deductible period.

The costs that are to be paid by the insurer must, because of the limitation in Cl. 16-4, sub-clause 2, be recalculated into indemnity days by dividing the costs by the amount of the daily indemnity.

12.2.6 Cl. 16-11, sub-clause 3

The basic rule in relation to costs incurred to prevent or minimise loss is that no apportionment is to be made even though the measures taken also benefit the assured's uninsured interest, see Cl. 4-12, sub-clause 2.

However, sub-clause 3 of Cl. 16-11 contains a rule which provides that the assured shall bear a portion of the extra costs in proportion to the amount of time that is saved for his account, and this is a departure from the solution that otherwise applies to costs incurred to prevent or minimise loss.

The principles for apportionment according to sub-clause 3 have been outlined as follows in the Commentary to Cl. 16-11:

> *"The principles applicable to apportionment under a loss-of-hire insurance must take account of the way in which the cover is normally structured in such insurance: the assured is liable for the agreed deductible period, after which the insurer is liable for the number of days of indemnity stated in the policy, and should the loss of time exceed this maximum, the assured is again liable for the excess number of days. Costs must therefore be apportioned in such a way that the assured and the insurer cover the costs related to a saving of time during the periods of loss of time for which they are respectively liable. This means that the assured first bears costs related to any reduction of the number of days in excess of the insurance contract maximum, whereafter the insurer must cover costs related to any reduction of the number of days covered by the insurance contract, and finally the assured must cover costs related to time saved within the deductible period."*

13. INTEREST

The assured may claim interest compensation pursuant to Cl. 5-4 of the Plan. Sub-clauses 3 and 4 were amended in the 2013 Plan.

Cl. 5-4 reads:

> *"The assured may claim interest as from one month after the date on which notice of the casualty was sent to the insurer. If the insurer has to refund the assured's disbursements, interest accrues from the date of the disbursement. If the insurer is to indemnify the assured for loss of time, interest does not accrue until one month after expiry of the period for which the insurer is liable.*
>
> *If the assured fails to provide information and documents as mentioned in Cl. 5-1, and the settlement as a result thereof is delayed, he may not claim interest for the resulting loss of time. The same applies if the assured unjustifiable rejects full or part settlement.*
>
> *The rate of interest is six month CIBOR, NIBOR or STIBOR + 2% for insurance contracts in which the sum insured is stated in Danish Kroner, Norwegian Kroner or Swedish Kronor respectively, and otherwise six month LIBOR + 2%. Interest is determined as at January 1 of the year the insurance contract comes into effect at the average rate for the last two months of the preceding year.*
>
> *After the due date, cf. Cl. 5-6, interest on overdue payments accrues according to the rate stated in sub-clause 3 + 2 %.*

It follows from Cl. 5-4, sub-clause 1, that in respect of compensation under a loss of hire insurance, interest accrues one month after expiry of the period for which the insurer is liable. This provision reflects the Insurance Contract Act Section 8-4, third paragraph. Cl. 14, sub-clause 1 of the 1972/1993 conditions provided that interest was payable as of one month after the completion of the repairs.

The starting point is therefore no longer the completion of the repairs, but the expiry of the period for which the insurer is liable. In cases of slow steaming however, adjusters have long applied the principle that interest is instead payable one month after the last day of the slow steaming period.

Pursuant to Cl. 5-4, sub-clause 3, the rate of interest is six month CIBOR, NIBOR or STIBOR + 2 % for insurance contracts in which the sum insured is stated in Danish Kroner, Norwegian Kroner or Swedish Kronor respectively, and otherwise six month LIBOR + 2 %.

Interest is calculated as of 1 January of the year the insurance contract comes into effect at the average rate for the last two months of the preceding year. The applicable rates for selected currencies are published by CEFOR each January on its website.[31]

[31] www.cefor.no

After the due date, cf. Cl. 5-6, interest on overdue payments accrues according to the rate stated in sub-clause 3 + 2 %.

If the assured fails to provide information to the insurer and documentation necessary to settle the claim, interest shall not accrue during the period of delay caused by such failure.

Also the insurer himself may claim interest as per Cl. 5-7, sub-clause 3, last sentence, which reads:

> *"In loss-of-hire insurance, the insurer may demand interest on advance payments from one month after expiry of the period for which he is liable".*

This provision gives the insurer the right to claim interest from the same time as the assured may pursuant to Cl. 5-4. This rule does not give the insurer an incentive to pay any amount on account during a long repair period.

14. TRADING AREA

The provision regarding trading area is set out in Cl. 3-15, and may limit or exclude the assured's right to compensation under his loss of hire insurance. The clause was amended in 2016.

Cl. 3-15 reads:

> *The ordinary trading area under the insurance comprises all waters, subject to the limitations laid down in the Appendix to the Plan as regards conditional and excluded areas. The person effecting the insurance shall notify the insurer before the ship proceeds beyond the ordinary trading area.*
>
> *The insurer may consent to trade outside the ordinary trading area and may require an additional premium. The insurer may also stipulate other conditions which shall constitute safety regulations, cf. Cl. 3-22 and Cl. 3-25, sub-clause 1.*
>
> *The vessel is held covered for trade in the conditional trading areas, but if damage occurs while the ship is in a conditional area with the consent of the assured and without notice having been given, the claim shall be settled subject to a deduction of one fourth, maximum USD 200,000. The provision in Cl. 12-19 shall apply correspondingly. If claims arising out of ice damage are a result of the assured's failure to exercise due care and diligence, further reduction of the claim may be made based on the degree of the assured's fault and the circumstances generally.*
>
> *If the insurer has been duly notified in accordance with sub-clause 1 of trade within the conditional trading areas, the insurance remains in full force and effect, subject to compliance with conditions, if any, stipulated by the insurer.*
>
> *If the ship proceeds into an excluded trading area, the insurance ceases to be in effect, unless the insurer has given his consent in advance, or the infringement was not the result of an intentional act by the master of the ship. If the ship, prior to expiry of the insurance period, leaves the excluded area, the insurance shall again come into effect. The provision in Cl. 3-12, sub-clause 2, shall apply correspondingly.*

Reference is made to the Commentary to Cl. 3-15. The trading area is wordwide except the so called conditional and exclusive trading areas defined in the Appendix to the Plan and illustrated by maps.

According to sub-clause 1, the person effecting the insurance is obliged to notify the insurer in advance if the vessel is to trade outside the ordinary trading area and enter one of the conditional or excluded areas. Sub-clause 2 expressly provides what may seem obvious and which was implied in the previous versions of the Plan, that the insurer may consent to trade or voyages outside the ordinary trading area and may make his consent conditional upon payment of higher premium to reflect the potentially higher risk. The insurer may also impose other conditions such as higher deductible, compliance with relevant safety regulations etc. Sub-clause 4 is new in 2016 and emphasises that the assured is fully covered if he has

complied with his duty to notify the insurer of trade in the conditional areas and all the conditions for the consent to the trade set by the insurer.

Even if the assured has failed to notify the insurer of trade in one of the conditional trading areas, he is still held covered according to sub-clause 3, but subject to an extra deduction of one fourth of the claim, maximised to USD 200,000. The reason behind this particular deduction is to avoid the assured speculating at the insurer's expense by not giving notice of trading in the conditional areas until after damage to the vessel has actually occurred. Notice must be given separately to the loss of hire insurer. Notice to the hull insurer is not enough, as these two insurers are completely independent, cp. under 3.5 above. The per-casualty reduction is to be calculated as per Cl. 12-19. The deduction applies separately to the loss of hire insurance and shall not be apportioned with the hull insurer. The assured is also obliged to pay the extra premium the insurer would have required if he had been duly notified in advance. This applies regardless of whether any damage did occur while sailing in the conditional area, but in practice it may be difficult for the insurer to discover the breach of the trading area if there is no damage. But modern technology has made things easier for the insurers as they may trace the movements of the portfolio of vessels insured, if they so wish.

It should further be noted that the deduction is subject to the assured having expressly consented to the vessel trading in the conditional trading areas. If the vessel proceeds beyond the ordinary trading limit and into the conditional trading areas due to, e.g. navigational error, the insurer cannot request a reduction as per Cl. 3-15, sub-clause 3.

Sub-clause 5 provides that if the vessel proceeds into an excluded trading area, the insurance will be suspended unless the insurer has given his prior approval for the vessel to proceed into such area or unless the vessel proceeded to such area in order to save human life or to salvage ship or goods, Cl. 3-12, sub-clause 2. On the other hand, if sailing into an excluded trading area was not intentionally made by an act of the vessel's master, the insurance cover will not be suspended. The insurer has the right to make his approval of the vessel sailing into an excluded trading area conditional upon increased premium or other conditions, e.g. longer deductible period etc. As soon as the vessel leaves the excluded trading area, the ordinary insurance comes into effect again.

15. RETURN OF PREMIUM

It follows from Cl. 6-5 that the assured may demand a reduction in the premium if the insurance period is shorter than agreed or if the insurance has not been in effect for a period of time. The reduction in the premium shall correspond to the reduction of the insurance period.

Furthermore, pursuant to Cl. 6-6, the assured may request a reduction in the premium when the vessel is laid-up or in similar circumstances. The condition is that the vessel must be laying at one location for an uninterrupted period of at least 30 days with no cargo on board. The period is to be calculated as 30 calendar days and neither the date of arrival nor the date of departure from lay-up is to be included in the calculation of such period. It should be noted that, as per Cl. 6-6, sub-clause 1, this provision does not give a right to a reduction in the premium, but rather a right to demand negotiations for such reduction.

Finally, it follows from Cl. 6-7 that a claim for reduction in premium is to be made within six months of the expiry of the insurance year or within six months after the expiry of the insurance period if this is shorter than one year.

16. BLOCKING AND TRAPPING AND OTHER WAR RISKS SPECIALITIES

War risk cover taken out on the basis of Chapter 15 of the Plan will also constitute a loss of hire insurance, see Cl. 15-2 (e). The deductible period, the daily amount, the maximum number of days etc. must be agreed in the policy and otherwise the conditions and limitations of cover shall be the same for the war risks and marine risks loss of hire insurance. Cl. 15-16, sub-clause 1, expressly provides that the provisions of Section 6 of Chapter 15 shall apply in addition to the provisions of Chapter 16.

There is an alternative way of covering war risks loss of hire insurance which may be used if the owner does not want to cover it on the basis of Chapter 15 of the Plan. If the owner has covered hull insurance for marine and war risks on foreign conditions, he will not need the full package contained in Chapter 15, but he may wish to cover loss of hire insurance on Norwegian conditions (i.e. Chapter 16 of the Plan) both for marine and war perils. This can be achieved simply by expressly stating in the loss of hire insurance contract that it also comprises war risks according to, for example, Cl. 2-9 of the Plan or any other war risks clause that clearly defines the risks that shall be comprised by the war risks loss of hire insurance. It would also be advisable to incorporate the provisions contained in Clauses 15-4 to 15-9 or similar clauses in foreign conditions, in particular the English Automatic Termination clause.

16.1 Cl. 15-16. Extended cover for war risks blocking and trapping

It has been explained in 3.7.2 above that the marine loss of hire conditions, in Cl. 16-1, sub-clause 2, cover loss of time due to blocking and trapping of the vessel by physical obstructions. The corresponding rule under the war risk conditions has been extended in order to include blocking and trapping by non-physical obstructions. This extension has been effected by replacing the marine conditions in Cl. 16-1, sub-clause 2, letter (b), with the following provision set out in Cl. 15-16, sub-clause 2:

> *"The insurer is liable for loss due to the ship being wholly or partly deprived of income because it is prevented from leaving a port or a similar limited area."*

The marine loss of hire conditions provide cover only if the vessel is prevented from leaving the port by a *physical* obstruction other than ice. (It should be noted that a loss of time due to the vessel being prevented from *entering* the port is not covered under any circumstances.) War risks may of course also create *physical* obstructions (e.g. bombing of a port wrecking several vessels which wreckage prevents other vessels from leaving the port). There is no doubt that loss of time due to such *physical obstruction* is also covered by the war risk conditions in Cl. 15-16, sub-clause 2, which is wide enough to include blocking and trapping both by *physical obstruction* and by other means.

For practical purposes, such other means of blocking and trapping are interventions by a foreign state power, cf. Cl. 2-9, sub-clause 1 (b) and above under 2.3.3. Such intervention may be by way of capture, Cl. 2-9, sub-clause 1 (b), blocking the entrance of the port with mines or threatening to torpedo vessels leaving the port. Such threat must be more specifically directed towards the port in question than the general risk of being torpedoed at sea during a

war. If the enemy navy is waiting outside the port ready to fire at the vessel, the vessel must be considered as having been prevented from leaving the port as per Cl. 15-16, sub-clause 2.

It is not crucial to define the term «port» since the further words "similar limited area" clearly suggest that blocking and trapping outside ordinary ports are included in the cover. The Commentary to Cl. 15-16 and Cl. 16-1 gives very little guidance on this point and only refers to Cl. 15-12 which provides for total loss compensation in case the vessel is trapped by a war peril for more than 12 months..

The Commentary to Cl. 15-12 mentions that the cover for blocking and trapping was developed during the various wars in the Middle East. Vessels were trapped in the Suez Canal when this was closed after air attacks; the same was the case for vessels trapped in Shatt-al-Arab. Such areas are deemed similar to ports or harbours. The Commentary also suggests that the whole Arabic Gulf is to be treated as a limited area similar to a port, since the Norwegian War Risks Association implied that a closing of the Strait of Hormuz due to war perils would constitute blocking and trapping under their insurance conditions. The Commentary goes on to state expressly that the Great Lakes do not constitute such a «limited area» similar to a port even if the only entrance is through the St. Lawrence Seaway. If vessels are trapped in this area because the locks in the Seaway are destroyed by bombing, there is no loss of hire cover under Cl. 15-16.

Wilhelmsen and Bull: Handbook on Hull insurance, Gyldendal 2007, page 345 adopts without reservation the solution of the Commentary in relation to Cl. 15-12 that the Great Lakes are not “a similar limited area”.

The Commentary to Cl. 15-12, which is also relevant to Cl. 15-16, emphasises that the wording “port or similar limited area” means that the area must not be too large:

> *“The comparison shows that the area must not be too large geographically and, accordingly, must be comparable to a port.”*

This means that loss of hire cover is not extended to vessels or off-shore units operating on off-shore locations on the high seas even if war perils may wholly or partly deprive them of income. Off-shore units, which are anchored while at work on the location, are therefore not readily moveable. A threat of attack against the unit may temporary require evacuation of the whole crew, which results in down time or off hire under the contract with the operator of the field. But even if, due to the threat, the unit is restricted in its operation, the cover under Cl. 15-16 has never been intended to comprise vessels or units operating stationary on the high seas. The high seas are certainly not comparable with a port and no loss of hire cover is therefore available unless the threat materialises into a physical damage to the vessel or unit.

This view was contested in an arbitration case “Bulford Dolphin”, published in ND 2009 page 202. The arbitrators concluded in accordance with the view expressed above. Due to this arbitration award the Commentary to Cl. 15-16 was amended by adding the following:

> *Both Cl. 15-16 and Cl. 15-12 apply only to blocking and trapping in ports or similarly limited areas. In an arbitration award rendered on 8 May 2009 between Dolphin Drilling and the Norwegian Shipowners’ Mutual War Risks Insurance Association (Bulford Dolphin), the court found that a rig anchored off the coast is not in a port or similar limited area. The court also stated*

that Cl. 15-16 only applies to blocking or trapping due to interventions by a State power, cf. in that respect the remark above, and that blocking or trapping due to threats of attack by terrorists or pirates is not recoverable under loss-of-hire insurance. This statement is an obiter dictum and concerns the construction of an issue that is highly controversial. However, as long as piracy was limited under Cl. 2-9 (d) to the "open sea" the statement had little practical significance in relation to piracy because it is unlikely that the geographical area specified in Cl. 15-12 and Cl. 15-16 would at the same time be in the "open sea"[32]*. In view of the expansion that has now been made in the geographical aspect of the concept of piracy, however, piracy could conceivably take place within "a similar limited area", cf. the Commentary on Cl. 2-9 (d). To avoid this expansion of the concept of piracy having an unintended effect on loss-of-hire cover, the Committee agrees that it is natural to limit the scope of Cl. 15-16 to only cover interventions by foreign State powers. With regard to shipowners' overall need for loss-of-hire insurance in the event of attacks by pirates and terrorists, the cover provided under Cl. 15-16 will in any event be totally marginal.* (Footnote and emphasis added)

The clear intention behind the above underlined quote from the Commentary to Cl. 15-16 was also to make it clear that any loss of time due to piracy or terrorism not resulting in any damage to the vessel would not be covered under Cl. 15-16 even if it may be said that the vessel was blocked or trapped by pirates or terrorists in a port or similar limited area. The assured may cover in the market loss of hire insurance for loss of income due to piracy or terrorists attacks such as waiting time while negotiations of ransom are going on etc. but it will depend on the employment of the vessel whether the assured needs such cover. Under certain charterparties the vessel is not off hire due to piracy attacks. Hence, it was agreed in 2010 that such cover should not be part of the standard cover under the Plan. This has not been subject to any further discussions during development of the Nordic Plan, neither for the 2013 version, nor the current 2016 version.

16.2 Cl. 15-17. Loss in connection with a call at a visitation port, temporary stay, etc.

Cl. 15-17 reads:

> *"The insurer is also liable for loss of time if the ship is brought to a port by a foreign State power for the purpose of:*
>
> *a) visitation and search of cargo, etc.*
> *b) capture and temporary detention.*
>
> *If the assured is entitled to compensation for total loss under Cl. 15-11 or Cl. 15-12, he is not entitled to compensation under this section beyond the first month of the loss of time. If compensation has already been paid, it shall be deducted from the total loss compensation."*

As opposed to Cl. 15-16, only detention in port is relevant in this case, there is no extension to a detention in a "similar limited area". The Commentary does not suggest any reason for the restriction and does not offer any assistance in interpreting the word "port". We venture that

[32] The Commentary to Cl. 2-9, sub-clause 1 (d) was substantially amended in 2010 by defining the geographical area for piracy much wider and more precise than criminal acts on the high seas.

port must be read somewhat liberally, but certainly excluding mere stoppage at sea. The words "brought to a port" suggest that the vessel must be brought to a place which is a safe port for the vessel insofar as marine risks are concerned. In this context, the Arabian Gulf is not a port. It may be questioned whether satisfactory cover is provided to the assured, as it is difficult to understand why the insurer cannot cover any loss of time in excess of the agreed deductible period caused by a detention by foreign state power, regardless of whether the vessel is detained in port or at sea.

The Commentary to Cl. 15- 17 suggests that detention for customs purposes is included in Cl. 15-17, and refers to an unpublished Norwegian arbitration award by Brækhus, the "Germa Lionel" commented on in Kaskoboken on pages 73-73 and 239-240 and in Handbook in Hull Insurance, by Bull and Wilhelmsen on page 95. This is somewhat misleading because the facts surrounding «Germa Lionel» are better classified as an aggressive intervention by a state power than a mere detention for customs purposes. The intervention by a state power to exercise customs and other normal civil authority is undoubtedly a marine peril, see the Commentary to Cl. 2-9, sub-clause 1, letter (b), where it is stated: *"The war risk insurance therefore does not cover losses arising from the ship being detained by the authorities ……because the crew is suspected of smuggling."*

The "Germa Lionel" was detained by Libyan authorities for two months. The vessel came from London where there had been an 11 day siege at the Libyan Embassy following a protest at which a policewoman had been shot and killed. When the vessel arrived in Libya, the crew were interrogated and one crew member died as a result of torture. The whole cargo was searched. It was never clarified what the Libyan authorities were looking for, but apparently they realised that they made a mistake because the vessel was released unconditionally (and without the slightest apology). The arbitrator held that it was the war risk insurer that should compensate part of the extra expenses etc. pursuant to provisions similar to Cl. 3-17. He held that the action of the Libyan authorities was an intervention pursuant to Cl. 2-9, sub-clause 1(b), but emphasised that whatever reason the Libyan authorities had for their intervention, they went far beyond what could be considered the exercise of normal civil authority for a port state.

Intervention by a foreign state power and blocking and trapping depriving the assured of the use of the vessel for more than twelve months entitles the assured, if caused by a war peril, to claim total loss compensation pursuant to Clauses 15-11 and 15-12. If so, according to Cl. 15-17, sub-clause 2, the assured is not entitled to loss of time compensation for more than the first month, which corresponds to the period the insurer is not obliged to pay interest on the total loss compensation, cp. Cl. 5-4, and see under 13 above. In this context, any payment under his war risks hull insurance less than the total loss compensation does not deprive the assured of his right to claim loss of hire. If the assured has been compensated for loss of time during the twelve-month period, such compensation in excess of one month is deducted from the total loss compensation cp. the last sentence of Cl. 15-17.

This does not create any difficulty if both insurances are covered by the same insurer, as Chapter 15 presupposes. If that is not the case, it is difficult to see how the two insurances can be combined in this manner, particularly if the war risk hull cover is covered on foreign conditions but war risks loss of hire is covered on the basis of Chapter 16 with extensions as per Section 6 of Chapter 15. If the assured is not entitled to any total loss compensation under his war risks hull cover in case of interventions by foreign state power or blocking and

trapping lasting for more than twelve months, then, of course, the war risks loss of hire insurer must pay in full as per their policy.

If the assured is entitled to total loss compensation under his war risk hull cover, the war risk loss of hire insurer must become subrogated to the assureds claim for total loss, see Cl. 2-6 sub-clause 2. Admittedly this solution is not readily apparent from the wording of Cl. 2-6, but the loss of hire insurance must be deemed to be subsidiary to the hull insurance in this regard. If the insurer who is secondarily liable has already paid, he must be entitled to be subrogated to the assured's claim against the primary insurer in accordance with the general rules on subrogation. The special rule on subrogation in Cl. 5-13 is not applicable, see the Commentary to Cl. 5-13 where it is expressly stated that Cl. 2-6 on double insurance shall govern.

The Commentary to Cl. 15-17 states that Cl. 15-17, sub-clause 2, is a general rule, which may imply that it is also applicable in relation to the extended blocking and trapping cover under Cl. 15-16, sub-clause 2. The reference in Cl. 15-17, sub-clause 2 to Cl. 15-12 supports this understanding of the Commentary, but apart from that, the wording of Cl. 15-17 only deals with situations where a vessel is trapped in port after having been brought into the port by a foreign state power.

If a vessel is trapped in a port which was entered freely, because the port is subsequently blocked after bombing or mining, it is indeed difficult to read into Cl. 15-16 the limitations contained in Cl. 15-17, particularly since Cl. 15-18 expressly refers to Cl. 15-17. One would have expected such a reference also in Cl. 15-16, if the same limitation of cover should apply. On the other hand there is no reason to treat these cases differently. If the assured obtains full compensation for total loss, there is no reason for him to get loss of hire compensation in addition, cp. the discussion under 4.1 above. It seems that the Commentary is correct on this point, provided that it is read as suggested above.

16.3 Cl. 15-18. Loss caused by orders issued by the insurer

Cl. 15-18 reads as follows:

> *"The insurer is also liable for loss of time resulting from orders issued by the insurer, cf. Cl. 15-4. However, this does not apply to orders given by the insurer in connection with the outbreak of war.*
>
> *If the assured is entitled to compensation for total loss under Cl. 15-13, Cl. 15-17, sub-clause 2, shall apply correspondingly."* (The English version of the Plan contains a misprint as sub-clause 2 refers to Cl. 15-3 rather than Cl. 15-13.)

According to Cl. 15-4, the war risk insurer is entitled to give orders as to how and where to operate the vessel in order to reduce the risk of damage to or loss of the vessel. If such orders cause the assured to suffer a loss of income, he is entitled to be compensated for this by the insurer. Such order may be to stay in port until further orders are given by the insurer. If the vessel is kept in port without income for more than six months, the assured is entitled to total loss compensation pursuant to Cl. 15-13. In such a case, the loss of hire compensation shall be reduced to only one month, see above under 16.2.

It is clear that there is little or no point for the loss of hire insurer to invoke Cl. 15-18 if he does not also cover the war risk hull insurance. It is difficult to see any benefit for a loss of hire insurer in giving any orders aiming at preventing a loss of hire claim, if he must compensate the assured's loss of time resulting from following such orders. By keeping the vessel in port he may theoretically avoid paying for loss of hire during repairs if the vessel is damaged during sailing. The latter payment may be higher than the payment for the detention in port, but this is a very speculative calculation which would probably be avoided by most insurers.

17. LOSS OF HIRE FOR FISHING VESSELS

17.1 Overview of Chapter 17 of the Plan

Loss of hire for fishing vessels is found in Chapter 17, Section 7 (Clauses 17-56 – 17-61). Chapter 17 contains the standard insurance conditions in the Plan applying to insurance of fishing vessels and small freighters. Section 1 contains rules that are common to Sections 2-7. Conditions for hull insurance are found in Sections 2 and 3, for catch and equipment insurance in Sections 4 and 5 and shipowners' liability insurance in Section 6.

Cl. 17-1 makes it clear that the rules in Chapter 17, Sections 1-7 only apply to the extent that this is expressly agreed in the insurance contract. This means that the parties in principle have the option to insure fishing and coastal vessels on the basis of the other Chapters of the Plan, if they so wish. But it is not given that the insurers agree to insure e.g. hull insurance on the basis of the somewhat wider cover in Part Two of the Plan intended for ocean going vessels. The assured may not be interested in such wider cover if it means he has to pay a higher premium. Hence, it is normally on the insurer to ensure that the somewhat more restricted cover in Chapter 17 is expressly agreed in the insurance contract. If not, Chapter 17 will not apply. It follows from the above that Section 7 is not applicable unless it has been expressly agreed that the insurance shall also cover loss of hire, which is according to the general principle in the Plan that each type of insurance must be expressly agreed.

For the sake of good order, it must be emphasised that all the insurances under Chapter 17 are also subject to the rules in Part I of the Plan (Chapters 1 to 9) unless excepted in Chapter 17 (or in the individual insurance contract).

17.2 Clause 17-56. Relationship to Chapter 16

Cl. 17-56 reads:

> *The provisions of Chapter 16 apply with the changes prescribed in Cl. 17-57 to Cl. 17-61.*

Loss of time for fishing vessels is covered on the basis of Chapter 16, subject to the changes that follow from Cl. 17-57 to Cl. 17-61. These special rules are intended to apply only to fishing vessels and not to smaller freight vessels that are also insured on the basis of Chapter 17, Sections 1 – 6. Such freight vessels can obtain loss of hire insurance on the basis of Chapter 16 subject to any changes that might be laid down in the individual insurance contract.

17.3 Clause 17-57. Liability of the insurer/applies instead of Clause 16-1

Cl. 17-57 reads:

> *The insurance covers loss due to the vessel being wholly or partially deprived of income on account of damage to the vessel, provided that the damage is recoverable*

under Chapter 17, Section 2, or would have been recoverable if no deductible had been agreed, see Cl. 12-18. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules in Chapter 17, Section 2, shall be replaced by the corresponding conditions of the insurance concerned when assessing whether the damage is recoverable. If the hull insurance provides extended cover under Chapter 17, Section 3, the rules in the first and second sentences shall apply correspondingly in relation to Section 3.

This Clause is verbatim very similar to Cl. 16-1, but all the same replaces Cl. 16-1 in its entirety because the important difference between Cl. 16-1 and Cl. 17-57 is that it is the provisions regarding hull insurance in Chapter 17, Section 2, that determine whether compensation is payable under the loss of hire cover. The last sentence of Cl. 17-57extends the loss of hire insurance correspondingly, if the hull insurance has been extended according to Chapter 17, Section 2.

Sub-clause 2 of Cl. 16-1 has not been incorporated and will therefore not apply to fishing vessels. The reason for this is that these provisions are presumed not to be of any practical significance for fishing vessels.

17.4 Clause 17-58. Total loss/applies instead of Clause 16-2

Cl. 17-58 reads:

The insurer is not liable for loss of time resulting from a casualty that gives the assured the right to compensation for total loss under Chapter 11 with Cl. 11-3, sub-clause 2, amended pursuant to Cl. 17-11 or under the corresponding conditions in the hull insurance that apply to the ship pursuant to Cl. 17-57, second sentence.

This Clause is very similar to Cl. 16-2, but with the important amendment that follows from Cl. 17-11 that the threshold for condemnation has been set at 90 % instead of 80% as in Cl. 11-3, sub-clause 2.

17.5 Clause 17-59. Calculation of compensation for fishing vessels/Ref. Clause 16-3

Cl. 17-59 reads:

The insurance does not cover loss that is due to the vessel being deprived of income from fishing as a result of regulatory measures introduced by the authorities or the fact that the authorities have stopped fishing activities.

Quotas which are not fished in full during the quota year due to damage to the vessel, cf. Cl. 17-57, and which are allowed by the authorities to be transferred to a new quota year, shall be regarded as quotas fished in the original quota year, if the quota is fished in the new quota year. The same applies to quotas transferred by the vessel to other vessels in the quota year.

> *The claims adjustment shall be issued as soon as possible after the quota year is over, but in cases where quotas are transferred to a new quota year, the claims adjustment shall be issued as soon as possible after the end of the new quota year, cf. Cl. 5-2 and Cl. 5-6.*

When calculating compensation for loss of time for fishing vessels, Cl. 16-3 will apply in full in addition to Cl. 17-59, but Cl. 17-59 contains important limitations on the extent of the compensation that can be claimed under the loss of hire insurance.

The rationale is that calculating compensation under loss of hire insurances for fishing vessels poses special challenges and difficulties compared with ordinary merchant vessels, whether they be seagoing or have a limited trading route along the coast, because operations of fishing vessels are subject to control of national fishing authorities. The authorities' control may consist of time limitations on the fishing of certain fish species, quotas for individual fishing vessels and overall seasonal or annual catch quotas. Seagoing fishing vessels will, nevertheless, have possibilities of obtaining a license or permit to switch from one type of fishing to another in different areas and it will thereby be possible to use the vessel for income-generating fishing operations throughout or during large parts of the year.

Fishing is strictly regulated in almost all European countries as well as internationally through cooperation under the International Council for the Exploration of the Sea (ICES). Legal authority for regulating fishing in Norway is provided by the Act of 6 June 2008 on the Management of Wild Living Marine Resources *(havressursloven)*. The Marine Resources Act empowers the authorities to establish national quotas, group quotas, district quotas and quotas for individual fishing vessels. Permits for individual fishing boat owners to engage in fishing are governed by the Act of 26 March 1999 No. 15 relating to the right to participate in fishing and hunting (*deltakerloven).* Quotas for the different types of fish are fixed for one year at a time by the fishery authorities pursuant to the Marine Resources Act.

Cl. 17-59, *sub-clause 1*, therefore provides that the insurance does not cover losses resulting from the vessel being deprived of income due to regulatory measures introduced by the authorities or from the authorities having stopped fishing operations. The wording "authorities" includes national authorities, authorities in other countries and supranational authorities like the EU. This provision is a logical consequence of the principle expressed in the Commentary on Cl. 16-3 with reference to the English judgment in the "CAPRICORN", which determined that loss of time which occurred during a period when the vessel would have been deprived of income regardless of the damage is not recoverable, see further 3.1 above.

Therefore, the question of whether there is a recoverable loss cannot be considered solely on the basis of whether the vessel has been unable to operate regularly due to damage. Consideration must also be given to whether the vessel has been prevented from fishing its full allocated quota of a specific species of fish. If, once the vessel is back in operation after an interruption due to damage, it is able to fish its full allocated quota, the assured has suffered no loss and is thus not entitled to compensation.

This can be illustrated by the following examples:

(1) A purse seiner licensed to fish mackerel suffers damage to machinery on 1 October, as a result of which the vessel is unable to operate until 1 December of the same year. Mackerel is normally fished in the period September-November. Prior to the interruption, the vessel had

fished two-thirds of its quota. When it began to operate again on 1 December, the assured was unable to fish the rest of his quota since the fish were no longer present in the Norwegian zone. In this case, the assured has in fact been deprived of the possibility of fishing during the period 1 October to 1 December. In principle, however, the loss will be limited to the time the vessel would need to fish the remainder of its mackerel quota. On the other hand, the vessel could conceivably lose income that it might have earned from alternative fishing operations, such as herring and autumn mackerel fishing.

(2) A fishing vessel is licensed to trawl for Norwegian spring spawning (NSS) herring. The vessel began fishing for herring on 1 February, but due to grounding on 20 February spent 30 days in a yard for repairs. When the grounding occurred, the vessel had fished 30 % of its quota of NSS herring. After repairs of the vessel were completed, it continued to fish for blue whiting, for which it also had a quota. In the autumn of the same year, the vessel resumed fishing for NSS herring and fished its entire quota before the end of the year. The vessel was able to fish the remainder of its quota of NSS herring before the end of the calendar year, but missed the opportunity to fish for blue whiting during the period in which repairs were carried out and is thus entitled to compensation for this loss of time, unless the vessel had also fished its full blue whiting quota.

(3) A trawler has a quota to fish sand eel (tobis) in the North Sea. The fishing season starts on 1 May. On that day a fire breaks out on board the boat, which spends 30 days in a shipyard to repair the damage. On 25 May the authorities stop the fishing because the proportion of stunted fish is too high. Fishing is not re-opened that season. The vessel has had a time loss of 30 days, but due to the moratorium on fishing, the vessel would only have been able to fish for 25 days. The recoverable loss of time is therefore limited to 25 days. If, on the other hand, the vessel had had the right to fish other species for which the authorities had not halted fishing activities, the number of days of indemnity is not reduced.

If the assured leases another vessel to fish his full quota while the insured vessel is deprived of income, the costs of such leasing must be recoverable under Cl. 16-11.

Cl. 17-59, sub-clause 2, second sentence, provides that quotas which are not fished in full during the quota year due to damage to the vessel, cf. Cl. 17-57, and which the authorities allow to be transferred to a new quota year, are to be regarded as quotas fished in the original quota year if the quota is fished in the new quota year. This provision has been included because in some cases the fishery authorities may allow quotas that are not fished in full in the quota year to be credited to the quota fixed for the following year. This can apply to both group quotas and vessel quotas. The legal basis for such "transfer" is provided by the individual regulations governing the fishing activities in question, which are laid down pursuant to Cl. 11 of the Marine Resources Act. If, despite the damage, the assured is able to fish his full quota for one year in the course of two quota years, he will not have suffered any loss that is recoverable under the loss of hire insurance. However, this is conditional on the displacement in time of the fishing activities not having negative consequences for the assured's possibility of fishing his full quota for the new quota year or in the form of a reduced quota as a result of the transfer.

Once the fixed quota for individual vessels or groups has been fished in full, the fishery authorities may grant an extra quota. As a rule, this is done if the fishery authorities see that a great deal of the total quota for individual species of fish remains unfished in the quota year. When the total quota has been fished in full, fishing activities are stopped. If the assured is allocated an extra quota of this nature, it may be taken into account in the calculation of loss.

However, such extra quotas may raise difficult issues in practice that must be resolved on a case-by-case basis. If the assured has not been able to fish his full ordinary quota on account of the damage, but would in any event have been allocated an extra quota, he will have suffered a loss. If the assured received the extra quota because he was unable to fish his full ordinary quota, the extra quota could be seen as compensation for the loss of all or part of his ordinary quota. Quotas which the vessel would obviously not have managed to fish are not recoverable. Situations where the vessel would obviously not have managed to fish its quota may arise as a result of poor operational decisions, the unavailability of fish or the fact that extra quotas are allocated so late that they cannot be fished in the quota year or the following quota year in cases where quotas are allowed to be transferred from one year to the next.

Under sub-clause 2, second sentence, of the provision, the rule set out in the first sentence, to the effect that quotas fished in full in the new quota year are, in certain cases, to be regarded as having been fished in full in the original quota year, applies correspondingly to quotas transferred by the vessel to other vessels in the quota year. The rationale for this expansion of cover is that shipowners may transfer all or parts of their quota to other vessels in accordance with rules laid down by the authorities. These quotas may be used both in the event of a casualty and in connection with the vessel's ordinary operations, and consequently will limit the shipowner's loss.

Due to the quota rules, sub-clause 3 contains a special rule in relation to the general rule in Cl. 5-2 regarding when the claims adjustment is to be issued. Whether or not the vessel has managed to fish its full allocated quota is not ascertained until the end of a quota year. This means that the insurer will not be able to assess whether the assured has suffered a real loss until the end of the year. The duty to issue the claims adjustment has therefore been deferred to as soon as possible after the end of the quota year. The same applies when quotas are transferred to a new quota year. In such a case, the duty to issue the claims adjustment arises as soon as possible after the end of the new quota year.

Under Cl. 5-6, compensation thus falls due for payment six weeks thereafter. This applies even if the agreed insurance period has expired at an earlier date. This special rule will have relevance for the point in time when interest on overdue payments begins to accrue, cf. Cl. 5-4, last sub-clause. For loss of hire compensation, however, interest under Cl. 5-4 will accrue as provided in Cl. 5-4, sub-clause 1, third sentence, from one month after the end of the period for which the loss of hire insurer is liable, which will normally be one month after repairs of the vessel were completed, cf. Cl. 16-13. The expiry of the quota year will be of no relevance in this connection. If the insurer wishes to avoid paying interest under Cl. 5-4, he must make a payment on account under Cl. 5-7 in the usual manner.

17.6 Clause 17-60. The daily amount for fishing vessels/applies instead of Clause 16-5

Cl. 17-60 reads:

> *The assured's loss of income per day (the daily amount) shall be calculated on the basis of the average income per day from fishing for vessels of the type and size in question and the geographical area in which it is natural for the vessel to deliver fish during the period when the vessel is deprived of income, less such expenses as the assured saves or ought to have saved due to the ship not being regularly operated.*

The assured's loss of income per day (the daily amount) shall be calculated on the basis of the average income per day from fishing for vessels of the type and size in question and the geographical area in which it is natural for the vessel to deliver fish during the period when the vessel is deprived of income, less such expenses as the assured saves or ought to have saved due to the ship not being regularly operated.

17.7 Clause 17-61. Agreed daily amount for fishing vessels/applies instead of Clause 16-6

If it is stated in the insurance contract that a certain amount per day shall be paid in compensation for loss of income, the said amount is the maximum compensation that may be paid out per day under Cl. 17-60 unless it is clearly evident from the contract that the amount is an agreed daily amount.

As opposed to Cl. 16-6, Cl. 17-61 contains no presumption that if a daily amount is stated in the insurance contract, this shall be deemed to be an agreed daily amount. To the contrary, the presumption is the other way around, namely that the daily amount stated in the insurance contract is merely the daily sum insured or the maximum amount to be paid per day. Thus, the loss of hire insurance for fishing vessels is normally covered as so called “open insurance” and calculation of the loss shall be made in accordance with Cl. 17-60, cf. Cl. 17-59. It is in principle possible also for fishing vessels to let the daily amount stated in the insurance contract be a so called “agreed daily amount”, but this must in case be expressly written into the insurance contract in no uncertain terms. It is unlikely that the insurer will accept the daily amount to be an “agreed daily amount” for vessels subject to quota regulations. For vessels fishing worldwide, able switch between quota systems in different parts of the world, and thus able to earn income more or less all year around, an agreed daily amount may make sense.

18 LOSS OF HIRE FOR MOBILE OFFSHORE UNITS

18.1 Overview of Chapter 18 of the Plan

Chapter 18 of the Plan on Insurance of Mobile Offshore Units (MOUs) was substantially amended in the 2013 Nordic Plan. In the 2016 Version a new Section 6 on construction risks was added, and Section 5 on war risks was expanded by incorporating all clauses from Chapter 15, amended as appropriate to fit war risks insurance for MOUs.

By incorporating Chapters 10–14 on Hull- and Total loss insurances into Section 2 and 3 of Chapter 18 and Chapter 16 on Loss of Hire insurance into Section 4 of Chapter 18 of the Plan in 2013, Chapter 15 into Section 5 of Chapter 18 of the Plan and adding a new Section 6 on construction risks to Chapter 18 of the Plan in 2016, the intention that Chapter 18 contains all clauses relevant to MOUs was completed. There are no longer any cross references to any other parts of the Plan except to Part One, which according to the express provision of Cl. 18-1 also constitutes the "background law" for insurance of MOUs unless specifically amended by Cl. 18-1.

Thus, the applicable Loss of Hire Clauses for MOUs are found in Section 4 of Chapter 18 of the Plan (Clauses 18-43 to 18-56). Many of these Clauses are identical to the corresponding Clauses in Chapter 16 of the Plan. The Commentary to these Clauses are, therefore, limited to saying just that and referring to the Commentary to the equivalent clause in Chapter 16 of the Plan. Those Clauses that are only edited to fit to MOU terminology without any substantive amendment, are not commented on here.
There are two Clauses, Cl. 18-54 Simultaneous works and Cl. 18-55 Loss of time after completion of repairs that were substantively amended. Cl. 18-54 will be dealt with in 18.2 and Cl. 18-55 in 18.3 below.

18.2 Clause 18-54 Simultaneous works

Clause 18-54, Sub-clause 1 reads:

> *If repairs covered under this insurance are carried out simultaneous with work which is not covered under any loss of hire insurance, but which:*
>
> *a) is carried out to fulfil classification requirements, or*
> *b) is necessary to enable the MOU to meet technical and operational safety requirements or perform its contractual obligations, or*
> *c) is related to the reconstruction of the MOU,*
>
> *the insurer shall pay compensation for half of the time common to both categories of works in excess of the deductible period. Works under a - c, which would not have deprived the MOU from income if carried out separately and which have not delayed the casualty repairs, shall not be taken into account. If casualty damage is discovered or occurs during the period the MOU would have been deprived of income if the work under (a)–(c) had been carried out separately, time for repairs carried out simultaneously with scheduled works under a - c shall not be compensated.* (Emphasis added)

This Clause was new in the 2013 Plan and corresponds to Cl. 16-12. In addition to some editorial amendments substantive amendments were made in the 2013 Plan compared to Cl. 16-12 by adding the two new sentences to sub-clause 1 emphasised above. The Commentary to Cl. 16-12 is relevant also to Cl. 18-54 and is therefore referred to, see also 7.4.1 above.

The provision regulates the liability of the loss of hire insurer in cases where repairs that are covered by the insurance and work that is not covered by it are carried out at the same time. The latter may be relevant to a loss of hire insurance for an earlier or later year, or it may be work that is not covered by any insurance, e.g. work relating to classification or modifications.

When repairs relating to one or more casualties (under one or more loss of hire insurance contracts) are carried out at the same time as work for the assured's account (e.g. work in connection with periodic classification surveys), the loss of time during the stay at the repair yard will in actual fact be due to several concurrent causes of damage. In the absence of other provisions, the loss in such cases must be apportioned between the assured and the various insurers in accordance with the rule of apportionment in Cl. 2-13. However, this type of solution is unsatisfactory from a technical legal standpoint because it will entail numerous decisions that are made largely on a discretionary basis. In order to avoid these problems, therefore, more clear-cut rules of apportionment have traditionally been applied in the loss-of-hire conditions. The rules of apportionment in Cl. 18-54 are based on those principles set out at Cl. 16-12, with the result that the causation rules in Cl. 2-13 are set aside in two respects:

Firstly, by applying relatively simple criteria, Cl. 18-54 (and Cl. 16-12) prescribe when simultaneous repairs are to be regarded as concurrent causes of the loss of time, and when one of the repairs is to be regarded as the only cause. In this way, difficult and, to some extent, subtle questions of causation are avoided. Secondly, Cl. 18-54 (and Cl. 16-12) fix the exact proportions to be used when apportioning the time lost among the various repairs; it is therefore unnecessary to use the discretionary rule of apportionment in Cl. 2-13.

These two departures from the main rule considerably simplify the issue. The fact that the provisions may occasionally give one of the parties an unwarranted advantage is of little significance compared to the substantial advantages achieved for the adjustment of the claim under the loss of hire insurance.

Pursuant to sub-clause 1 (a) to (c), an apportionment is to be made between the assured and the insurer when specified owner's work is carried out at the same time as casualty work. Owner's maintenance work which does not fall within the categories of work defined in letters (a) to (c) shall never be subject to any apportionment pursuant to Cl. 18-54.

In accordance with sub-clause 1, first sentence, the apportionment is to be made on the basis of an equal shares principle: the insurer shall pay compensation for half of the common repair time in excess of the deductible period. The said principle presupposes that the common work time is utilized equally effectively by both parties, and that it is therefore equitable to share the loss of time during this period equally; furthermore, this type of 50/50 rule is very easy to apply in practice.

This reasoning is generally relevant also to MOUs, but compared to vessels or MOUs carrying goods and/or passengers, MOUs will to a much larger extent carry out not only ordinary maintenance work, but also letters (a) to (c) work while they are offshore and still earn hire wholly or in part.

Hence, a new second sentence was added to sub-clause 1 providing that works under letters (a) to (c) which would not have deprived the MOU from income if it had been carried out separately shall not be taken into account for apportionment pursuant to the first sentence of sub-clause 1. This means that the assured may carry out e.g. classification work simultaneously with casualty work without any apportionment of the common time, if the classification work could have been carried out separately without loss of income. It will be a question of fact whether the classification work was of such nature that it could have been carried out without loss of income. If not, a 50/50 apportionment shall be applied on the common time. If the owner's work delays the casualty work, sub-clause 4 of Cl. 18-54 applies also on how the delay shall be apportioned between the casualty- and owner's work.

It was considered whether the principle adopted in the new second sentence of sub-clause 1 should be applied in the insurers favor in those cases where the casualty work is deferred to a period when the MOU is out of service due to owner's work. It was, however, agreed that it is in both the insurers, as well as the assured's, long term interests to encourage the owner to defer the casualty work to a convenient time rather than risk to impose on the insurer an unnecessary loss by repairing casualty work at once. The obligation to mitigate loss according to Cl. 3-30 cf. Cl. 3-31 would, of course, limit the owner's possibilities to impose an unnecessary loss on the insurer. All the same, it was felt prudent to supplement the potentially contentious Cl. 3-30 with an economic incentive for the owner to defer casualty work whenever prudent to a convenient time and still be compensated for half the common time according to the first sentence of sub-clause 1.

However, the new third sentence of sub-clause 1 provides that if casualty damage is discovered or occurs during a period when the MOU would have been deprived of income if works under letters (a) to (c) had been carried out separately, time for repairs carried out simultaneously with scheduled works under letters a) to c) shall not be compensated. The third sentence of sub-clause 1 only applies if casualty work is repaired simultaneously with the same scheduled works under letter (a) to (c) during which the casualty work was discovered or occurred. If the casualty work so discovered or occurred is deferred to a subsequent period when other scheduled works under letters (a) to (c) are carried out, then what is written above on deferred casualty work shall apply, cf. also, in this regard, Cl. 3-30.

18.3 Clause 18-55 Loss of time after completion of repairs

Cl. 18-55 reads:

> *After repairs have been completed, the insurer shall only be liable for loss of time:*
>
> *a) until the MOU can resume the activity that it was engaged in under the contract of employment that was in force at the time of the casualty, or*
>
> *b) while the MOU moves back to an equidistant position to where it without the casualty would have commenced the move to its next location under a contract of employment that was entered into with binding effect prior to the commencement of the move to the repair location.*
>
> *Cl. 18-52 shall apply correspondingly to loss of time after completion of repairs.*

Cl. 18-55 is corresponding to Cl. 16-13, but letters (b) and (d) are not deemed relevant to MOUs and are therefore not included in Cl. 18-55. Cl. 18-55 (a) is not substantively amended compared with Cl. 16-13 (a), apart from some editorial amendment to adapt it to the modus of operation of MOUs. Letter (b) is amended as compared with Cl. 16-13 letter (c).

This provision limits the insurer's liability for loss of time that occurs after repairs have been completed. According to the main rule for calculating loss of time set out in Cl. 18-46, the insurer would have been fully liable for time lost after completion of repairs to the extent that this loss of time was a result of the casualty.

The insurer would, therefore, have had to pay compensation for loss of time until the MOU was again back to its previous employment, as well as for any loss of time resulting from the termination of the contract of work. Thus, Cl. 18-55 involves a limitation on the liability that follows from Cl. 18-46 with regard to time lost after completion of repairs. In accordance with sub-clause 1, first sentence, the insurer is only liable for such loss of time in those cases that are specifically mentioned in letters (a) and (b); in all other cases, the liability of the loss of hire insurer ceases when the repairs have been completed.

Letter (a) deals with the situation where the MOU, after completion of repairs, is to continue to operate under the contract of works that was in effect at the time of the casualty; in such case, the insurer is liable for time lost until the MOU has resumed its former employment. The provision applies irrespective of the type of contract of works concerned. Contractual obligations that are not set out in an actual contract of works must be regarded as equivalent to such a contract in this connection. If, on the other hand, the contract of works is cancelled due to the MOU's stay at a repair location, the insurer is only liable for the time lost up to the completion of repairs, unless cover is provided under letter (b).

Letter (b) regulates loss of time for a MOU that does not return to the location at which the casualty occurred but moves to another location, either to commence new operations that it was scheduled to move to, after the completion of the operations it was engaged in at the time of the casualty, irrespective of whether the MOU actually completed those operations, or to take up work under a new contract of works that was concluded prior to *"the commencement of the move to the repair location"*. These words are new as compared with Cl. 16-13 letter (c) which only compensates loss of time after completion of repairs if the contract was entered into prior to the occurrence of the casualty. A contract may be legally binding and therefore concluded even if the contract is not formalized in a written agreement duly executed and signed by the parties. A mere letter of intent, however, will not satisfy the requirement of a binding contract pursuant to letter (b).

The next location may be in a different direction from the repair location than the location at which the casualty occurred, but the insurer's liability will be limited to the time necessary to move in the new direction for a distance equal to the distance, a return to the casualty location.

Loss of time after completion of repairs covers both the situation where the MOU remains in the repair yard for a while after repairs have been completed and while the MOU moves to a location to resume its normal activity. However, loss of time due to the MOU being unable to find employment immediately after repairs have been completed is not covered. Such loss of time may in certain cases be said to be a consequence of the repairs and hence also a consequence of the damage that was repaired. However, the dominant cause of the loss of

time will be the market conditions, or possibly decisions made by the assured, and it is therefore natural that the loss should not be covered.

The reference in sub-clause 2 to Cl. 18-52 is made in respect of its sub-clause 2, second sentence, which establishes that removal time occurring during the deductible period is not to be apportioned, cf. the Commentary on Cl. 18-52.

18.4 Suspension of the Loss of Hire insurance during lay-up

This discussion is in principle also relevant with regard to loss of hire insurance based on Chapter 16, but is more practical for MOUs, hence the discussion here.

There are no provisions in the Plan that suspends the insurance in case the vessel or MOU is laid-up. Cl. 3-26 requires that a lay-up plan shall be drawn up which shall be submitted to the insurer for approval. Cl. 9-3 vests approval of the lay-up plan with the claims leader with binding effect for the co-insurers, if any. If no lay-up plan has been issued by the assured, or he has failed to obtain approval of it by the insurer, or the lay-up plan has not been complied with, this will be deemed to be a violation of a safety regulation sanctioned according to Cl. 3-25, sub-clause 1. Cl. 6-6 gives the assured a right to negotiate a return of premium on certain conditions in case the vessel or MOU is laid-up.

Thus, the assured has the option to keep the vessel or MOU fully insured during lay-up, alternatively to agree with the insurer various other arrangements deemed satisfactory to both parties' interests under the circumstances. Normally, under a so called cold lay-up[33], the assured will get a return or reduction of the premium as the risks the vessel or MOU is exposed to during lay-up are less than during trading. But, the risk for damage to or loss of the vessel or MOU is not eliminated altogether during lay-up, so normally the hull insurance and other property insurance is maintained with an adjusted insured value, if the lay-up is due to a falling market lowering the values of vessels or MOUs, cf. Cl. 2-3, sub-clause 2.
However, for loss of hire insurance it may be in the best interests of the assured to have the insurance terminated or suspended during an extended lay-up period. There will be no compensation under the loss of hire insurance if the damage to the vessel or MOU is repaired during lay-up, as the assured is not suffering any loss of income as the vessel or MOU would have been out of service regardless of the damage, see 3.1 above.

On the other hand, the assured may still suffer a loss of income at a later stage, namely when the damage is repaired. In this context it is unimportant whether the damage was discovered immediately when it occurred, or only after the vessel or MOU was recommissioned and started normal operation. The assured ought, therefore, to consider carefully what insurance arrangements are in his best interest. If the loss of hire insurance is terminated or suspended during lay-up, any damage to the vessel or MOU occurring[34] during lay-up will be uncovered.

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[33]In cold lay-up condition the machinery is taken out of service and the vessel or MOU is kept "electrically dead" with the exception of emergency power. This condition usually implies 3 weeks re-commissioning time or more depending on the level of preservation and maintenance during lay-up, see also XX above.

[34] Cl. 2-11 entails that under certain circumstances a peril may be deemed to have struck prior to the "occurrence" with the effect that the resulting damage shall be referred back to a previous insurance year or, in this context, before the loss of hire insurance was terminated or suspended. But, in many

A damage that occurred during lay-up must be referred back to the lay-up period regardless of when the damage was, or should have been, discovered.

Repairs may not be possible or uneconomical to carry out at the location of the lay-up, so the vessel or MOU will have to be removed for repairs. Such removal will normally be done in connection with the vessel or MOU breaking the lay-up, in which case the assured may be suffering a loss of income as the transition period from breaking the lay-up to the vessel or MOU being ready for trading/operating again is prolonged due to the damage repairs. Normally, the deductible period according to Cl. 16-7/Cl. 18-49 start to run from the commencement of the loss of time, which will then be when the lay-up period ends.
An example may illustrate the point:

An offshore unit (MOU) is laid-up between two contracts. The MOU is damaged during the lay-up. The remaining period of lay-up is 45 days. The deductible period is 30 days. If repairs are commenced immediately at lay-up site and last for 75 days, there will be no claim under the loss of hire insurance. The MOU would have been out of service in any event the first 45 days due to the lay-up, and the next 30 days are the deductible period commencing at the end of the lay-up period. Only if repairs continue for more than 75 days will the loss of hire insurance respond by paying the daily amount for the number of days exceeding 75. If the daily amount is reduced during the lay-up, e.g. from USD 150,000 to USD 75,000, the loss of hire insurer will pay only USD 75,000 for each day in excess 75 days.

The result will be the same in cases where the MOU must be removed for repairs. Such removal may entail that the daily running costs are increased as compared with mere lay-up costs. Such increased costs will not be covered under an ordinary loss of hire insurance, if there is no loss of income. So, if the removal occurs while the MOU is out of service, i.e. during the 45 days remaining of the lay-up period in the above example, there will not be any compensation during the removal, even if the daily costs are increased during the removal.
In practice, it is often agreed that the daily amount is set at NIL at the termination or expiry of the charter, and that the daily amount is increased to the new daily charter rate from the moment a new charter is agreed. Alternatively, the increase of the daily amount may take effect when the new charter enters into force.

If the daily amount is set at NIL during the lay-up between two charters, there will not be any compensation under the loss of hire insurance for the number of days of repairs exceeding the deductible period, if the damage occurs while the daily amount is set at NIL even if the repair takes place after the daily amount is increased to the new charter rate. As explained below at footnote 2, the loss of hire cover must be referred back to the cover in place when the damage occurs. If the loss of hire insurance is terminated or suspended during lay-up there will be no cover for incidents occurring during the lay-up. The same goes if the daily amount is set at NIL during lay-up.

Hence, the assured should carefully consider whether it is in his best interest to terminate or suspend the loss of hire cover during lay-up. In the same way he should equally carefully consider whether it is in his best interest to set the daily amount to NIL.

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cases, may be most cases, the peril strikes more or less at the same time as the damage occurs, which is what we have in mind, leaving aside the finer points of Cl. 2-11 for the purposes of this discussion.

APPENDIX

NORDIC MARINE INSURANCE PLAN OF 2013, VERSION 2016
CHAPTER 16, SECTION 7 CHAPTER 17, SECTIONS 4 & 5-6 CHAPTER 18[35]

Chapter 16

Clause 16-1. Main rules regarding the liability of the insurer

The insurance covers loss due to the ship being wholly or partially deprived of income as a consequence of damage to the ship which is recoverable under the conditions of the Plan, or which would have been recoverable if no deductible had been agreed, see Cl. 12-18. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules in Chapters 10 - 12 of the Plan shall be replaced by the corresponding conditions of the insurance concerned when assessing whether the damage is recoverable.

The insurance also covers loss due to the ship being wholly or partially deprived of income:

a. because it has stranded,

b. because it is prevented by physical obstruction (other than ice) from leaving a port or a similar limited area, or

c. as a consequence of measures taken to salvage or remove damaged cargo, or

d. as a consequence of an event that is allowed in general average pursuant to the 1994 York-Antwerp Rules.

Clause 16-2. Total loss

The insurer shall not be liable for loss of time resulting from a casualty which gives the assured the right to compensation for total loss under Chapter 11 of the Plan or under the corresponding conditions in the hull insurance that applies to the ship pursuant to Cl. 16-1, sub-clause 1, second sentence.

Clause 16-3. Main rule for calculating compensation

Compensation shall be determined on the basis of the time during which the ship has been deprived of income (loss of time) and the loss of income per day (the daily amount). Loss of time that occurred prior to the events described in Cl. 16-1 shall not be recoverable.

Clause 16-4. Calculation of the loss of time

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Loss of time shall be stipulated in days, hours and minutes. A period of time during which the ship has only partially been deprived of income shall be converted into a corresponding period of total loss of income.

The insurer's liability for loss of time resulting from any one casualty, and for the total loss of time resulting from all casualties occurring during the insurance period, shall be limited to the sum insured per day multiplied by the number of days of indemnity per casualty and altogether stated in the insurance contract.

Clause 16-5. The daily amount

The assured's loss of income per day (the daily amount) shall be fixed at the equivalent of the amount of freight per day under the current contract of affreightment less such expenses as the assured saves or ought to have saved due to the ship being out of regular employment.

If the ship is unchartered, the daily amount shall be calculated on the basis of average freight rates for ships of the type and size concerned during the period in which the ship is deprived

Clause 16-6. Agreed daily amount

If it is stated in the insurance contract that loss of time shall be compensated for by a fixed amount per day, this amount shall be regarded as an agreed daily amount unless the circumstances clearly indicate otherwise.

Clause 16-7. Deductible period

Each casualty shall be subject to a deductible period which shall run from the commencement of the loss of time and last until the loss of time, calculated in accordance with the rule in Cl. 16-4, sub-clause 1, second sentence, is equivalent to the deductible period stated in the insurance contract. Loss of time in the deductible period is not recoverable.

Damage caused by heavy weather or navigating in ice which has occurred during the period between departure from one port and arrival at the next one shall be regarded as one casualty.

If a separate deductible period for damage to machinery has been agreed on, Cl. 12-16 shall apply correspondingly.

Clause 16-8. Survey of damage

The provisions of Cl. 12-10 shall apply correspondingly to this insurance.

Clause 16-9. Choice of repair yard

The insurer may require that tenders for repairs be obtained from repair yards of his choice. If the assured does not obtain such tenders the insurer may do so.

If, due to special circumstances, the assured has reasonable grounds to object to the repairs being carried out by one of the repair yards that has submitted a tender, he may require that the tender from that yard be disregarded.

The assured shall decide which yard is to be used. However, the liability of the insurer shall be limited to the loss of time under the tender that would have resulted in the least loss of time among the tenders for which the assured would have been able to claim compensation under the hull insurance. If the assured chooses this repair yard, the claim shall be settled on the basis of the actual time lost, even if this is greater than that specified in the tender. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the liability of the insurer shall be limited to the loss of time under the tender that would have resulted in the least loss of time plus half of any additional loss of time that may occur.

Clause 16-10. Removal to the repair yard, etc.

Loss of time during removal to the repair yard shall be attributed to the category of repairs that necessitated the removal.

If removal to the repair yard was necessary for more than one category of repairs, the removal time shall be apportioned in accordance with the time that each category of work would have required if carried out separately. Removal time that falls within the deductible period shall not be apportioned.

The rules of sub-clauses 1 and 2 shall also apply to loss of time during surveys, while obtaining tenders, during tank cleaning, while waiting to commence repairs or due to other similar measures that were necessary in order to carry out the repairs.

Clause 16-11. Extra costs incurred in order to save time

The insurer shall be liable for extra costs incurred in connection with temporary repairs and in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance, insofar as such extra costs are not recoverable from the hull insurer. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules of Cl. 16-1, sub-clause 1, second sentence, shall apply.

The insurer shall not, however, be liable for such costs in excess of the amount he would have had to pay if such measures had not been taken.

If time is saved for the assured, he shall bear a share of the extra costs that is proportionate to the time saved for his account.

Clause 16-12. Simultaneous repairs

If repairs covered under this insurance are carried out simultaneously with work which is not covered under any loss of hire insurance, but which:

a. is carried out to fulfil classification requirements, or

b. is necessary to enable the ship to meet technical and operational safety requirements or perform its contractual obligations, or

c. is related to the reconstruction of the ship,

the insurer shall pay compensation for half of the time common to both categories of repair in excess of the deductible period.

If repairs resulting from two casualties, both of which are covered under this insurance, are carried out simultaneously, the rule in sub-clause 1 shall apply correspondingly for the time that is within the deductible period of one casualty, but not within the deductible period of the other casualty.

If repairs covered under this insurance and work covered under other loss of hire insurance are carried out simultaneously, the insurer shall pay compensation for half of the repair time common to both categories of work in excess of the deductible period. This also applies where repairs under the other insurance contract are carried out within the deductible period under this insurance contract. Furthermore, if work which is not covered underany loss of hire insurance but which falls within the scope of sub-clause 1 is carried out simultaneously, the insurer shall only pay compensation for one fourth of the common repair time which exceeds the deductible period.

When applying the rules set out in sub-clauses 1-3, each category of work shall be deemed to have lasted for the number of days the work would have required if each category of work had been carried out separately, reckoned from the time the work started. Unless the circumstances clearly indicate another point in time, all categories of work shall be deemed to have started on the ship's arrival at the yard. Any delay which might occur due to several categories of work being carried out simultaneously shall be attributed to all categories in proportion to the number of days each category would have required if carried out separately, reckoned from the time the work started. However, the insurer’s liability shall not exceed the amount that would have been payable if the category of work for which he is liable had been carried out separately.

Clause 16-13. Loss of time after completion of repairs

After repairs have been completed, the insurer shall only be liable for loss of time:

a. until the ship can resume the voyage or activity that it was engaged in under the contract of affreightment that was in force at the time of the casualty,

b. until ships which are employed in liner trade or in another way follow a fixed route or operate in a defined geographical area can resume their activity,

c. while the ship sails to the first port of loading under a contract of affreightment that was entered into with binding effect prior to the casualty,

d. until passenger ships can resume their activity, but for a period not exceeding fourteen days.

Cl. 16-10 shall apply correspondingly to loss of time after completion of repairs.

Clause 16-14. Repairs carried out after expiry of the insurance period

The insurer shall not be liable for loss of time resulting from a stay at a repair yard that commences more than two years after expiry of the insurance period.

Loss of time resulting from a stay at a repair yard which commences after expiry of the insurance period shall be recoverable in accordance with the rules of Cl. 16-5, even if the daily amount is an agreed amount pursuant to Cl. 16-6, if this results in lower compensation.

Clause 16-15. Liability of the insurer when the ship is transferred to a new owner

When damage to the ship is repaired in connection with a transfer of ownership, the insurer shall not be liable for time that would in any event have been lost in connection with the said transfer. If the transfer has to be postponed due to repairs covered by this insurance, the insurer shall be liable for the assured's loss of interest in accordance with the rules of Cl. 5-4, even though the ship would not have earned income during the postponement.

The insurer's liability pursuant to sub-clause 1 shall not exceed the compensation calculated on the basis of the sum insured per day and:

a. the period of time by which the transfer was postponed, or

b. the time it must be estimated that the buyer will take to repair the ship,

less the agreed deductible period. The deductible period is calculated in consecutive days even if the loss of interest differs from the sum insured per day. No compensation may be claimed under Cl. 16-13 in these cases.

The assured's claim against the insurer may not be transferred to a new owner.

Clause 16-16. Relationship to other insurances and general average

The rules as to subrogation in Cl. 5-13 of the Plan shall apply correspondingly to:

a. the assured's right to claim compensation for loss of time and operating costs during removal to a repair yard under Cl. 12-11 or Cl. 12-13 of the Plan, or equivalent provisions in other conditions applicable to the ship's hull insurance, and

b. any right the assured might otherwise have to claim compensation for the loss from another insurer or in general average.

Section 7 Chapter 17

Clause 17-56. Relationship to Chapter 16

The provisions of Chapter 16 apply with the changes prescribed in Cl. 17-57 to Cl. 17-61.

Clause 17-57. Liability of the insurer/applies instead of Clause 16-1

The insurance covers loss due to the vessel being wholly or partially deprived of income on account of damage to the vessel, provided that the damage is recoverable under Chapter 17, Section 2, or would have been recoverable if no deductible had been agreed, see Cl. 12-18. If the hull insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules in Chapter 17, Section 2, shall be replaced by the corresponding conditions of the insurance concerned when assessing whether the damage is recoverable. If the hull insurance provides extended cover under Chapter 17, Section 3, the rules in the first and second sentences shall apply correspondingly in relation to Section 3.

Clause 17-58. Total loss/applies instead of Clause 16-2

The insurer is not liable for loss of time resulting from a casualty that gives the assured the right to compensation for total loss under Chapter 11 with Cl. 11-3, sub-clause 2, amended pursuant to Cl. 17-11 or under the corresponding conditions in the hull insurance that apply to the ship pursuant to Cl. 17-57, second sentence.

Clause 17-59. Calculation of compensation for fishing vessels/Ref. Clause 16-3

The insurance does not cover loss that is due to the vessel being deprived of income from fishing as a result of regulatory measures introduced by the authorities or the fact that the authorities have stopped fishing activities.

Quotas which are not fished in full during the quota year due to damage to the vessel, cf. Cl. 17-57, and which are allowed by the authorities to be transferred to a new quota year, shall be regarded as quotas fished in the original quota year, if the quota is fished in the new quota year. The same applies to quotas transferred by the vessel to other vessels in the quota year.

The claims adjustment shall be issued as soon as possible after the quota year is over, but in cases where quotas are transferred to a new quota year, the claims adjustment shall be issued as soon as possible after the end of the new quota year, cf. Cl. 5-2 and Cl. 5-6.

Clause 17-60. The daily amount for fishing vessels/applies instead of Clause 16-5

The assured's loss of income per day (the daily amount) shall be calculated on the basis of the average income per day from fishing for vessels of the type and size in question and the geographical area in which it is natural for the vessel to deliver fish during the period when the vessel is deprived of income, less such expenses as the assured saves or ought to have saved due to the ship not being regularly operated.

Clause 17-61. Agreed daily amount for fishing vessels/applies instead of Clause 16-6

If it is stated in the insurance contract that a certain amount per day shall be paid in compensation for loss of income, the said amount is the maximum compensation that may be paid out per day under Cl. 17-60 unless it is clearly evident from the contract that the amount is an agreed daily amount.

Section 4 Chapter 18

Clause 18-43. Main rules regarding the liability of the insurer

The insurance covers loss due to the MOU being wholly or partially deprived of income as a consequence of damage to the MOU which is recoverable under the conditions of the Plan, or which would have been recoverable if no deductible had been agreed, see Cl. 18-33. If the H&M insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules in Chapter 18, Section 2, of the Plan shall be replaced by the corresponding conditions of the insurance concerned when assessing whether the damage is recoverable.

The insurance also covers loss due to the MOU being wholly or partially deprived of income:

a. because it has stranded,

b. because it is prevented by physical obstruction (other than ice) from leaving a port or a similar limited area, or

c. as a consequence of measures taken to salvage or remove damaged cargo, or

d. as a consequence of an event that is allowed in general average pursuant to the 1994 York-Antwerp Rules.

Clause 18-44. Total loss

The insurer shall not be liable for loss of time resulting from a casualty which gives the assured the right to compensation for total loss under Chapter 18 of the Plan or under the corresponding conditions in the H&M insurance that applies to the MOU pursuant to Cl. 18-43, sub-clause 1, second sentence.

Clause 18-45. Main rule for calculating compensation

Compensation shall be determined on the basis of the time during which the MOU has been deprived of income (loss of time) and the loss of income per day (the daily amount). Loss of time that occurred prior to the events described in Cl. 18-43 shall not be recoverable.

Clause 18-46. Calculation of the loss of time

Loss of time shall be stipulated in days, hours and minutes. A period of time during which the MOU has only partially been deprived of income shall be converted into a corresponding period of total loss of income.

The insurer's liability for loss of time resulting from any one casualty, and for the total loss of time resulting from all casualties occurring during the insurance period, shall be limited to the sum insured per day multiplied by the number of days of indemnity per casualty and altogether stated in the insurance contract.

Clause 18-47. The daily amount

The assured's loss of income per day (the daily amount) shall be fixed at the equivalent of the amount of hire per day under the current contract of employment, less such expenses as the assured saves or ought to have saved due to the MOU being out of regular employment.

If the MOU is unchartered, the daily amount shall be calculated on the basis of average rates of hire for MOUs of the type, size and area of operation concerned during the period in which the MOU is deprived of income.

Clause 18-48. Agreed daily amount
If it is stated in the insurance contract that loss of time shall be compensated for by a fixed amount per day, this amount shall be regarded as an agreed daily amount unless the circumstances clearly indicate otherwise.

Clause 18-49. Deductible period
Each casualty shall be subject to a deductible period which shall run from the commencement of the loss of time and last until the loss of time, calculated in accordance with the rule in Cl. 18-46, sub-clause 1, second sentence, is equivalent to the deductible period stated in the insurance contract. Loss of time in the deductible period is not recoverable.
Damage caused by heavy weather or navigating in ice which has occurred during the period between departure from one port or location and arrival at the next port or location shall be regarded as one casualty.
Damage caused by heavy weather occurring as a result of the same atmospheric disturbance whilst the MOU is stationary at one location shall be regarded as a single casualty.

Clause 18-50. Survey of damage
The provision of Cl. 18-27 shall apply correspondingly to this insurance.

Clause 18-51. Choice of repairer
The insurer may require that tenders for repairs be obtained from repairers of his choice. If the assured does not obtain such tenders, the insurer may do so.

If, due to special circumstances, the assured has reasonable grounds to object to the repairs being carried out by one of the repairers that has submitted a tender, he may require that the tender from that repairer be disregarded.

The assured shall decide which repairer is to be used, However, the liability of the insurer shall be limited to the loss of time under the tender that would have resulted in the least loss of time amount the tenders for which the assured would have been able to claim compensation under the H&M insurance. If the assured chooses this repairer, the claim shall be settled on the basis of the actual time lost, even if this is greater than that specified in the tender. If the H&M insurance has been effected on conditions other than those of the Plan, liability of the insurer shall be limited to the loss of time under the tender that would have resulted in the least loss of time plus half of any additional loss of time that may occur.

Clause 18-52. Move to the repair location, etc.
Loss of time during move to the repair location shall be attributed to the category of work that necessitated the move.
If move to the repair location was necessary for more than one category of work, the time of the move shall be apportioned in accordance with the time that each category of work would have required if carried out separately. Time of move that falls within the deductible period shall not be apportioned.
The rules of sub-clauses 1 and 2 shall also apply to loss of time during surveys, while obtaining tenders, during tank cleaning, while waiting to commence repairs or due to other similar measures that were necessary in order to carry out the repairs.

Clause 18-53. Extra costs incurred in order to save time
The insurer shall be liable for extra costs incurred in connection with temporary repairs and in connection with extraordinary measures taken in order to avert or minimise loss of time covered by the insurance, insofar as such extra costs are not recoverable from the hull insurer. If the H&M insurance has been effected on conditions other than those of the Plan, and these conditions have been accepted in writing by the insurer, the rules of Cl. 18-43, sub-clause 1, second sentence, shall apply.
The insurer shall not, however, be liable for such costs in excess of the amount he would have had to pay if such measures had not been taken.
If time is saved for the assured, he shall bear a share of the extra costs that is proportionate to the time saved for his account.

Clause 18-54. Simultaneous works
If repairs covered under this insurance are carried out simultaneous with work which is not covered under anyloss of hire insurance, but which:

a. is carried out to fulfil classification requirements, or
b. is necessary to enable the MOU to meet technical and operational safety requirements or perform its contractual obligations, or
c. is related to the reconstruction of the MOU,

the insurer shall pay compensation for half of the time common to both categories of works in excess of the deductible period. Works under a - c, which would not have deprived the MOU from income if carried out separately and which have not delayed the casualty repairs, shall not be taken into account. If casualty damage is discovered or occurs during the period the MOU would have been deprived of income if the work under a - c had been carried out separately, time for repairs carried out simultaneously with scheduled works under a - c shall not be compensated.

If repairs resulting from two casualties, both of which are covered under this insurance, are carried out simultaneously, the rule in sub-clause 1 shall apply correspondingly for the time that is within the deductible period of one casualty, but not within the deductible period of the other casualty.

If repairs covered under this insurance and work covered under other loss of hire insurance are carried out simultaneously, the insurer shall pay compensation for half of the repair time common to both categories of work in excess of the deductible period. This also applies where repairs under the other insurance contract are carried out within the deductible period under this insurance contract. Furthermore, if work which is not covered under any loss of hire insurance, but which falls within the scope of sub-clause 1, is carried out simultaneously, the insurer shall only pay compensation for one fourth of the common repair time which exceeds the deductible period.

When applying the rules set out in sub-clauses 1-3, each category of work shall be deemed to have lasted for the number of days the work would have required if the two categories of work had been carried out separately, reckoned from the time the work started. Unless the circumstances clearly indicate another point in time, all categories of work shall be deemed to have started on the MOU's arrival at the repair location. Any delay which might occur due to several categories of work being carried out simultaneously shall be attributed to all categories in proportion to the number of days each category would have required if carried out separately, reckoned from the time the work started.

Clause 18-55. Loss of time after completion of repairs
After repairs have been completed, the insurer shall only be liable for loss of time:

a. until the MOU can resume the activity that it was engaged in under the contract of employment that was in force at the time of the casualty, or
b. while the MOU moves back to an equidistant position to where it without the casualty would have commenced the move to its next location under a contract of employment that was entered into with binding effect prior to the commencement of the move to the repair location.

Cl. 18-52 shall apply correspondingly to loss of time after completion of repairs.

Clause 18-56. Repairs carried out after expiry of the insurance period
The insurer shall not be liable for loss of time resulting from a stay at a repair location that commences more than two years after expiry of the insurance period.
Loss of time resulting from a stay at a repair location which commences after expiry of the insurance period shall be recoverable in accordance with the rules of Cl. 18-47, even if the daily amount is an agreed amount pursuant to Cl. 18-48, if this results in a lower compensation.

Clause 18-57. Liability of the insurer when the MOU is transferred to a new owner
When damage to the MOU is repaired in connection with a transfer of ownership, the insurer shall not be liable for time that would in any event have been lost in connection with the said transfer. If the transfer has to be postponed due to repairs covered by this insurance, the insurer shall be liable for the assured's loss of interest in accordance with the rules of Cl. 5-4, even though the MOU would not have earned income during the postponement.
The insurer's liability pursuant to sub-clause 1 shall not exceed the compensation calculated on the basis of the sum insured per day and

a. the period of time by which the transfer was postponed, or
b. the time it must be estimated that the buyer will take to repair the MOU,

less the agreed deductible period. The deductible period is calculated in consecutive days even if the loss of interest differs from the sum insured per day. No compensation may be claimed under Cl. 18-55 in these cases.
The assured's claim against the insurer may not be transferred to a new owner.

Clause 18-58. Relationship to other insurances and general average
The rules as to subrogation in Cl. 5-13 of the Plan shall apply correspondingly to:

a. the assured's right to claim compensation for loss of time and operating costs during removal to a repair location under Cl. 18-28 or Cl. 18-30 of the Plan, or equivalent provisions in other conditions applicable to the MOU's H&M insurance, and
b. any right the assured might otherwise have to claim compensation for the loss from another insurer or in general average

Section 5-6 Chapter 18

Clause 18-74. Relationship to Section 4 above
The provisions contained in this Section shall apply in addition to the provisions in Section 4 above.

Instead of Cl. 18-43, sub-clause 2 (b), the following shall apply: The insurer is liable for loss due to the MOU being wholly or partly deprived of income because it is prevented from leaving a port or a similar limited area.

Clause 18-75. Loss in connection with a call at a visitation port, a temporary stay, etc.
The insurer is also liable for loss of time caused by a foreign State power for the purpose of:
a. visitation and search of cargo, etc.
b. capture and temporary detention.

If the assured is entitled to compensation for total loss under Cl. 18-69 or Cl. 18-70, he is not entitled to compensation under this Section beyond the first month of the loss of time. If compensation has already been paid, it shall be deducted from the total loss compensation.

Clause 18-76. Loss caused by orders issued by the insurer
The insurer is also liable for loss of time resulting from orders issued by the insurer, cf. Cl. 18-62. However, this does not apply to orders given by the insurer in connection with the outbreak of war.
If the assured is entitled to compensation for total loss under Cl. 18-61, Cl. 18-75, sub-clause 2, shall apply correspondingly.

Clause 18-77. Choice of repairer
Cl. 18-51 does not apply.

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