

Comité Maritime International



Apportionment of risk in maritime law

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## LORD DIPLOCK: INTRODUCTION

In the Comité Maritime and its constituent associations there is an unrivalled wealth of practical experience and legal expertise in maritime law and maritime affairs.

At the previous conferences of the CMI we have devoted our time to the drafting of conventions for consideration at the Diplomatic Conference in Brussels and also voluntary agreements such as the York/Antwerp Rules and such indeed as the Tokyo Rules have become. This time we are proposing to make an experiment, to take a fresh look at the concept of the apportionment of risk in maritime law. That is a topic which has a significant effect upon the economics of sea transport and is a major pre-occupation of maritime law.

I would like to start by trying to define very briefly the risks that we will be talking about. They are the risk of physical damage to or destruction of property (I am excluding personal injury because it is really a separate topic) and also the risk of loss due to the temporary removal from commerce of goods or ships, the loss due to delay. Losses of those two kinds are necessarily part of the overall cost of maritime transport and of overseas trade, whether the loss is allowed to lie where it initially falls or whether it is transferred from where it originally falls to some other person by a recourse action. Maritime law, or at any rate maritime lawyers, tend to lose sight of the fact that whichever way we do apportion the liability for the loss it is going to form part of the cost of maritime transport and is going to be reflected ultimately in the price of the goods at their destination.

What we do in maritime law is to distribute risk in two ways, one by classifying it according to its cause, and the other by distributing it according to its quantum whatever the cause may be. I speak for example of the package limitation in the Hague Rules or of the Shipowner's global limitation of liability under the 1957 convention.

So far as cause is concerned, in trying to clear my mind on this subject I found it convenient to classify risk as misfortune risks, those which cannot be reduced by precautions taken or extra care taken which is economically justifiable, and fault risks which are those which can be reduced by precautions taken or by greater care. The latter, fault risk, one can classify as maritime law has tended to classify it, as management fault: bad organisation before the voyage starts, navigational fault, carelessness broadly speaking after the voyage has started. In using the expression 'fault risk' one must remember that this has nothing to do with 'sin'. Maybe it had something to do with 'sin' 500 or 600 years ago but it has not today, and if the cost of administering recourse claims exceeds the reduction in loss or damage consequent upon such deterrent effect as recourse liability may have, then no liability for conduct however careless is justifiable economically. If a limit is to serve a useful purpose then it must in this context be a limit that is unbreakable, apart from scuttling or something of that kind. What I suggest is, that instead of thinking about 'sin' and who is to blame, the questions which we ought to be asking ourselves are those which are set out in the last paragraph of the summary of my introductory remarks (see Appendix I): how does the current allocation of risk loss from a particular class of risk, misfortune risk or fault management or fault navigational risk, affect the overall cost of seaborne trade of the kind in which the risk occurs. This is a question which in my experience lawyers, or at any rate judges, seldom ask themselves. It gives rise to the question, is there any other way of allocating the loss that would be more economical? Then the third question if the answer is yes is, to what extent could the more economical way be adopted voluntarily without conflict with national law?

There are, as all of you are aware, two proposals at present actively being considered to alter the present method of allocation of risk. One, which is coming up at the Diplomatic Conference in November, is the IMCO proposal for the institution of a new convention on limitation of liability. This convention is based upon the draft which the CMI itself produced at the Hamburg meeting. The other is the proposals not yet so far advanced by Uncitral for an amendment of the Hague Rules. Now as practical men and women we shall no doubt in the course of this Seminar pay particular attention to those two proposals for alteration of allocation of risk but our discussions are intended to range over a wider field because allocations of risk throughout the field react on one another. To give a simple example they affect global limitation: if you remove a liability from a shipowner or increase the liability on a shipowner that affects the amount of the limitation fund available for other forms of loss. Another reason for the wider range is that when we look at different aspects, different areas of the field of allocation of risk, we find that there are different ways of allocating it. The question to ask ourselves is why should there be? I think we shall find very often the answer is a purely historical one, the reasons for which have now disappeared, but at any rate it is worthwhile asking the question. And if we find that one is wiser than another we should consider whether it should not be extended beyond the field in which it at present applies.

At this opening stage I do not know the answer to any of the questions which I hope we are going to consider in the next few days, nor do the panel of distinguished speakers who you see sitting around me. By Saturday morning, as compared with now I hope we shall have cleared our minds about the questions which I have posed, or at any rate some of them, and

may have reached some general consensus upon some of the matters, in particular I would hope upon the changes proposed in allocation of risk in the two proposals for amendments to conventions, the IMCO proposal and the Uncitral proposal, that I have already mentioned. The way in which I hope we are going to clear our minds and see if we can reach some general consensus is that we shall start with the members of the panel who will introduce the discussion and stress the points of importance in the papers, the outline of which I hope you have read because the object of this exercise is not to have a series of lectures upon different aspects of maritime law. If that were the object and if the panel knew the answers to the questions there would not be much point in having this Seminar at all. They could write down the answers and circulate them to you. So I am going to invite them to introduce quite briefly the points which they have summarised in the papers that are before you, to stress those which are important. I shall then invite questions and comments from the audience in the hall and from the members of the panel. We have got among this audience people with vast and specialised experience in various aspects of the matters which we are going to discuss and I hope that we shall get you in the audience into a discussion arguing the pros and cons. You may not agree with the speakers: the speakers do not agree among themselves on various issues. Let us get these differences out, let this be a real Seminar, something where one gets a socratic discussion going, clears one's mind and gets some way towards the answer to the problems posed.

## B. G. NILSON: Risk allocation in practice today—a Shipowner's view

The figures that I have given in my paper are, to take an expression from our trade, believed to be correct but not guaranteed. I think that they are about right but I do not intend to discuss these figures at all. It is my intention now to discuss some other statistics in a direct continuation of the first part of my paper. I am going to talk about the claims costs that we see in a shipping operation and in different types of shipping operation.

The relative claims cost, that is to say, the percentage of claims related to the amount of freight earned varies widely. The factors that influence these variations are for example, the value of the goods, the type of commodity, packaging, the mode of transportation and then geographical, seasonal, political and competitive conditions of the particular trade. So it is very hard to come up with distinct figures, but in the liner trade between Europe and North America we have been able to define certain relations between the claims percentage and the freight. Expressed as a percentage of freight we have found that our container claims amount to about 1.65% of the freight and lash barges 1.60% whereas in the break bulk trades on the same trade route we find 2.8% of claims as a percentage of the freight. There is a very clear difference here which shows that modern forms of transportation have contributed to reducing cargo damage.

Out of the claim amounts that are presented to us as carriers about half are honoured. On the container side we pay about 40% of the claims presented and on the lash side 60% of the claims presented. Thereafter claims are either recovered from our P. & I. Club or taken for our own account when they do not exceed the deductibles. Since however the non cargo items in our P. & I. insurance amount to almost as much as the cargo claims paid, our total P. & I. premium bill comes very close to the total amount of cargo claims presented. In other words of the cargo claims we pay half, and the non cargo claims are about the same so our total P. & I. bill is about the same as the cargo claims presented.

To try and define a similar cost structure for the bulk and tanker operations is extremely difficult. We have tried to do this but the variations between the commodities and the market conditions are so great that it does not look meaningful. For dry bulk cargo one can probably use the figure of slightly below 2% of the freight as claims for damage to the cargo. There is one comparison however that may be of some interest and that is to look at the credit balances of some different types of operations in a P. & I. Club. I have some figures which show the relationship between assessed premium and paid out claims for a number of operators over a five year period. This should show the success of the operation from a cargo claims point of view in that they show the experienced performance. The figures here express what the underwriter is keeping and how much he is paying out of the premium which he is receiving from the various types of operators. I have accordingly listed them here in an increasing list of inefficiency, so to say:

- Container carriers — between 32% and 40%
- Tankers — 37%
- Short sea liner operations — 58%
- OBO carriers — 66%
- Pure Bulk carriers — 86%
- Break bulk operations — 93%
- Worldwide tramping — 122%

This is a pretty large sample and I think it at least gives an idea of structure and development. I think we should all realise that shipowners and especially liner operators, regard the handling of claims as an important feature of their market image, of their commercial operation and each claim is handled with a sideways glance to its individual commercial merits. The importance of the customer and the prevailing competitive situation in the trade together with future shipping prospects are all things that from a strictly legal point of view have an irrational effect on the settlement pattern. We know from bad years in shipping, like 1975, that the cost of paid out claims rise very steeply in such a year.

Another important aspect of claims handling in a shipping company is that there should be good communication between the people who settle the claims and the people who are trying to better the methods of cargo handling and who continually try and develop new methods to prevent cargo damage. In our company, for example, the claims department is part of the cargo handling department and it is both administratively and physically placed within the cargo handling department.

If in order to reduce total costs recourse action was cut out by means of an all risks cover on cargo leaving the shipowner with no liability for cargo damage at all, would that lead to a relaxing of his care for the cargo? I think undoubtedly it would, especially with some carriers. For a well established liner operator who is a national line for example, and intends to stay there another 100 years in the trade I do not think it plays such a big role because to him the competitive situation and the need to retain first class commercial standing in his market would be strong enough to prevent deterioration in his cargo care effort. On the whole,

however, I think it has to be admitted that the machinery of risk allocation between cargo and shipowner, burdensome and costly as it is, does play a role in maintaining an effective damage prevention system.

One strong argument in favour of the existing system is that a lot of people are familiar with it. They have adapted to it, they have learnt to understand it, they have learnt to plan by it and we have invested a lot of money in the system. I think it is probably not entirely unfair because over a time at least it places the risks and the costs where they are felt to belong, but the criticism of the system falls on its lack of smoothness. It is a very old system, a 50 year old system, and the industry in which it was designed to regulate has changed vastly even during the last 10 years. So like any system that is unchanged over a long period, it probably has attracted a great deal of unnecessary administrative ballast. Indeed if an average administrative cost for an average claim amounts to about 50% of that claim then we certainly have reason to take a deep look into what possibilities there are of simplifying the system. Anything that would cut down on the administrative and legal expenses for the parties and better adjust the system to present developments would be a welcome improvement.

Damage to ships and goods is a fact of life, and transportation a risky business.

Nobody wants insurance; it works as the best known form of *substitution* of certain roles inherent in the performance of transportation. So the entire volume of insurance is just risk apportionment. It is not only the refined recovery instruments but the whole marine insurance institution that we are scrutinizing since an overwhelming part of maritime loss goes through an insurer today.

The insurance establishment will not take any ideological innovations lying down, but that should not stop us from continuing to try and find optimal forms and adapting to change.

I repeat what I said, that the role of insurance is not performance in itself but substitution of performance, and therefore the real performers enacting the drama of transportation only want to substitute such roles as they do not feel fit to take on themselves. It can therefore be argued that if the insurers — the stuntmen of transportation — want to rationalize away part of their act, the leading role actors might start to ask, why have them at all? In other words: You only want to insure what you are prepared to litigate! Substitution is always second best. Loss of performance is never totally compensated by money. A transporter like a producer is always trying to come up with the perfect product. Any substitution to that product is a failure or at least a flaw in the product.

Limitation of liability for a transporter, as expressed in his Bill of Lading, is exactly the same thing as the small text on the guarantee form of your new clock radio. They are the legal expression of the flaws in the production line.

It is not our task here to discuss these flaws or how they could be overcome, but rather try to find a system, which is an incentive to continually refine the performance and at the same time is so simple and straight forward that it leads to a drastic reduction of the administrative process involved. I think this is our duty.

## NIKLAS KIHLMOM—The cargo owner's view and his insurance requirements

The risk capital of merchants is always limited and in any commercial export/import transaction they are faced with two categories of risks. One is commercial risk and another is transportation risk, and they much prefer to maximise the use they can get out of the risk capital available by concentrating on what they know and are competent to carry, the commercial risks, and pay a small and reasonable price for protection against transportation risk. Because of the time limit imposed by our Chairman I will not go too deeply into a description of what the cargo owner requires of his risk protection system. I will go straight into what the Chairman has set as a keynote of this particular aspect of our discussions: the costs involved. We look first at the claims paid by cargo insurers for general cargo in the liner trade. Generally speaking slightly more than 20% of all claims paid by cargo insurers are FPA claims, that is claims which arise because the carrying vessel has met with some accident.

Generally speaking the origin of FPA claims lies either in a fault risk, in errors in navigation or in misfortune risks, fire or acts of God, and under the existing system of risk allocation the carrier is without any liability for such losses. Therefore the risk is ultimately borne by the cargo insurers except for a very few cases where the risk is transferred to the P. & I. Clubs because of a case of unseaworthiness of a vessel.

If we then take away from the total claim bill paid by cargo insurers all these FPA claims we have left about 80% particular average claims. A considerable part of these refer to pre-shipment or post-shipment damage or to damage where the place of loss cannot be ascertained so that no recourse is possible. If we take away those claims, the volume of particular average claims remaining represents the potential field of transfer of risk by way of recourse from cargo insurers to shipowners or other carriers. Now the size of this potential recourse field is very much smaller than one would expect because in practice it is limited by certain factors. First of all, a large number of claims are so small that recourse is not worthwhile from the point of view of expense to the insurers. Many cargo insurers today apply a minimum limit of approximately \$100 or more. Secondly, proof of loss which is sufficient to enable a rapid settlement under a cargo policy is very often not sufficient to proceed successfully with a recourse claim against the carrier. This is mainly because the proof of loss available to the cargo insurer very often does not demonstrate closely enough the cause of and the place of that loss. To him it is sufficient for settlement that it occurred during the currency of the policy; to succeed against the carrier much more detailed information is required. Today under the existing system therefore only a minor proportion of the claims paid by cargo insurers is ultimately transferred by way of recourse against sea, land or air carriers. The percentage varies from approximately 5% to approximately 20%. The administrative expense incurred by cargo insurers in respect of these recourse actions is generally very low on the continent of Europe. The situation is different in U.S.A. and in other markets or cases where no cure, no pay contingent fee recovery agents are used. In London and in the continental market law suits relating to cargo recourse actions seem to be very rare and they are mainly sought where a leading case is desired or where the sums involved are very substantial.

The costs incurred by cargo insurers are not limited to recourse expense but let me deal with recourse expense first. Cargo insurers' recourse expense is low — I put a maximum on it for a well run company of about 2% of gross cargo premium volume which would be equal to about 2.5% of total claims volume. A further cost item under this system of cargo insurance is survey and settlement costs. Now most cargo insurers are prepared to accept small claims without benefit of survey, but survey is required in the majority of cases. Survey costs vary considerably, depending on the complexity and size of the loss but a representative order is believed to be about 8% to 12% of the amount of loss in cases where survey is required.

Settlement costs are generally incurred as a specific item only where settlement is effected on the other side of the ocean by settling agents. They also vary but a major underwriting organisation has issued guide lines and they vary from 7½% of small to about 2½% of very large claims.

The total order of these two items is therefore perhaps 10% to 20% of the amount of the loss settled by agents. However it should be pointed out that most claims are settled directly without incurring separate settlement fees. The average claims handling adjustment and settlement costs over the whole field are therefore lower. I estimate that 12½% of premiums and perhaps 16% to 17% of the total claim bill is a representative figure. Further I would say that if total premiums are taken to be 100 with an average profit of 5% leaving 95 paid by the cargo clients, all expense, management marketing, administration and re-insurance, claims settlements surveys, recourse, etc. will take about 25% of the original 100, leaving 70 out of the original 100 as the claims paid. That means that the total administrative expense of the cargo insurance system today runs at about 25% and that the recourse portion thereof is a small, very small fraction. I would admit, as I said before, to a maximum of 2%.



The discussions of the Uncitral proposals have caused cargo insurers to think very closely about the pros and cons of the proposed alteration of the system. Time will not permit me here to go into detail except to say that for once cargo insurers are generally in full agreement that the Uncitral proposals are very uneconomic, that they will cause administrative expense to rise very sharply.

The proposed new system will cause a very much larger and unknown risk burden to fall on the carrier and his insurance costs will increase more than his actual but unascertainable risk burden on each voyage. This increase will have to be passed on to the cargo owners by adjustment of the freight. But cargo owners will still need cargo insurance in respect of risks for which the carrier will not be liable: act of God, the pre-carriage and post-delivery losses and the large proportion represented by concealed damage where it cannot be ascertained whether it occurred during the time the carrier was liable or not. Other reasons for a continuation of the practice of buying cargo insurance would be difficulties in obtaining proof of claim against the carrier and general uncertainty as to the speed of settlement, possible loss of interest and so on. Admittedly cargo insurance costs would go down because of a transfer of FPA claims to the carrier but not in exact proportion to the reduction in the risk burden because there will not be a very significant reduction in the administrative costs of the cargo insurance system. Recourse actions and litigation will increase because carriers cannot in the future be expected to do what they do not do today, that is to say, accept all claims made. All this means additional expense to the cargo interests and the net effect is therefore felt by cargo insurers to be that Uncitral means an increase in freight costs which is greater than the decrease in cargo insurance costs. What are we to do? My contention is that any radical change of the present system of risk allocation between ship and cargo would be economically wasteful and that it would be better to improve the performance of the present system.

There are two avenues open for improving the present system. One would be to reduce the number of claims. If the bankers and merchants of this world were to recognise that first dollar coverage is no longer necessary, that it costs a merchant in hidden costs several dollars to file a claim for \$25 against his cargo insurers and if a system with a fixed deductible could be introduced in the cargo insurance risk protection system, that would vastly cut down on the sheer volume of claims and therefore on the volume of unnecessary administrative costs. Second the number of recourse actions could be limited not by law but by agreement. Such an agreement has just been concluded, although I do not know if it has been ratified by all the parties concerned: that is the recourse agreement in Scandinavia between the cargo underwriting associations of Denmark, Norway and Sweden and the leading liner companies of those three countries. This recourse agreement sets a lower limit of Sw.Kr. 1,000 or \$227 and states that no claims for amounts of less than \$227 will ever be presented by way of recourse. It also sets a top limit which is about \$12,500 over which a claim is handled under the existing system, but anything in between, where the documents indicate that the loss might have or has occurred whilst the goods were entrusted to the shipowner will be split 50-50, all of them without argument. Now that will cut down a bit on cargo insurers costs and it will cut down a very great deal on the claims department costs of shipowners and P. & I. insurers. This agreement may be only a straw in the wind but I would conclude by saying that a straw in the wind has one useful property which is sometimes overlooked. It shows which way the wind is blowing.

## WILLIAM BIRCH REYNARDSON—The insurance of shipowners' liabilities

All of you will, I am sure, have read Lord Diplock's introductory paper and will have listened with attention to his opening statement this morning. Some of you may have read the summary of my paper. Two main points were made in both papers. First, we are considering at this Seminar not morals but money. Second, the existing legal régime for apportionment of risk between the shipowner and the cargo owner is based on fault. This is a doctrine firmly rooted in the fertile soil of morality — "moral wrongdoing for which the offender must pay". Although, as Lord Diplock has observed, the Courts treat the parties to maritime adventure as if they were individuals morally responsible for fault and paying any loss out of their own pocket, the fact is that liability for fault is almost always vicarious. As he once wrote "it is not the actual sinner who pays for the consequence of his sin". The position today has been described as "a complex of legal rules, largely devoid of moral and of penal effect, the function of which is to mark off the field of recoverable damage".

So the question which arises out of these two points and which we have to consider is whether the complexities involved in the existing system are economically justified.

In my paper I have attempted to demonstrate, albeit in very summary form, how the liability of the shipowner has swung like a pendulum, from the almost absolute liability of the common carrier to no liability (by the incorporation of exemption clauses in bills of lading), finally settling — somewhat uneasily — in a compromise position regulated by the Hague Rules.

The main justification for this basis of liability is that the shipowner is encouraged to take care of the cargo he carries. Although this aspect should not be entirely rejected, the deterrent effect of liability based on fault is certainly reduced by reason of the fact that liability is generally vicarious and by insurance. It will, however, be appreciated that the loss record of an owner is one of the main considerations which determines his premium and I have given some examples of this in paragraph 5 of my paper.

The existing rules of apportionment of risk necessitate a dual system of insurance. The cargo owner insures his cargo with a cargo underwriter and the shipowner insures his liability with a P. & I. Underwriter. This means that although there is no double insurance (each claim being paid only once) there may be an overlapping of insurance coverage. The cargo underwriter reimburses the cargo owner in the event of his cargo being lost or damaged. The P. & I. Underwriter reimburses the shipowner in the event of the cargo owner (or his underwriter) establishing by way of recourse that the loss or damage was caused in circumstances for which the owner is liable. In a case, therefore, where the shipowner is at fault but the cargo owner does not exercise his right of recovery from the shipowner, there is an overlap of covers. The effect of this is that the cargo owner's loss record with his underwriter is falsely worsened whereas the shipowner's is falsely improved.

We have noted from Mr. Kihlbom's paper that, in the majority of cases, the cost of the recourse proceedings makes the recovery by the cargo underwriter uneconomic. Quite apart, however, from these costs, the dual system involves additional expenses in that both sets of underwriters (and also to some extent shipowners) maintain departments dealing with similar matters, for example claims records, underwriting, loss prevention and the like. Mr. Kihlbom once wrote "Cargo underwriters, shipowners and P. & I. Clubs together maintain an army of skilled and highly paid men for the purpose of arguing cargo recourse claims. The cost of maintaining this army must ultimately be borne by the cargo owners. It is a natural query whether this army is not far too large".

There is no doubt that, on the face of it, the existing dual system involves both expenditure and loss of time which, by the adoption of a single system of liability would be substantially reduced. The figures which I have set out in my paper indicate that, of the total claims reimbursed by P. & I. Clubs each year, about 30% are in respect of liability to cargo. The cost of dealing with such claims is about 7.5% of the total cargo claims paid, made up as follows:—

Advice of lawyers, surveyors, etc. 4%

Cost of Management and administration, etc. 3.5%

We have seen, from Mr. Nilson's paper that shipowners would not favour a system under which they were exempted from liability. They wish to continue to handle cargo claims; they consider that damage prevention would suffer. He suggests that the logical solution might be to make the shipowner fully responsible for the safe carriage of the cargo entrusted to him. Mr. Kihlbom, in his paper, does not comment specifically upon this suggestion but no doubt he would share the views expressed by the International Union of Marine Insurance which are set out in paragraph 4 of my paper. He does, however, infer that economies could be made on the lines of an agreement between cargo and P. & I. Underwriters not to pursue recourse actions or anyway to limit them. I am doubtful whether such an agreement could be successfully negotiated. It would require the consent of cargo owners who would, perhaps naturally, object to any agreement between underwriters which prejudiced the right of recovery against a shipowner at fault. It is thought that a more realistic approach would be

for cargo underwriters to insist on their assured accepting higher deductibles so that only major claims would be paid. These claims would be likely to justify the expense of recourse proceedings.

But even if it were possible to reduce the cost element of recourse proceedings, there still remains the high expense of administration to which I have already referred. It seems to me that there may well be scope for economies in this sphere. Both cargo and P. & I. underwriters might do well to consider the possibility of setting up organizations to take over many of the administrative functions of a group of underwriters. This could reduce the cost of individual offices each dealing with such matters as documentation, records, etc.

So far as concerns the abolition of the dual system of insurance, I do not believe that to make the shipowner fully liable would really be practicable in the context of ordinary maritime carriage. As Mr. Kihlbom has stated, shippers must have comprehensive cover. They would, therefore, require insurance of their goods for the period before the shipowner takes them over and after he delivers them. But I consider that in certain specialized through transit trades, where the shipowner is the operator and where liability is accepted by him for door to door carriage, a single system of insurance might well have distinct economic advantages. This would mean that the shipowner/operator would assume full liability for the cargo and cargo insurance would not really be necessary. It is in this particular sphere that co-operation between liability and cargo underwriters is particularly desirable. The risk should be shared between the two sets of underwriters. If the insurance industry is to expand healthily every attempt must be made to improve efficiency by reducing unnecessary expenditure (which is borne by the consumer) yet retaining, so far as is possible, the existing market pattern of cargo and liability underwriters.

In past discussions the sectional interests of the insurance market have been heard loudly and it would seem that no real attempt has been made to seek out the views of the cargo owner. But the trend is clear — whether we like it or not, that increasing liabilities are being imposed on the carrier. Perhaps insurers should remember that 'he who pays the piper calls the tune'.

## FRANCESCO BERLINGIERI—The apportionment of risk between ship and cargo—under Bills of Lading

There are two papers on the Contract of Carriage as a whole, one on bills of lading and one on charter parties. There are two papers because the allocation of risks in the liner trade and in the charter trade is different. The allocation is different in that for instance the risk of delay in the liner trade is entirely borne by the shipowner whilst in the chartering trade the risk of delay is allocated between shipowner and charterer in a different way, according to the nature of the contract. This was why it was thought convenient to have two separate papers on this subject. My task is to report briefly the situation as regards bills of lading. The aims to be pursued in so far as allocation of risk is concerned in bills of lading are in my estimation two fold. First one should try to reduce accidents because although insurance is a very important factor in the field of bills of lading, it does not cure all consequences of loss of or damage to goods. Although losses are spread amongst a great number of people, there are still some items of such losses which are not indemnified. The owner of goods which are lost or damaged beyond repair will for example have to substitute these goods and the new ones will arrive late thereby causing damages; moreover, their cost may meanwhile have increased and the buyer will pay a higher price, whilst the insurance indemnity is based on the old price. Therefore in addition to the great contribution of the underwriting world towards the spreading of the losses the reduction of accidents is something one should aim at as much as possible. In order to achieve reduction of losses one could try to reduce losses using a system of deterrence by which shipowners may be induced to exert greater care in the carriage of the goods. It has already been said here that insurance does not destroy the deterrent effect. It has been explained that the system which is used by most Cargo Underwriters and P. & I. Clubs is such that the losses are to a great extent brought back to those who are responsible for them. So the liability for losses still acts as a deterrent.

The second aim which I would say is as important as the reduction of accidents is the reduction of the CIF cost of the goods. We are not here discussing the cost aspect but we may discuss and we are discussing the insurance and freight aspect. The cost of insurance of the goods may be influenced by the amount of liability which will rest on the carrier and also by the cost of the overhead expenses of the insurance companies in recovering by way of recourse from the shipowner. The freight is also influenced by the amount of liability which is borne by the shipowner because one of the constituent elements of the freight is the cost of the P. & I. cover which is influenced by the amount of liability of the shipowner. This can therefore exert some influence on the rate of freights.

If we look at the present system, in order to find out whether the system can be improved, we find that the deterrent aim is achieved through the provision of the shipowner's liability regarding seaworthiness at the commencement of the voyage. The duty of the shipowner to exercise due diligence at the commencement of the voyage to make the vessel seaworthy is a deterrent because the shipowner is thereby induced to exercise care in preparing his vessel for the voyage. The exonerations from liability which exist in the present system do not impair the deterrent aim since the shipowner is already induced to exercise due diligence because he is the first one who is interested in keeping the vessel seaworthy during the voyage — he will be the first one to pay if the vessel is not seaworthy during the passage. There are mainly two exonerations from liability, first, the exoneration from liability for errors in navigation and second, exoneration from liability for fire. The first one does not, for the same reason I have indicated before, reduce the deterrence of the system because again the shipowner is the first one to suffer in case of errors in navigation by his crew. The second exoneration, that for fire, again does not decrease the deterrence for the shipowner.

The possibility of decreasing the CIF cost of the goods through a different distribution of risks between the shipowner and the cargo owner can be appreciated only by comparing the present system with possible alternatives. We have two extreme alternatives, one that the loss should rest where it falls, the other, a system of objective liability, which is sometimes also characterized as strict liability. The advantages of these two extreme alternatives would be that the cost of collecting losses would be avoided or substantially decreased but there are a number of possible disadvantages in both these systems. With regard to the first system deterrence would disappear, while with regard to the second system, namely objective liability, it seems to me that freight costs would probably increase much more than cargo insurance would decrease. At present therefore there is no good ground for adopting either of these two extreme alternatives. We are left now with the present system or with the amendments to the present system which have been suggested in the Uncitral draft. I think that we should have a look at these amendments and see whether and to what extent there would be a better deterrent or decrease in costs. There are various aspects which we could consider along these lines, the first being the period of responsibility which is going to change if the new rules are adopted to include the period between the delivery of the goods to the carrier and the loading of the goods on board and the period between discharge of the goods at destination and the taking in charge of the goods by the consignee. This will not in my opinion increase deterrence because the shipowner most often has no possibility of choosing the stevedoring company to which he has to entrust loading and unloading operations.

The second change relates to the basis of liability. The new rules have abolished all the so-called catalogue of exceptions and have adopted a basic rule which is similar though not identical to the so-called catch-all exception under letter q of Article 4 of the Hague Rules. The wording of the new rule is different; it says that the carrier shall be liable unless he proves that he, his servants and agents took all measures that could reasonably be required to avoid the accident and its consequences. By what test compliance with this rule can be determined remains to be seen. It seems to me that we are still on a fault system. I appreciate that somebody may say that this rule can be interpreted in a different way and construed to produce an objective system of liability, but the problem could be discussed for years and years. There are other aspects of the Uncitral draft which are worthy of some consideration, one being the continuous duty of exercising due diligence. At present the duty to exercise due diligence must be fulfilled before and at the commencement of the voyage. The reason why there is a provision to the effect that the carrier is bound to exercise due diligence at the commencement of the voyage is that originally the owner of the goods could not recover from his underwriters the loss of the goods if the vessel was unseaworthy at the commencement of the voyage. The consequence was that the shipowner had to be the insurer of the goods and had to be absolutely liable according to the common law for the seaworthiness of the vessel. Subsequently this absolute liability was changed and liability based on fault and the principle of the duty to exercise due diligence were introduced. Now what would be the change if the shipowner was bound to continue to exercise due diligence during the voyage? Certainly this might facilitate recourse actions from time to time but it would not increase the deterrent effect of the provision. Moreover the test which might be adopted in the future in order to ascertain whether or not the carrier has performed his obligation may differ. The diligence which must be exercised prior to the commencement of the voyage when the shipowner has some specific organisation which he can employ in order to check seaworthiness may be different from the kind of diligence he may and must exercise during the passage of the vessel. The abolition of exoneration for fault in navigation and for fire would of course facilitate recourse action but on the other hand would increase the number of recourse actions and would thereby considerably increase costs.

The problem we are confronted with now is whether these changes would actually decrease the CIF cost of the goods. It seems to me likely that the cost would not be decreased at all. We have presently a system which certainly is not perfect but which has undergone the test of jurisprudence for fifty years. Difficulties in interpreting some of the provisions have been reduced during these fifty years and we have come to a point at which we share considerable experience in the interpretation of these rules through the great efforts of judges of all courts of the world who have appreciated more and more the need for uniformity. If we are going to change the rules the uniformity which has been achieved so far will be destroyed and we shall have to start all over again with new rules and with disputes as to the interpretation of the new rules for years to come.

# RENÉ RODIERE

## *La partition des Risques - sous Charte-partie*

*présenté par Jacques Potier*

1. Le contrat d'affrètement vit dans la liberté. Les parties peuvent aménager leurs conventions comme elles l'entendent, au mieux de leurs intérêts, qui s'opposent certes, mais sont débattus librement parce que le poids économique d'un usager qui affrète un navire, que ce soit pour un voyage ou pour vingt ans, n'est pas moindre que celui du fréteur.

L'opposition avec les contrats de transport proprement dits, ceux qui se font sans charte-partie, est évidente. Dans la mesure où la Convention de Bruxelles du 25 août 1924 sur les transports sous connaissance, et les lois nationales, ne posent pas de règles impératives – les clients du transporteur sont trop nombreux pour qu'il leur soit possible de discuter un à un les termes de multiples contrats.

Qu'on ne dise pas que la différence tient à la plus ou moins grande importance de la cargaison. Ce n'est pas une question de taille ou de quantité. Un contrat de transport sans charte-partie, avec ou sans connaissance, diffère d'un contrat d'affrètement, quel qu'en soit le type, parce que le transporteur, dans le premier cas, prend en charge la marchandise tandis que l'affréteur, dans le contrat d'affrètement, ne la prend pas en charge.

Or ce qui singularise un contrat, ce sont les obligations des parties et elles seules. Ce n'est pas son objet, ni par suite son importance.

2. On comprend donc qu'aucune législation du Monde (à ma connaissance) n'édicte de règle impérative en matière d'affrètement. On y trouve des règles légales concernant la responsabilité du fréteur, mais ces règles sont supplétives de la volonté des parties et les chartes ne manquent pas de définir leur propre loi.

Certes aucune législation – ou presque – autre que la loi française du 18 juin 1966 ne fait la distinction tranchée entre les contrats de transport et les contrats d'affrètement, mais les lois qui mêlent les uns et les autres, comme le faisait le code de commerce français de 1808, ne manquent pas pour autant, après avoir énoncé les règles impératives imitées de la Convention de Bruxelles, de les écarter quand il y a une charte-partie ou de préciser que ces règles impératives ne sont applicables que dans les véritables contrats de transport. Témoin, le plus récent, le projet de code néerlandais : l'article 8.5.2.8. reproduit l'article 3, §§ 1 et 2 de la Convention de Bruxelles de 1924 et ajoute aussitôt que ces règles ne s'appliquent qu'aux transports sous connaissance.

Prenons un autre exemple dans le code polonais de 1961 qui, après avoir énoncé l'obligation de mettre le navire en bon état de navigabilité dans les termes de l'article 3, § 1 de la Convention de 1924 (art. 101), prescrit que le transporteur est responsable sauf faute nautique . . . et reproduit de la sorte l'art. 4, § 2 de la Convention (art. 156). Enfin après avoir énoncé la règle de réparation dans les termes de la Convention internationale (art. 158) le Code polonais ajoute tout à fait à la fin de la partie "Transport de marchandises" : "Si le contrat fait l'objet d'un *connaissance*, toute disposition contractuelle qui exclut ou limite la responsabilité du transporteur dérivant des articles 101, 156 et 158 est nulle" (art. 160, § 1).

Une étude exhaustive du droit comparé montrerait que la distinction entre contrat de transport sans charte-partie et contrat d'affrètement avec charte-partie est présente partout. Ainsi est-il clair qu'il y a seulement apparence que les législations étrangères confondent, comme beaucoup le croient, contrat d'affrètement et contrat de transport.

3. A lire rapidement la Convention de Bruxelles de 1924, écrite à une époque où personne n'avait dénoncé la duplicité d'une confusion, on pourrait croire qu'elle la commet.

Il n'en est rien. L'article 1er, *litt.* c, le prouve clairement quand il régit la situation dérivée de ce qu'un *connaissance* a été établi en vertu d'une charte-partie et précise bien que ce titre (le *connaissance*) régit "les rapports du transporteur et *du porteur du connaissance*", ce que l'on a entendu comme désignant le *tiers porteur* du *connaissance*, et non l'affréteur lui-même. Disons, seulement que la Convention de Bruxelles n'explique pas, ne définit pas la différence. Elle est néanmoins présente à son esprit.

C'est donc cette distinction fondamentale, qu'il faut avoir en tête constamment quand on s'occupe du partage des risques entre le fréteur et l'affréteur. On n'est pas devant le partage des périls de la mer entre le transporteur et le chargeur.

4. Le fait que le fréteur ne prend pas la marchandise en charge se marque d'abord par la règle que celle-ci est toujours chargée par l'affréteur. La différence entre les divers types d'affrètement (et je me bornerai à parler des affrètements au voyage et des affrètements à temps) s'estompe ici et ne subsiste que par ce que l'affréteur au voyage doit, sous peine de payer plus cher le service qui lui est rendu (ceci sous forme de surestaries), charger ou décharger dans les délais que fixe la charte-partie, tandis que l'affréteur à temps peut lambiner tant qu'il voudra. Le temps que prennent les opérations de mise à bord et de déchargement importe peu au fréteur à temps. Quant à la répartition des risques entre fréteur et affréteur, en cas d'avaries aux marchandises au cours des opérations de chargement et de déchargement, la question ne se pose pas : elles sont supportées par l'affréteur. Si par contre c'est le navire, ses apparaux ou sa coque qui souffrent

de ces opérations, l'affrèteur devra dédommager le frèteur. Tout ceci bien entendu dans l'hypothèse où le navire était en bon état de navigabilité.

Certes ces règles peuvent être écartées et de diverses manières, par exemple quand le frèteur accepte de charger lui-même la cargaison ou lorsque le chargement étant le fait de l'affrèteur, le frèteur accepte d'en supporter la responsabilité. Outre que ces clauses sont rarement utilisées dans la pratique, on observe que les polices d'assurances sur facultés ne manquent pas, dans la clause qui précise le temps des risques assurés, de dire que l'assureur commence à couvrir les risques au moment où les marchandises, conditionnées pour l'expédition, quittent les magasins, entrepôts ou usines au point extrême de départ du voyage assuré et cesse de les couvrir au moment où elles entrent dans les lieux où le destinataire fait déposer les marchandises à leur arrivée ; de la sorte, les opérations de chargement et de déchargement sont comprises dans la période que couvre l'assurance de l'affrèteur. Quel intérêt y aurait-il, à la suite d'une clause déplaçant les risques des manutentions, à substituer à cette assurance de chose qu'est l'assurance-facultés de l'affrèteur, l'assurance de responsabilité du frèteur ?

Ce qui vient d'être dit se réfère indifféremment à l'affrètement au voyage et à temps.

On va maintenant raisonner dans le cadre de l'affrètement à temps.

5. Les avaries et la perte des marchandises chargées sur un navire *affrété à temps* ne présentent pas de difficultés aux législateurs ou aux rédacteurs de *time charters* types.

On n'y conçoit pas que le frèteur puisse devoir en répondre. Il a frété son navire pour un an, dix ans, vingt ans. Ce navire va travailler dans un secteur géographique parfois défini mais de façon souvent vague. Comme on le dit dans notre jargon, toute la gestion commerciale du navire est passée à l'affrèteur. Comment le frèteur pourrait-il partager les risques de la mer avec l'affrèteur ? Il ne peut répondre que de ses fautes dans la gestion nautique du bâtiment c'est-à-dire que de la mauvaise navigabilité du navire (et encore faut-il qu'il en ait été prévenu à temps pour réparer si l'innavigabilité n'est pas initiale). C'est la solution générale des codes et des lois maritimes quand elles songent à régler ce problème, ce qui est rare tant la solution est évidente. La loi maritime française du 18 juin 1966 l'énonce (art. 8 et 9). Mais c'est aussi celle qui résulte du silence même de bien d'autres codes ou lois qui règlent le fret, fixent les obligations du frèteur, mais ne songent pas à dire que celui-ci est responsable seulement de la non-exécution desdites obligations : voyez ainsi, s'approchant presque de la solution explicite, l'article 191 du code bulgare de 1970, l'article 183 du code de l'U.R.S.S. de 1968, les codes nordiques qui ne songent qu'à régler le sort de la contribution du fret à l'avarie commune (art. 150 des quatre codes suédois, norvégien, danois et finlandais . . .).

La position des Chartes est significative. La *Baltime* 1939 énonce que le frèteur sera responsable du retard dans la mise à disposition du navire entre les mains du frèteur et des dommages qui peuvent en résulter, pour ajouter que, par contre, il n'est responsable d'aucune autre perte ou dommage, même dû à ses préposés, tandis que l'affrèteur sera responsable des dommages causés au navire (art. 13).

Quelle modification peut-on suggérer à cette absence de partage ou plutôt à ce partage qui tient compte seulement de la faute prouvée contre le frèteur et laisse à la charge de l'affrèteur tout ce qui relève des dangers de la mer ?

On n'en voit pas la possibilité. Quel armateur s'engagerait à réparer le dommage survenu dans des conditions douteuses à une cargaison qu'il ne connaît pas ? Le bon sens commercial dira : on ne garantit pas la perte de choses dont on ignore l'existence.

6. Sans y insister, disons que la solution est encore plus évidente dans l'affrètement *coque nue* où, moins encore que dans l'affrètement à temps, le frèteur n'a pas connaissance de l'emploi qui est fait de son navire et où il n'a pas même la gestion nautique de son bâtiment. La loi française, pourtant si explicite sur tous ces points, n'a pas même songé à dire quand le frèteur pourrait être responsable ou à dire qu'il n'est pas responsable des pertes et avaries des marchandises transportées sur un navire affrété *coque nue*.

7. Arrivons au cas plus délicat de l'affrètement au voyage. Plus délicat parce que le frèteur sait ce que porte son navire. La charte est parfois, souvent même, assez laxiste : elle dira par exemple que le navire chargera à Abidjan à destination de Rouen ou de Dieppe 1.500 quintaux de bananes sous emballage ; "*10% en plus ou en moins*". Lors de la conclusion de la charte, la cargaison n'est pas déterminée avec précision, mais elle le sera après le chargement et, si un connaissance est alors émis, il fera mention exacte de la quantité chargée ; du moins il pourrait le faire car il porte parfois à la fin la mention, "*Poids, contenu et qualité inconnus*".

A mon avis, le frèteur en pareil cas n'est pas responsable parce qu'il n'a pas fait cet acte de *maîtrise* qui caractérise le contrat de transport sans charte-partie et qui justifie la présomption de responsabilité du transporteur proprement dit : il n'a pas pris en charge la marchandise ; il a reçue à bord de son navire ; pour faciliter les négociations la concernant, il a délivré un connaissance qui peut être plus précis que celui qu'achève la formule indiquée ci-dessus ("*weight, contents and quality unknown*"). Pour autant il ne l'a pas reçue aux fins de la transporter sous sa responsabilité. Ceci explique la solution de la loi française de 1966 (art. 6) qui établit une simple présomption de faute que le frèteur lève en prouvant qu'il a rempli ses obligations (mettre le navire en bon état de navigabilité et le maintenir en cet état durant le voyage).

Cette solution est aussi celle du code italien (art. 393), quand il précise que le fréteur n'est pas responsable des obligations prises par le capitaine à l'occasion des opérations relatives à l'utilisation commerciale du navire, ni des fautes nautiques du capitaine et des autres membres de l'équipage, article qu'il faut lire comme intéressant tous les affrètements puisque les articles 387, 388 à 392 auront précisé qu'ils ne posaient de règles que pour l'affrètement à temps, alors que le chapitre entier concerne en principe tous les affrètements suivant la définition de l'article 384, aussi bien au voyage qu'à temps.

En bref, dans une conception rigoureuse de l'affrètement au voyage, conçu comme le contrat par lequel le fréteur s'oblige à mettre un navire en bon état de navigabilité à la disposition de l'affréteur en vue de lui faire accomplir le déplacement d'une marchandise, chargée et déchargée par l'affréteur, sur une relation définie (sauf les options de ports laissées à l'affréteur), dans cette conception, les périls de la mer sont à la seule charge de l'affréteur. Ceci, disons-le bien, à supposer que les faits soient connus et que la vérité n'échappe pas à l'interprète car, s'ils ne le sont pas, on pourra peut-être attribuer à tort une avarie due à la tempête à un défaut d'étanchéité du navire tel, qu'il aurait été constitutif d'un mauvais état de navigabilité.

8. Cependant on conçoit que les parties modifient cette règle et chargent sur les épaules du fréteur les périls dus à la mer. On conçoit que les lois établissent ici une présomption faible, ou même forte, de faute ou de responsabilité du fréteur puisqu'il conserve la gestion commerciale de son bâtiment.

De l'avis du rédacteur de ce rapport, c'est une erreur parce que le fréteur n'a pas pris la marchandise en charge, mais enfin l'erreur juridique n'est pas un tel contre-sens que la solution contraire, voulue par les parties expressément ou tacitement, doive être d'avance écartée.

Ceci dit, l'éternelle question se pose : quel intérêt y a-t-il à substituer cette présomption (autre qu'une présomption très légère à la manière de la loi française (art. 6, loi de 1966)) à la règle qui laisse à l'affréteur la charge des risques de mer ? On n'aboutira jamais qu'à un déplacement de l'assurance ; plus précisément au déplacement de l'intérêt qu'à tel ou tel contractant à s'assurer contre tel et tel risque. Les affréteurs y gagneront-ils quelque chose ? Non, car les armateurs demanderont à leurs navires la même rentabilité et, s'ils doivent s'assurer contre la responsabilité qu'entraînent pour eux les périls de la mer, ils le feront payer aux affréteurs par un taux de fret plus élevé.

9. Le partage des risques n'affecte pas seulement la responsabilité à l'égard des pertes. Il faut le considérer maintenant sous le rapport du fret.

Quand le navire ne parvient pas à destination dans l'affrètement au voyage ou qu'il disparaît ou ne peut plus servir dans l'affrètement à temps, que devient le fret prévu par la charte ? Bornons-nous, pour mesurer l'incidence des risques, aux cas où cette interruption du voyage ou du service survient par suite d'un péril de la mer, d'une fortune de mer.

A moins qu'elles ne disposent que le fret sera dû à tout événement, les chartes ne règlent guère cette question, sinon indirectement en spécifiant que le fret sera établi lors du déchargement de la marchandise et au prorata de celle-ci, ce qui d'ailleurs règle le cas de la perte, non celui de l'avarie.

Les lois (toujours supplétives en la matière) prennent parfois position. Le code de l'U.R.S.S. de 1968 dispose que le fret est dû malgré la perte ou l'avarie dès lors que le transporteur n'en est pas responsable (art. 155), mais ce texte ne concerne que l'affrètement au voyage ; l'article 185 spécifie, dans l'affrètement à temps, que le fret doit être versé jusqu'à la perte du navire et l'article 184 qu'il y a suspension du fret pendant le temps où le navire n'est pas exploitable à cause de son inaptitude à la navigation : cette dernière disposition rappelle celles du code italien de la navigation (art. 391) et du code bulgare (art. 193) ; celle de l'article 185, la règle du code maritime polonais (art. 188, § 2).

La loi française de 1966 précise dans l'affrètement au voyage que la force majeure qui empêche pour un temps très court de sortir du port permet à l'affréteur de décharger la marchandise à ses frais, mais qu'il doit payer le fret (art. 15, décret de 1966) ; au cas où le navire s'arrête en cours de route, l'affréteur doit le fret de distance (art. 16). Pour l'affrètement à temps, l'art. 23 du même décret précise que le fret n'est pas acquis à tout événement et l'art. 24 qu'il n'est pas dû pour les périodes pendant lesquelles le navire est commercialement inutilisable. Ces mêmes dispositions pourraient sans doute jouer dans le cas d'affrètement coque nue.

Le partage des risques dans les cas d'événement fortuits tend donc à être réglé de telle manière que l'affréteur ne doit rien quand il ne peut pas utiliser le navire (time charter) ou quand le service ne lui est pas rendu (affrètement au voyage).

La solution est équitable. Elle répond à la théorie générale des risques : quand, dans un contrat synallagmatique, une prestation n'est pas exécutée, l'obligation correspondante de l'autre contractant est suspendue ou disparaît.

Si les périls de la mer sont supportés par l'affréteur qui ne peut alors rien réclamer pour la perte ou l'avarie de sa marchandise, il est juste que son obligation de payer le fret soit également supprimée.



## **KAJ PINEUS—The apportionment of risk between ship and cargo—General Average**

*(This paper was given in French and subsequently translated)*

We know that the establishment of general average goes back to antiquity. We also know that the insurers began their trading at the end of the middle ages so that general average as an institution has lived alongside maritime insurance for more than four centuries at least. This might have meant that general average would be abolished in practice but you can see it has not been so from my written document. This shows that during the last 3 years 823 G.A. statements were notified to Lloyds. This shows that in reality every work day sees G.A. statements being issued.

If you come to the level of general average you will see from the small number referred to in my report of which I know the details, that the amount apportioned in G.A. during the same period is about £2m. Of damage to hull and cargo 30% was paid for by cargo and the rest by the shipowner and his hull insurer.

It follows that presently one cannot neglect general average as a method of apportionment of risk. However merely to establish a general average adjustment does not always mean that an apportionment of risk takes place because certain objections which come from cargo may have the consequence that the result shown on the general average statement is not abided by or that the contribution which should have come from the cargo to fill a gap in the accounts of the shipowner will not be paid by the cargo itself due to an objection of unseaworthiness or another objection of this kind. It has not been possible for me to establish the correct amount or the number of cases where this has happened but I am sure we could go so far as saying that this is rather frequent. Further, from research carried out I gather the feeling that the objections depend greatly upon the nationality of the cargo.

If one wants to assess the situation of general average in the world today one should mention that it is a voluntary agreement between parties and that nobody is forced to use it. Further, one does not apportion in general average expenditures which are not substantial. The value of the vessel may be very substantial compared to the cargo and the proportion to collect from cargo thus small indeed. The shipowner especially in the liner trade may be reluctant to proceed to the drawing up of a general average statement since cargo might get irritated, but when the figures are high the shipowner does not hesitate at all because he would otherwise be in a bad position with his hull insurer.

General Average is but one method of apportionment of risk. The disappearance of this apportionment will not make the amounts disappear which are now being accepted in general average: they will either be paid by one or other of the parties or another solution will have to be found. There will be a lack of certainty as to how one should tackle the charges, or the costs, which are now accepted under general average and which might then have to be paid for by cargo only.

What is the future of G.A. in the present world? We see in the first place that at the last amendment to the rules, in Hamburg 1974, the parties did not want to abolish general average. Further I emphasise once more that G.A. is an expression of the will of the parties: they are not obliged to use G.A. On the other hand if the draft convention on the revision of the Hague Rules is approved as it stands at present it may well be that the objections from cargo against paying the contribution indicated as due will become so much more frequent that the Hull and P. & I. Insurer will say that there is no use drawing up a general average adjustment because cargo never pays. It may then be preferable to come to some other arrangement.

It is not up to the adjuster to say that this is a happy solution and it is not up to the adjuster to say it is to the benefit of one or other party to accept this or that method. The costs should be kept in mind but these and other elements you will find in my concise document. It is not up to me to say what is for the best or what will be in the future. It is up to you to assess the consequences of the draft convention and its possible consequences on General Average.

## NICHOLAS J. HEALY—The apportionment of risk between Shipowner and third parties—Shipowner & Shipowner Collisions

We come this morning to an examination of the basis of liability when there is no contractual relationship between the parties. A typical example of a non-contractual relationship is that of two colliding vessels. Before discussing any possible changes in the basis of liability for collision loss it might be well to recall what systems are presently in force throughout the maritime world. We all know that until May of 1975 the United States, where a great deal of collision litigation takes place, had the equal division rule when two vessels were at fault. A great step toward world uniformity in collision law was achieved by the Reliable Transfer decision in 1975 which brought U.S. Law into conformity with the law of the Collision Convention countries: we now have the proportional fault rule. There is one remaining difference, however, and it is a very important one: in cargo cases in Convention countries the cargo interests in the event of a both to blame collision are entitled to recover from a non-carrier only in accordance with the degree of fault chargeable to the non-carrier. On the other hand in the United States the law still remains that the non-carrier is fully liable for the damage even though he is only partly at fault, but then having paid the amount of the cargo damage in full the non-carrier is entitled to an indemnity from the carrying vessel in accordance with the carrying vessel's degree of fault. We therefore have the rather anomalous situation that in a both-to-blame case, the carrying vessel is indirectly liable for a proportion of the cargo damage whereas in a sole fault case there would be no liability — no liability if the non-carrier was solely at fault because fault is the very basis of liability and no liability if the carrying vessel was solely at fault because of the Hague Rules error in navigation exception or the corresponding exception found in the usual charterparty or contract of affreightment.

It may be that eventually the Supreme Court will go all the way and change the case law relating to joint tortfeasors insofar as cargo claims are concerned and hold that the non-carrier is liable only in accordance with its degree of fault, but until that occurs, if it ever does occur, there will be this one substantial difference between U.S. law and the law of the Convention countries. When I speak of U.S. law I am also speaking of Liberian law because the Liberian code provides that with regard to matters not covered by the code itself the general maritime law of the United States shall be deemed the general maritime law of Liberia.

Aside from liability to cargo we thus have left two basic systems of liability in collision cases, one, the proportional fault system of the Convention countries, the United States and Liberia, and the other, the system which is followed in some South American countries, and perhaps elsewhere in the world whereby in the event of a both-to-blame collision neither vessel's owner may recover damages from the other, a rule very similar to the old common law contributory negligence rule whereby the contributory negligence of the plaintiff completely barred him from recovery.

Where the collision is due solely to the fault of one vessel there are no very substantial problems, except problems relating to computation of damages. In all the countries, so far as I am aware, there is liability on the part of the vessel at fault. Now what are the possible alternatives to this? We could have strict liability but how could this possibly work well in the case of a collision? To me it makes little sense to say that in the event two vessels are at fault, each must be held strictly liable to the other and pay 100% of the other's damages. The result could be for example that in the event of a collision between a fishing vessel and a supertanker, due 20% to the fault of the fishing vessel and 80% to the fault of the supertanker, the fishing vessel could be fully liable for what might be relatively heavy damage to the supertanker whereas the owner of the supertanker would only be liable for the relatively minor damage to the fishing vessel.

We could have a drop hands arrangement, that is a system whereby neither vessel would be liable to the other, but at least in the absence of a contractual arrangement among underwriters, a so called knock for knock agreement, it would not seem to make very much sense because here again you could have a fishing vessel guilty of only 20% fault without any remedy at all for a heavy loss — possibly a total loss — sustained as a result of the negligence of another vessel which contributed 80% to the collision. It seems to me that with all its faults the fault system is still the only practical system to be followed. It is of course expensive to apply. Necessarily there must be investigation expenses, there must be litigation expenses in the event that the case cannot be settled and by the very nature of things since ships move swiftly around the world these days the expense of obtaining testimony can be very heavy. Knock for knock agreements could perhaps be entered into between certain groups of underwriters but here there are difficulties too because one particular group of underwriters might specialise in insuring modern, well equipped vessels that are well manned and well maintained whereas another group might be less selective in its assureds and might therefore insure more shipowners who are careless in the maintenance and manning of their vessels.

It is a little ironic to think that for years the U.S. was being urged to adopt the proportional fault rule and now that it has finally adopted the rule, the wisdom of proportional fault is being

questioned in some quarters. It is certainly the fairest rule. I think that is almost self evident. It is only right that the vessel guilty of the greater fault should bear the greater part of the collision risk and that conversely the vessel guilty of the lesser fault should be let off more lightly, but the rule has certain disadvantages. To begin with in countries such as the United States, which do not have special Admiralty Courts, the same Judge that will be hearing a collision case one week may be hearing a bankruptcy case the next and a criminal case the week after and then a copyright case and so on. It is very rare that an Admiralty lawyer is appointed to the Federal Bench since generally our Federal Judges, although most of them are very able and very experienced lawyers, are not Admiralty specialists. Some pick it up very quickly; others have a bit more trouble perhaps because they may be in a district where the admiralty litigation is not so heavy. It is hard enough for such a Judge, no matter how intelligent and how well versed in the law generally, to decide which of two colliding vessels is at fault, or whether they are both at fault; it is going quite a step further to ask that same judge to decide how much of the fault should be chargeable to each of the two vessels. I think another possible disadvantage of the proportional fault rule is that it sometimes makes it more difficult to settle a collision case on the merits. I can recall one very heavy collision case involving several million dollars in damages that was settled on the merits in one telephone call between two lawyers, each representing one of the ships. Now if that same collision occurred today it might be much more difficult for those two lawyers to agree so quickly on a mutual recommendation of settlement because one might in all honesty believe that his vessel was only 40% at fault and the other was 60% at fault and vice versa. But again, with all its faults my personal belief is that the proportional fault rule which has finally been adopted in my country is the most desirable.

## PIERRE BONASSIES—Allocation des risques maritimes et tiers

Les dommages de pollution et les dommages causés aux installations portuaires constituent un élément important du coût actuel du fret maritime. En ce domaine, la responsabilité fondée sur la faute est abandonnée, et remplacée soit par une forte présomption de faute soit par un système de responsabilité objective ou de plein droit.

Examinons d'abord le cas du dommage causé aux installations portuaires, par exemple le dommage causé par un abordage à la pile d'un pont. Actuellement, le propriétaire des installations endommagées n'a pas à faire la preuve que le navire a commis une faute. Dans certains systèmes juridiques, par exemple en droit français, aucune référence n'est faite aux règles maritimes habituelles – celles de l'abordage – et l'armateur sera soumis à une responsabilité stricte et de plein droit – celle qui pèse sur le "gardien" d'une chose. En droit anglais ou américain, on admettra qu'une présomption de faute pèse sur le navire abordeur, et c'est à l'armateur de ce navire qu'il appartiendra de prouver que l'accident était inévitable. Particulièrement topique est le droit américain, qui condamne l'armateur, même si le propriétaire des installations terrestres endommagées a commis une infraction aux règles administratives régissant la construction ou l'utilisation de ces structures – infraction qui, sous le régime de la *Pennsylvania rule*, devrait entraîner un partage de responsabilité (voir, en ce sens, l'affaire du *Tojo Maru*). De surcroît, des règles plus sévères encore pour les armateurs sont appliquées en cas d'accident causant un dommage à des installations appartenant à l'Etat ou à une personne morale de droit public, commune ou autorité portuaire. Par exemple, en France, tout dommage causé, même en l'absence de faute, à une installation publique, qu'il s'agisse d'un quai ou de la pile d'un pont, est une "contravention de grande voirie", engageant de plein droit la responsabilité de l'armateur, responsabilité dont il ne peut se dégager qu'en prouvant la force majeure – et les tribunaux n'admettant qu'exceptionnellement la force majeure, comme le montre une décision récente du Conseil d'Etat dans l'affaire du *Princesse Irène*.

Dans un autre domaine aussi, de lourdes responsabilités pèsent sur l'armateur : celui du relèvement des épaves. Dans le droit de nombreux états maritimes, l'armateur a le devoir strict de relever son navire, s'il est un obstacle à la navigation, et ce alors même que le navire a sombré en dehors de toute faute de l'armateur ou de l'équipage.

Le dommage par pollution pose un problème particulier, dans la mesure où ce n'est pas seulement le fait du navire qui est impliqué mais aussi, au moins en partie, le fait de la cargaison. On aurait pu, ici, maintenir le principe de la responsabilité pour faute, sauf à admettre en l'absence de faute de l'armateur la responsabilité du propriétaire de la cargaison. La question a été discutée, et n'est pas, d'ailleurs, complètement réglée. Par exemple, la loi canadienne sur les eaux arctiques de 1970 fait peser une responsabilité solidaire sur l'armateur et sur le propriétaire de la cargaison. La possibilité de mettre en cause la responsabilité du propriétaire de la cargaison est, pareillement, en débat devant l'O.M. C. I., à l'occasion de la pollution par des substances autres que les hydrocarbures. En règle générale, toutefois, c'est, pour le moment, sur l'armateur que pèse la responsabilité pour pollution. La convention de 1969 dispose que le propriétaire du navire est strictement et complètement responsable, et c'est seulement en cas de faute de la victime, de faute de l'administration ou de force majeure – très étroitement entendue – qu'il est fait exception à cette responsabilité. La convention de 1969 ne concerne que la pollution par hydrocarbures, mais l'O.M.C.I. discute actuellement de son extension aux autres substances polluantes, et déjà de nombreuses législations nationales, telles celles des Etats Unis ou du Canada, ont adopté des réglementations inspirées de la convention de 1969, en les étendant à toutes les substances polluantes. Dans d'autres systèmes juridiques, comme en droit français, on aboutit au même résultat, en faisant peser sur l'armateur la responsabilité de plein droit qui incombe au "gardien" de la chose – ici, la substance polluante transportée par le navire.

Dans ces diverses situations, la responsabilité qui pèse sur l'armateur connaît des nuances multiples. Des causes d'exonération existent, qui varient selon les circonstances, et l'on peut citer plus d'un exemple de cas où l'armateur a été exonéré de toute responsabilité. Que l'on se rappelle du sinistre de Texas City, en 1947 où l'armateur a été exonéré de toute responsabilité, comme il en fut de l'armateur du navire *Ocean Liberty*, après l'explosion de Brest, survenue la même année. Mais la tendance actuelle est à la sévérité à l'égard des armateurs, et il n'est pas sûr qu'aujourd'hui les juges décideraient dans le même sens que dans les années 1950. Cette sévérité accrue est manifestée par la tendance à ne pas prendre en considération, dans des cas de ce genre, la limitation de responsabilité. Il ne fait aucun doute que certains textes, par exemple la loi de la Floride sur la pollution, ne mettent en cause la limitation de responsabilité.

Dans toutes ces situations, cependant, il paraît difficile d'envisager de réduire les coûts. Il ne semble pas qu'il existe des frais administratifs importants, s'ajoutant aux indemnités versées aux victimes, et qui pourraient être réduits. Le contentieux des litiges est aussi simple que possible, parce que du fait que c'est en général une responsabilité de plein droit qui est en cause il n'y a pas de problème de preuve. D'autre part, les règles appliquées en la matière peuvent difficilement faire l'objet d'aménagements conventionnels. En droit, ce sont des principes d'ordre public qui sont en cause, lesquels ne peuvent être aménagés avant le sinistre, et les accords entre assureurs sont malaisés à établir, parce que nombre de victimes ne sont pas assurées, ou sont assurées à des groupes qui n'ont pas de contacts réguliers avec le milieu de l'assurance maritime.

Est-il alors possible d'envisager une allocation ou distribution des risques différente ? Nous dirons très franchement ici notre opinion : pour nous, il ne paraît pas possible, ni peut-être souhaitable, de

En fait, pour l'essentiel, en France, sur la responsabilité, on peut dire qu'elle est fondée sur la faute, mais qu'elle est très sévère, et que l'armateur est très responsable.

rechercher une répartition différente des risques. Car, à la vérité, les données fondamentales des problèmes ici impliqués sont très différentes de ce qu'elles sont en matière de transport maritime, d'affrètement, voire même d'abordage, tous domaines où chacun participe à la vie maritime, où chacun tire avantages et bénéfices de cette vie, de telle sorte qu'il est normal de laisser à la charge de chacun une partie des risques. A l'opposé, cette participation n'existe pas pour la victime terrestre d'une pollution. Ceci, toutefois, n'est pas tout à fait exact pour les ports, qui, après tout, bénéficient de la vie maritime. Mais ils supportent aussi, déjà, une partie du risque maritime, dans la mesure où la limitation de responsabilité leur est opposable, alors qu'en cas de dommage causé à un navire par une installation portuaire aux-mêmes ne pouvant bénéficier d'aucune limitation de responsabilité.

D'autre part, s'agissant du dommage causé aux tiers, il y a un problème d'opinion publique. L'opinion publique aurait du mal à accepter ici un allègement ou une réduction de la responsabilité des armateurs.

Est-ce à dire que, dans ce domaine particulier, il n'y a aucune place pour une amélioration ? Nous ne le pensons pas. Observons d'abord qu'en ce domaine comme en tout autre il est souhaitable d'arriver à une unification internationale. Cette unification existe en matière de pollution par hydrocarbures ; elle devrait être étendue aussi largement que possible aux autres sources de dommage aux tiers. Un autre thème à explorer est celui de la canalisation des responsabilités, lorsque plusieurs personnes sont, dans une situation donnée, susceptibles d'être mises en cause. Très souvent, il est souhaitable de reporter principalement les responsabilités sur telle ou telle personne, car cela est propre à éviter toute hésitation aux victimes et à alléger le débat judiciaire. Cette technique de la canalisation est classique dans le domaine nucléaire, mais n'a pas été prise en considération dans la convention de 1969 sur la pollution par hydrocarbures (sauf pour ce qui est des préposés de l'armateur). Mais nous la retrouvons dans la loi anglaise sur la pollution (*United Kingdom Merchant Shipping (Oil Pollution) Act*) de 1971. Ce texte protège contre l'action en responsabilité non seulement les préposés de l'armateur, mais aussi toute personne rendant assistance au navire, avec l'accord de l'armateur. D'autre part, par une règle plus générale, il prévoit que si l'armateur a constitué le fond de limitation aucune action ne peut être intentée contre tout co-responsable éventuel qui, en droit commun, serait susceptible de bénéficier de la limitation de responsabilité. Certes, en tout ce domaine, une canalisation totale, absolue serait excessive, et pourrait faire perdre tout sens des responsabilités à ceux qui en bénéficieraient. Un degré raisonnable de canalisation paraît souhaitable.

Enfin, on pourrait envisager d'étendre le système du fonds de garantie, tel que prévu par la convention de 1971 qui a créé un tel fonds en matière de pollution par hydrocarbures. Cela aurait un double avantage. D'une part, les recours ouverts aux tiers seraient le plus souvent exercés par le voie amiable, et sans les formes procédurales et frais habituels. D'autre part, le système présenterait pour nous, spécialistes de droit maritime, l'avantage majeur d'associer aux risques maritimes les plus lourds – les risques de pollution – les entreprises non maritimes qui, par l'utilisation qu'elles font des substances polluantes, contribuent directement à la création de ces risques. Aussi bien, telle est déjà la tendance qui s'affirme dans certains droits, telle la loi Canadienne sur la pollution par hydrocarbures, ou la loi américaine de 1974 (*Clean Water Act*), qui prévoit la création d'un fonds non seulement pour ce qui est de la pollution par hydrocarbures mais aussi pour les navires transporteurs de gaz naturel. Pareillement, l'O.M.C.I. envisage l'extension de la technique du fonds aux substances polluantes autres que les hydrocarbures.

En conclusion, en accord avec ce qui a été dit par de nombreux orateurs, nous dirons que dans la recherche d'une meilleure allocation des risques en matière de dommages causés aux tiers, un élément doit, plus qu'en tout autre domaine, être conservé présent à l'esprit : c'est l'élément *prévention*. Rechercher une meilleure répartition des risques, c'est déterminer qui supportera le dommage une fois que ce dommage aura été causé. Mais c'est aussi reconnaître à l'avance l'échec de la communauté maritime car aucun système, qu'il soit de responsabilité, d'assurance, de fonds de garantie, ne restituera les richesses naturelles et les oeuvres humaines détruites. Aussi, le meilleur système d'allocation des risques encourt-il la critique s'il n'inclut pas l'élément prévention des risques.

## **PIERRE BONASSIES—The apportionment of risk between Shipowner & third parties—Shipowners and other third parties (translation)**

Pollution damage and damage to port and harbour installations constitute important components of the cost of maritime freight at present. Liability based upon fault is abandoned in this area and is replaced either by a strong presumption of fault or else a system of full liability or strict liability.

Let us begin with damage to port or harbour installations, for example, to the pillars of a bridge in the event of a collision. Now in such a case the owner of the installations which have been damaged will not have to prove that there has been fault on the part of the ship. In certain legal systems, for example under French law, no reference is made to standard maritime rules and regulations and the shipowner is subject to full and strict liability. In Anglo Saxon law on the other hand there is a presumption of fault and it is up to the owner of the ship to prove that the event was inevitable. What is particularly Utopian is United States law which condemns the shipowner even though the owner of the land structures which have been damaged had committed some infraction either of rules and regulations governing construction or of standard construction practice — here we may consider the so called Pennsylvania rule. Further, in the event of anything affecting public property or anything belonging to a public authority such as a municipal administration or a harbour authority, the rules are very stringent for the shipowner. For example in France any damage caused in any way whatsoever, even in the absence of fault, to any public installation be it a pier head or a bridge pillar, involves the liability of the shipowner and the only possible exception is force majeure. Similarly in the U.S., texts indicate that any damage to any federal property regardless of the cause, in effect incurs strict liability for the shipowner.

There is another case where the shipowner has to bear considerable liability: in connection with wreck removal. In the laws of many countries the owner of a ship which has been stranded or is for any other reason in a navigation-way or a sea-way must immediately remove the wreck of the ship.

Pollution damage is a separate matter since it concerns not only the fault of the ship which is involved but also to some extent fault related to the cargo being carried. Here the principle of liability based upon fault might well be maintained except that in the event of the absence of fault on the part of the shipowners there might be recourse against the owner of the cargo. The matter has been contentious and is not fully settled; for example the Canadian law adopted in 1970 laid down joint liability upon the shipowner and the owner of the cargo. The possibility of invoking the liability of cargo is at present being discussed by IMCO with respect to pollutants other than oil, but generally speaking at present it is upon the shipowner that liability for pollution is imposed. The 1969 Civil Liability Convention provides that the ship bears strict and full liability and only fault on the part of the victim, fault on the part of the administration or force majeure can provide an exception. The 1969 convention is limited to oil pollution damage but at present IMCO is in the course of discussing its extension to other pollutants and there are a number of domestic laws which have introduced identical laws and regulations into their legal codes extending these provisions to pollutants other than oil.

Now liability bearing upon the shipowner in such situations is fairly sophisticated. There are causes for exoneration varying according to the circumstances and there are many famous cases in which a shipowner has been cleared of any liability, I am speaking in particular of what occurred in 1947 at Texas City in the United States where the shipowners were cleared of any liability. But at present there appears to be a trend towards severity and under similar circumstances one cannot guarantee that present Judges would give the same verdicts as those in 1940s or 1950s. This severity would appear to be shown by a tendency to take no account of limitation of liability in cases of this kind. There is no doubt that certain laws, such as for example the Florida law or certain national laws appear at present to be challenging the concept of limitation of liability in this area.

Costs in this area would appear to be difficult to reduce. It does not appear that there are substantial administrative costs added to damages suffered by victims which might in any way be reduced. The whole process is very simple because what is generally involved here is full and strict liability so that there is no question of the burden of proof. Moreover, it is very difficult to have any conventions or agreements which would affect this. These are matters of public policy which can in no way be subject to discussion prior to the incident, and agreements between underwriters are difficult to establish since a number of victims in such cases are not insured or are insured with groups who have no regular contact with the maritime insurance world.

Is it possible to envisage some different distribution or apportionment of risk? I must very frankly state what I fear: I do not feel that it would be possible or even desirable to have a different apportionment of risk. Indeed the basic problems involved are very different from those which we have in normal shipping, chartering or even collisions where there is a direct participation in the maritime world and where there is direct access to the advantages and benefits of shipping so that it is normal to allow each party to have a part in the risk. But the land borne victim of pollution, say, has no such participation. This may not be

true of ports and harbours which after all profit and benefit from maritime life but in fact ports and harbours already bear part of maritime risk to the extent that limitation of liability can be invoked whereas they themselves whenever they cause any damage to ships cannot have recourse to limitation of liability.

Then there is the question of public opinion with respect to damage to third parties. Public opinion would find it difficult to accept any attenuation or reduction of the liability of ship-owners.

Does this mean that there is no room for improvement in this particular field? I do not think that this is the case. First of all in this field, as in all other fields, it is desirable to have international unification and standardisation. This does exist in the event of oil pollution and it should be extended as broadly as possible to other possible sources of damage. Another possible way could be that of channelling liability where several people may be involved in a given situation. Very often it is desirable to have liability bearing essentially on one party or the other since this avoids any hesitation on the part of the victims and tends to make the whole legal process easier. This channelling process is familiar in the nuclear field but it is not taken into account in the 1969 pollution convention. We do find it in the United Kingdom Merchant Shipping (Oil Pollution) Act of 1971. It extends the same limitation of liability with respect to victims to all persons who help the ship. It also provides that any party who may be liable is not suable by the victim if the shipowner has established a limitation fund and the persons jointly and severally liable may come under general provisions on limitation of liability. Absolute and total channelling of liability might go too far and may entail the loss of a feeling of responsibility on the part of those who may have contributed to the loss but a reasonable degree of channelling would appear to be desirable.

Finally consideration might be given to an extension of the compensation fund as laid down in the 1971 Convention on the creation of a compensation fund for oil pollution. This has a double advantage. First of all there is a right of recourse by third parties which generally speaking will be on an amicable basis and will not involve legal processes, and, second, it makes the whole procedure less cumbersome. Furthermore for us as specialists in maritime law it presents the major advantage of making it possible to associate with the heaviest maritime risk, that of pollution, non-maritime concerns which by their use of polluting substances directly contribute to the creation of the risk involved. There appears to be a trend in this direction in some laws, for instance, the Canadian law on oil pollution and also the 1974 United States Clean Water Act which stipulates the establishment of a fund not only with respect to oil pollution but also for carriers of natural gas. Also, the extension of the fund technique to pollutants other than oil is at present being considered.

To conclude I would here agree with what has been said here by many speakers in seeking for a better apportionment of risk with respect to damage caused to third parties, but in this more than in any other field there is one fact that we must always bear in mind, that is to say, prevention. The distribution of risks and the apportionment of risk is to determine who will have to bear the damage once that damage has been caused but it means that in advance we recognise that there has been a failure of the maritime community because no system, be it of liability, insurance or guarantee fund, no system can restore the natural wealth and resources which have been destroyed. The best system of apportionment of risk would be subject to criticism if it were not to include this element of prevention.

## **RICHARD RUTHERFORD—The apportionment of risk between Shipowners and third parties—the Hull insurer**

In the introduction to my paper I have rather simply set out the situation as between hull insurer and shipowner under the collision clause. The only point that I will wish to make on that section of the paper is that it does illustrate or ought to illustrate that the hull insurer stands behind his assured. He partakes of the risks of his assured. He is not a party to the adventure in which the assured is engaged. He is not a banker. He is not a guarantor. It seems to me that this idea appears to have gained prevalence in various circles, so much so that in international conventions we get insurers being put up as guarantors.

Now the next point on which I would like to talk is costs. Certainly in collision actions costs can be and are sometimes very much too high. Certainly a great deal could be saved in costs in collision actions and in many other liability cases if there was perhaps a more general sense of urgency among the parties to resolve the issues. This is not always true but it is very often true in my experience.

But to come onto the examples I gave. I would wish to put the sample in my paper into its proper context. What I did was to take the entire submission of claims and advices into my office for two weeks in respect of collision: some were very old and some were new. To put that sample into its perspective perhaps it would be as well to give some indication of what my office does and what it handles in the way of claims. It acts for all the marine underwriters at Lloyds in the settlement of claims, that is to say, all the marine claims have to pass through my office for the purpose of being paid. Most of the marine underwriters rely upon my office to handle their claims although some marine underwriters do retain claims staff at their boxes. In the office I have 25 technicians on hull business, 23 technicians on cargo business, 5 technicians handling excess of loss reinsurance business. I have 7 extra endorsement staff whose job is to apply stamps and dates etc. to settlements when they are done. I have 3 attached staff who are uniformed messengers and I have 5 secretaries. That is a total of 68 people of which 53 are technical men encouraged to handle claims individually on their own account without too much reference unless they need guidance. We receive 64,000 claims per annum. We dispose of something in the order of £300m. of underwriters' money per annum. The cost of the office, that is to say the technical side of the office is in the region of £600,000 per annum, the cost of taking down the claims, that is to say causing the payment of the claims to be made and advising the various underwriters is a further £300,000 per annum rounding up to about £1m. per annum. Now £1m. applied to claims paid per annum works out at about a third of 1%. That must give some idea of the cost of the claims service of the marine market at Lloyds.

However I should make the point that in the marine market and in London generally, of course, the broker plays a very important part in claims settlement and the broker carries, as far as we are concerned, a great deal of the burden of correspondence with the client. Forty claims settlements out of 64,000 is not an adequate sample but at the same time they did help me to clarify my own mind because our experience does turn over on the proportion of 64,000 claims represented by collision claims. It did give me a guide, and does indicate that collision actions are in fact usually spread over a number of years.

If I could now turn to the question of what could be done. A great deal could be done in small ways to reduce problems. I dealt perhaps rather too much at length on the question of knock for knock. There have been attempts at knock for knock as we all know in the past. They have usually worked because it was necessary they should work because of the circumstances at the time. I do not believe they were ever very popular and I think that as soon as they could be dispensed with those arrangements were dispensed with. We are after all commercial people. We all have a responsibility to those who are behind us, the shareholders or our underwriters and we are all expected to make profits. That being so I cannot see knock for knock or dropping hands in respect of rightful and proper recoveries being accepted by the people who have to justify on the balance sheet why they have not recovered what they should have recovered, or to justify to their re-insurers why they can collect a 100% claim unreduced by a potential and proper recovery. In small ways it is the practice to make a decision at a fairly early stage not to pursue a collision action or a recovery action of some kind. Waiver of subrogation clauses appear quite frequently in various policies. The practice of naming associates of the assured in the policy immediately at inception in fact dictates that there will be no subrogation issue against those named people. I think that that gives an indication of the sort of things that can be done apart from separate independent agreements. But to come back to the knock for knock arrangement, I have given some examples of the way in which knock for knock has been applied. As another example why it is difficult to apply, I have a situation at present where both sides of a collision are wholly insured in London and almost with the same underwriters on both sides. You would think that it would be quite simple to have the underwriters drop hands or at least negotiate a settlement, and that is what they want to do, but they are finding that they must take into account the problems of their particular assured: one, who is wholly innocent says why should my record suffer, the other one who is wholly to blame, says but if you had not made side deals with



somebody else you would be able to recover from yet another party and not me. This argument is going on at present and I am trying to sit in judgment.

This illustration makes the point that even where the ideal situation is present for knock for knock it is still extremely difficult to achieve it.

## ALEX REIN—Limitation of Liability

The first step in the process of apportioning a maritime risk is to decide whether the loss shall rest where it falls or whether it shall be transformed into a liability loss to be borne by another party. If the reason for transforming the loss into liability is that the act is sinful then the matter rests there, there is no reason to alleviate the burden of the sinful person, so he will carry the full liability.

If however the apportionment is based on more rational considerations one will very often find that the full liability put on the other person is not only unreasonable, but is not a pragmatic solution. So one has to have another round of apportionment and that can be done basically in two ways: one is to let the victim carry the bottom part of the loss, in other words to introduce a deductible. This is a device which is not much used in maritime law but we have one example in the new Athens Convention regarding passengers' luggage. There the passenger has to carry the deductible where the ship is liable for his luggage. The other method which we all know so well, is to cut off the loss at a certain higher stage and let the victim carry the excess himself, that is, limitation of liability.

Now we have several variations of limitation of liability as a means of performing apportionment of risk, one is the package limitation in the Hague Rules, another one is the per capita limitation of passenger claims, but the main tool in performing apportionment by way of limitation is the so called global limitation, the ancient and venerable rule in maritime law that the shipowner can limit his liability for all claims arising out of the same incident to a certain limitation fund. The theme which has been allotted to me is not the whole range of limitation only global limitation. The Hague Rules limitation has been dealt with in connection with the Hague Rules.

As you know, the present international system of limitation has now been under revision for some time and is coming up for final treatment at the Diplomatic Conference which will start in London on the 1st November. It would not be proper for me to go into the details of the limitation rules — that will require a Seminar of its own. All I intend to do is to show that global limitation of liability is a necessary wheel in a rational system of apportionment of risks and to point out the minimum requirements for this necessary wheel to function properly. A little more than 50 years ago the old venerable rules were for the first time codified in an international convention, that of 1924. It was obvious already at that time that the historical purpose of these rules had died. You could not justify limitation of liability on the grounds originally advanced for it — to persuade seafarers to embark upon maritime ventures. That was not necessary any more, and it is even less necessary today. Today I think the situation is reversed, what we need now is some means to dissuade shipowners to embark upon building even more ships because there is an excess of tonnage and that is a great cost to the customers too. The fact that the institute of limitation survived not only the codification, but also the revision in 1957, shows one thing quite clearly; there must be a new reason for it, different from the original one. This is a phenomenon which is not uncommon in the history of law. An institution may prove to have a useful function other than the one originally contemplated. I am not sure that everybody realised exactly what that other function was. For many years it was good legal Latin to try and justify the institution by a philosophical argument. It was said that it was "natural", a product of natural law, that the seafarer's risk of liability arising from the perils of the sea should be limited to the capital invested and the profit realised in that maritime venture. Obviously this was no tenable argument and did not hold water. It never had; and the unreasonably low figures which were the result of inflation and rigid tonnage figure rules were about to discredit the whole institution. Also, in some countries there was a marked reluctance to abide by the principle of limitation; the United States of America is one good example. Although under the limitation statute there is limitation for personal injury, the Courts do not observe the rules. There is in fact no limitation for personal injury in America. Likewise, it was inherent in the whole system that limitation of liability should be applied not only to the shipowner but also where his liability was insured. Nevertheless the direct actions statutes came one after another in the various States, starting in Louisiana I think, with the result that where there is a direct action there is in fact no limitation of liability except the limitation of the sum insured. Therefore many lawyers and shipowners took a very pessimistic view of the future of limitation when the question of a new revision came up after the Torrey Canyon disaster.

When the CMI undertook to make the first draft it was advocated by one faction that we should try and modernise the rules and make them more suited to the new purpose, which would mean a new convention to replace the old one. But a strong faction within the CMI was against it for the simple reason that an attempt to introduce a new convention and new concepts would kill the whole idea, whilst if we only made a Protocol to the old Convention and raised the figures and otherwise made as few changes as possible, we could probably smuggle the principle through and let it live for another few decades. That pessimism has turned out to be unfounded.

The real justification as I see it for not only retaining, but extending, the scope of global limitation is that it is a necessary vehicle by which a rational apportionment of risks can be

achieved. Once it has been agreed, as I think it has been here during the last few days, that the notion that liability for maritime losses is punishment for sin is misconceived it follows quite logically that the party selected to carry liability cannot be expected to carry a higher liability than that which he can reasonably insure. Insurance is the only practical way of making the damage good. You cannot rely on people having fortunes any more and those who commit faults are not always very prosperous. How can one see to it that the liability exposure corresponds to the optimal insurance cover? You cannot expect any tortfeasor to have insurance up to the sky. The answer is that one can define an insurable liability interest in the same way as the Marine Insurance Act defines an insurable property interest, or in a language more familiar to those here present, one can allow the liable party to limit his liability to a certain limitation fund. What shall be the criterion for assessing the size of such a fund? Obviously, the insurability, the amount of insurance cover which that particular entrepreneur is able to carry. There is no point in having him carry a liability which he cannot reasonably insure. It is a further requirement if the wheel in the machinery shall be an efficient one, that once the limitation fund has been assessed it must be unbreakable. Unbreakable in the sense that it can only be broken if there is no insurance behind, either because the liable person has omitted to insure himself or because he has committed an act which deprives him of his insurance cover. These are the basic requirements to a rational limitation of liability system necessary in order to implement a rational system of apportionment of risk. I am glad to say that in the draft, the IMCO draft, which will now be put before the Diplomatic Conference, these principles have been accepted basically. Today, contrary to all expectations there is no movement at all to abolish limitation as such. There is not even a dissenting voice as far as I know at IMCO. Also a majority is in favour of making the limit unbreakable. However, the prerogative of limitation of liability is still reserved for shipowners and, of course, that makes the whole system lopsided because there are other parties to maritime ventures than shipowners. Cargo owners are sometimes made liable for damage to the ship. There is even a strict liability in the Hague Rules for dangerous cargo causing damage to the ship, a liability which is not easy to insure. There are other contractors, stevedores, repairers and so on. They will not get the benefit according to the present draft. The only exception which has been made is in respect of salvors who are not at the same time shipowners or operating from a ship. When we made the first draft in CMI we made a point of changing the title of the convention. It should not be a convention on shipowners' liability, but a convention on limitation of liability for maritime claims. The title has survived the IMCO treatment but that is almost all. The only extension which has been made is, as I say, with respect to salvors. Now, the reason for this is quite obvious. It is not so much that the governments do not want to give the other parties to maritime ventures the same benefit, more the practical difficulties in finding a way of defining the limits. It was so easy in respect of ships because originally we have the value of the ship that was by British initiative transformed into a tonnage rule, and the tonnage rule remains, but how can one define the stevedores' liability? Should that be related to the ship's tonnage or to something else. Now as a matter of fact IMCO will have to resolve that question in another connection because of salvors who are not operating from a ship. There the likely solution is that one will find a new system of assessing the sum and that certainly can be done, but I see no practical chance that IMCO will further extend the right of limitation.

It goes without saying that, preferably, there should be one global limitation fund for all claims arising out of the same accident. If you split up the cover by having several limitation funds for several kinds of damage you not only make the insurance more expensive but you also have difficulties with capacity. I have written about this in my paper. The governments in IMCO have turned a deaf ear to this argument. There is a separate fund for oil pollution and now that fund may in the future also comprise other hazardous liquids, and there will also be a separate global limitation fund for passenger damage. This is unfortunate and I see no reason why there should be separate treatment of pollution damage which by definition is trivial property damage. On that point as well I see no chance of any change in the draft which is before IMCO.

Finally, the most important question is how to select claims subject to limitation of liability. There will be detailed rules about that in the convention, but the convention says nothing about liability, it only deals with limitation of liability. Other statutes will decide whether or not a certain loss shall be transformed into liability and thereby come under the scope of the new convention. For instance damage to cargo. From the point of view of the technique of limitation of liability it is important that you do not allow claims to compete in the limitation fund if they can be settled better in another way, for instance by letting the victim carry the loss himself. One example is cargo claims. It does not matter to the technique of limitation whether you say the cargo owner should carry his own loss, or that the shipowner shall issue a guaranteed bill of lading. In neither case will there be limitation of liability and I think the capacity question is solved by the very fact that cargo insurers who today insure cargo directly may just as well reinsure the P. & I. Club's liability to shipowners. A knock for knock agreement as I pointed out in the paper would also be beneficial in the sense that it would reduce the volume of claims to be covered out of the limitation fund, but these are matters of substance to be decided on the merits and have nothing to do with the technique of limitation of liability.

## SUMMARY OF DISCUSSION

*(Note: because of the diffuse nature of the discussion no attempt has been made to summarise the discussion in chronological order. Instead discussion on separate subjects has been summarised.)*

### **Carriage of Goods: Nature of liability**

1. Several speakers referred to circumstances where schemes of liability had been tried which were different from the Hague Rules:
  - (i) In the steel trade from Antwerp as well as in the container trade to Australia customers had been offered insured bills of lading but in both cases had preferred to continue with their existing insurance arrangements.
  - (ii) In river traffic in the U.S.A. some carriers had agreed to accept common law liability in order to obviate the need for cargo insurance.
  - (iii) A private agreement had been made between a carrier and a large shipper that no claims should be brought. However this scheme was unsuccessful because without claims the carrier was unable to trace defects in his system of loss prevention.
  - (iv) In traffic on the Rhine the carrier contracts out of all liability but competition is successful in keeping up the standards of carriage.
2. In addition to these it was pointed out that different schemes of liability could and did apply to carriage of goods on deck, the carriage of animals and delay. A plea was therefore made to retain this diversity by limiting the level of mandatory liability so that parties could reach agreement above this level. On the other hand the nature of liability was only one factor in determining whether or not a claim should be pursued: the commodity, the market, the possible jurisdictions, all could play a crucial part in making this decision. Capricious decisions in different jurisdictions also contributed to uncertainty and this at least could be avoided if the carrier was made more strictly liable. The deterrent effect would also be increased thereby.
3. Some shippers agreed that the carrier should be made more strictly liable and further that General Average should be abolished. However others considered that the present system was preferable since it permitted cargo interests to make their own insurance arrangements. Transport was a relatively minor consideration in the overall sale contract and both parties wanted the security of cargo insurance instead of the protection of more liability. Cargo insurance was also thought to be superior since it could provide cover from warehouse to warehouse at the full value of the cargo even including a profit element of more than 100% if required.

### **Third World: the Uncitral Draft**

4. A plea was made by observers from the Republic of China that the interests of the Third World should be considered in all deliberations affecting trade. This plea was echoed by several speakers who urged the CMI to play a role in assisting and educating the developing world.
5. Certain general points on trade and insurance practice had particular application to developing countries:—
  - (i) Recovery from cargo insurers was inevitably quicker than recovery from the liability underwriters of the carrier. Therefore if strict liability was instituted greater capital outlay would be required to finance the longer lapse of time before the claim was paid.
  - (ii) The Third World needed to develop its financial skills in banking and insurance and would therefore be hindered by strict liability which would only involve liability underwriters, generally in the industrialized countries.
  - (iii) Higher levels of liability would ultimately involve higher freight rates which would normally be paid in foreign currency. A proportion of this could be retained if the risk was borne instead by the domestic cargo underwriter.
6. To the extent that the Uncitral draft promoted the effects outlined above it was to be opposed. It was also to be opposed on the ground that it was less than clear and that lack of clarity could only produce confusion and wasted expense. The following points were made inter alia:
  - (i) the standard laid down in Article 5 is less than clear since it is not indicated whether the test to be applied is objective or subjective. Does it approximate to due diligence?
  - (ii) since there is now no positive duty on the shipowner and therefore in some countries no statutory duty, does this mean that duties which could not be delegated before can now be delegated?

- (iii) under the Hague Rules if the carrier wishes to claim exoneration he must show the cause of the loss or damage and then show that this cause falls within the exoneration provided in the Rules. In the Uncitral draft it seems that cargo interests must show the cause. In this sense cargo would appear to be worse-off under the new regime.

### Insurance Practice

7. Both cargo and P. & I. underwriters were asked whether their rates reflect fault. Both replied that rating follows claims experience very closely. Thus a shipowner would expect his ordinary claims to be used as the basis for calculating his rate with his P. & I. Club. Catastrophe claims would not be included for this purpose. Similarly cargo cover is rated according to experience, with FPA claims omitted. In this way account is taken of the standard of care in packaging and in selection of carrier etc.
8. The question was raised whether underwriters, P. & I. and cargo, were sufficiently flexible to be able to accommodate some of the ideas which had been put forward when liability generally was being discussed. In reply it was pointed out on behalf of P. & I. Clubs that there was no theoretical bar to variation of cover being offered provided all members considered the risks to be mutual. Shipowners were already covered on different terms, some on higher deductibles or on more limited terms others on the Hague/Visby Rules instead of the more normal 1924 Hague Rules. However a note of caution was sounded: as the shipowner came closer to being a cargo underwriter the statutory controls governing the latter might become applicable.
9. Cargo underwriters also felt able theoretically to offer untrammelled flexibility to service any of the schemes which had been put forward. Reference was made to the scheme agreed by Scandinavian carriers and underwriters whereby no recourse action is brought for claims less than \$227 and claims between that figure and \$12,500 are settled without discussion on a 50/50 basis. Another instance of the flexible approach of cargo underwriters is the cover provided in a turnkey project where cover is provided for each stage in an operation and for each aspect of it until the time when property is transferred and the key of, for example, the hospital turned. This example is perhaps no more than a demonstration of the part a cargo underwriter can play in risk management generally — again an illustration of the flexibility the cargo underwriter can offer.
10. Various suggestions were put forward to make the operation of P. & I. and cargo insurance cheaper. No recourse agreements and strict liability were considered in some detail, but it was generally agreed that neither could bring benefit overall. It would be difficult to justify a structural change of this order since recourse actions only cost a maximum of 20% of claims paid and cargo insurance premium itself is only .25% of the value of the goods in world trade. However economies could be sought within the present system. For example joint recovery departments or joint P. & I. and cargo departments could be established. Alternatively joint records could be established. A more radical approach might be for cargo and P. & I. to institute a fund jointly with rates established by a common set of records. However the warning was issued that several of these schemes had been attempted before but with little success.
11. In response to enquiry P. & I. underwriters and hull underwriters explained their role in the release of an arrested ship. The letter of Indemnity issued by P. & I. Clubs was normally sufficient in most parts of the world to secure release of a vessel without further security. However bank guarantees were sometimes required and these could prove costly. Even more costly and wasteful was the practice of requiring deposits. The hull underwriter does not regard release of arrested vessels as part of his function except to the extent of endorsing the hull policy to the P. & I. Club as counter indemnity where the Club has put up security. However when called upon to do so the hull underwriter may put up security and would normally employ a bonding company.
12. Attention was drawn to the loss prevention measures instituted by both cargo and hull underwriters. In addition to the part played by way of rating and inserting terms in the policy, positive steps have been taken to disseminate information by courses and news letters pointing to such things as problems in packaging or collision analysis.

### Collisions

13. Although some had thought that knock for knock agreements might be an attractive and simple way of reducing the costs of collision actions it was generally acknowledged that there would be drawbacks because —
  - (i) some costs would not be insured
  - (ii) deductibles might differ
  - (iii) fault would have to be considered in order to determine the rights of third parties.
14. An alternative method of simplifying collision procedure would be to reintroduce the 50/50 rule which had obtained in the U.S.A. until the recent *Reliable Transfer* case.

Several speakers thought this decision retrograde since it might put on an inexperienced judge the artificial burden of distinguishing fine degrees of fault when both ships might be insured by essentially the same underwriters. On the other hand the apparent simplicity of the 50/50 rule was delusive since 75/25 was equally within the capability of an inexperienced judge and much more likely than the contentious 60/40 apportionment.

15. The general conclusion was that although a 50/50 apportionment was theoretically cheaper to administer, shipowners would prefer a fault rule. However whichever rule applied its application should be made universal.

#### **Limitation of Liability**

16. It was generally agreed that the limits under the proposed new Convention should be virtually unbreakable since otherwise there was little point in the Convention. Further, care should be taken to ensure that the figure fixed upon should not be so low as to dissuade states from ratifying the Convention. On the other hand the figure could not be too high provided always that the cost was reasonable.
17. Some problems were envisaged from the retention of a special fund for oil pollution and it was anticipated that at some point in the future the funds would have to be amalgamated. It was generally accepted that a single fund for property and personal claims was probably the most efficient means of utilizing the capacity of the market nonetheless it was felt by some that a dual fund system would be preferable.

## SUMMARY & CONCLUSION — LORD DIPLOCK

The time has now come where I am scheduled to try and give a summary of the discussions which we have had during the past two days. For my part I have learnt a great deal that I did not know before about the way maritime business and maritime insurance is conducted and I myself have been fascinated by the facts and figures which have been presented to us by the panel of speakers and also by the diversity of opinions which we have heard during the interventions from the floor.

When people were intervening from the floor during the course of the discussion, I invited them in addition to giving their names to say what they did, so that we should know the sectional interest which they represented. I think it appropriate that I should do something of that kind myself. You know my name and if you have read the programme that was distributed you will know that one of the things I do is to act as a Judge in the Supreme Court of the United Kingdom. In that respect I am completely neutral between shipowners and cargo owners, between P. & I. Insurers and between cargo owner insurers and everyone concerned in the industry. So in that sense there is no sectional interest that I represent; but I am also a consumer of imported goods and that is the sectional interest which I have to declare to you so that you will know which way my prejudices lie and if I confess to you that I have some little responsibility for suggesting the theme of this Seminar it was as a representative of that sectional interest that I did so. Now I mention this because if the adherence to a particular legal system and the way in which it allocates various categories of risk between the parties directly concerned in sea transport, costs more in administrative costs and legal fees than the losses which the adoption of that system prevents, I and hundreds of millions of other consumers of imported goods in developing countries as well as developed countries, are the ultimate victims of any punishment which is imposed upon those guilty of human error. If the cost of allocation, the cost of deciding disputes is greater than the reduction of loss resulting from that system, the punishment for any sin that there may be in human error is vicarious and so is the responsibility. When we are talking about fault we are talking about vicarious liability, almost certainly of a limited liability company for human error on the part of those whom it employs. What I am interested in is that in searching for legal systems or ways of allocating liability for loss we do not lose sight of the fact that unless we keep our minds concentrated on what the cost of all this is, any punishment for human error is ultimately going to be paid by me and by you and by hundreds of millions of people who are the consumers of imported goods. So the question which I ask in my sectional interest as a consumer is, will the system of allocating responsibility for loss, whether it be fault, whether it be absolute liability, whether it be to let the loss stay where it first falls, induce management to take precautions which will reduce the amount of losses to an extent exceeding the cost of precautions, the cost of administration of the system. Now one may call this deterrence and I will call it that because that is the expression that is being used. It is a convenient way of trying to estimate what the economic cost is of the various systems. What has emerged from the figures that we have had is that all transfer of loss, from one party to another, from him on whom it first falls, costs money in administrative costs. What also appears is that the costs of such a transfer can be very small indeed. It is small when it is transferred from the cargo owner to his own insurer. It is small when it is transferred from cargo to P. & I. in those cases which are referred to by Mr. Birch Reynardson in his paper as the obvious cases where liability is obvious and can be admitted at once. But it is expensive, and this is where the expense really begins, when there is uncertainty as to whether the liability is transferrable or not, where it is necessary to get evidence and produce proof which would stand up if necessary to litigation and where the criteria of liability are so vague that they depend upon the subjective judgment of the individual judge before whom the matter comes. Perhaps the most important and obvious examples of this are the collision cases where apportionment may be 60/40, 50/50, 40/60 depending on the experience of the Judge. So far as I am concerned that has been the lesson which I have learnt from this Seminar: where there is certainty the cost of transfer is comparatively small and when there is uncertainty the costs grow. It is quite true that if we can remove uncertainty we will reduce the amount of work for lawyers and it may be that if I had been at this Seminar something over 20 years ago I might have had to declare a sectional interest against that but we have, I think, a majority here who have not got that sectional interest prominently in mind.

So I have been looking at the various systems — and we have a whole variety of systems within the topic of this Seminar, the fault system, the divided system in the Hague Rules, strict liability in port installations and wreck removal and the like — I have been looking at them to see what evidence we have of the deterrent effect of having a system which transfers loss from cargo owner or cargo insurer to shipowner or P. & I. Club. I think it has emerged from the discussions that fear of liability, whether strict or fault, is not a major factor in making shipowners take precautions to limit the loss or the risk of loss or damage to cargo that they carry. What they are concerned with is to keep their ships running successfully and efficiently. I think it is probably true, and I always try and remind myself when I am sitting deciding cases about contracts that when people enter into contracts their primary thought is not what is it going to cost them if they do not perform it, their primary thought is

what their obligation is to perform it. But deterrence, though it is not the major factor in persuading shipowners to take proper precautions for the safety of the cargo, is warranted. I think that has been the general impression and general consensus: that it is a factor and a worthwhile factor. I had wondered before this Seminar started, whether the deterrent factor was removed or blunted by liability insurers and I think it has emerged that the effect of the rating system for premiums adopted by cargo underwriters and the record method of assessing the premium adopted by the P. & I. Clubs for liability insurance does have the result that over the years, say 3, 4 or 5 years, the assured, be he shipowner or cargo owner, does pay in premium the actual costs of the claims which the underwriter has met in the first instance. This is true so far as the ordinary run of the mill claims are concerned and those are the claims — I am leaving out the disasters — which better methods, better precautions, can reduce. The method of premium rating based on records, since they reflect over 2 or 3 years the actual loss and damage which has been caused, do provide the shipowner and the cargo owner with material which enables them to judge whether precautions which are possible in order to prevent or reduce these losses are economically justified by the amount of loss which they will prevent.

But this too has emerged I think, that even if there were the inducement to the shipowner to reduce his losses if the claims against him are reflected in the premium, a deterrent effect no less closely related to the amount of the losses could still be produced by the cargo insurers charging differential premiums as they do already according to the method of transportation used. The cargo insurer can distinguish and does, between one shipowner and another if he finds that the loss record on particular shipments by a particular line is above the average.

One final general comment before I try to see what has emerged from our particular discussion. We have to work within the legal system: this is not a conference of the CMI to draft conventions altering the law as to the apportionment of liability. What we have been doing is to consider how, working within the system, we could produce the overall economic cost of apportionment of risk. Now that leaves two methods that are available to us working within the system. To the extent that national law permits freedom of contract, apportionment between the parties to a contract is one with which we can deal and make such alterations as we please if we find that the economic effect is to reduce the overall cost of sea transport. The other opportunity offered is by virtue of the fact that, working within the system, whether there be contracts or not, working within the tort system, working within statutes in national law, there is nothing that I know in any system of law which forces a person who has had his rights infringed to enforce them against the person against whom he has a remedy. If the cost of enforcing a remedy is going to be greater than the recovery which the remedy provides then there is nothing in any legal system which makes the victim incur those uneconomic costs by enforcing his rights. These are the two fields, contract and failure to enforce rights where it is uneconomic to do so, to which our attention has been directed in this Seminar, rather than to amendments to the general law which does not lie within our subject on this occasion.

I will now try to deal as briefly as I can, with the four classifications in which we have approached this subject. One thing has struck me under each of these classifications: if I were re-writing the introductory portion concerning resistance to change, it would have been in capital letters and red ink because I have found at this Seminar that, if anything, I had underestimated the resistance to change I would find.

Now let me turn to the first of the categories, the shipowner and cargo owner, which was the subject of papers which we had from Professor Berlingieri, Professor Rodiere and Mr. Kaj Pineus. I think that there was a general consensus that within this field there should be left as much room for freedom of contract and flexibility as possible. We had confirmation from cargo insurers and from P. & I. insurers that variety of contract of carriage presented no difficulty from the insurance point of view. Now the Hague Rules do limit freedom of contract and flexibility if a bill of lading is used to evidence the contract of carriage and they do prevent the shipowner from contracting out of a minimum liability which is placed upon him by the Rules. That of course does limit freedom of contract, but to think that one can abolish the Hague Rules, or introduce a provision enabling shipowners to contract out of them, would in my view be politically quite impossible. On the other hand there has been no appreciable criticism of the Hague Rules and the fact that where they are not compulsory in charterparties it has been so common to insert the paramount clause, suggests that this particular system of allocating risk is one which has worked well to the contentment of all parties. It may be that this is merely a manifestation of resistance to change but there is some common sense behind the Hague Rules even today and under modern conditions in that the exceptions deal with loss which is due to human error, which advance precautions cannot avoid, whereas those for which liability cannot be excluded, what I call the management risks, are risks in which precautions can reduce the risk of loss. So while there has been no real criticism of the Hague Rules there has been, I think, a consensus of criticism of the changes suggested in the UNCTAD/Uncitral Draft. Criticisms because basically these changes will increase the number of recourse actions and also because of the vagueness of the phrases used leading to great uncertainty and great doubt as to what the subjective position of the Judge will be in the various jurisdictions. They will render useless all that



expensive jurisprudence accumulated over 50 years upon the meanings of the phrases in the Hague Rules and for many years after a new and vague criterion has been set down there will be all the expense incurred again while the uncertainty continues to exist.

May I turn then next to the change which could be made without conflicting with the Hague Rules, that is to say, to put the liability on the shipowner as strict liability or to go even further by issuing an insured bill of lading. There has been little general support for this. I think it has emerged that shippers in their interest will want cargo insurance whatever system of liability is placed upon the carrier, because cargo insurance provides for the shipper and the receiver a service which goes far beyond the mere spreading of risk which one thinks of as the main function of the insurers. It can provide cover for that part of the carriage when the goods are not within the control or the custody of the shipowner, and the insurance can be tailor-made according to the requirements of the cargo owner, the deductibles which he wants, the extent of risk which he wants covered. Further cargo insurance provides as an insured bill of lading cannot, a guarantee of prompt payment of the claim to the cargo owner irrespective of whether there is any doubt as to the liability of the shipowner. He can get cover in his own country from a payor of his choice and prompt payment enables him to avoid the liquidity problems which he will otherwise risk incurring if he has to make the payment himself or wait until he had recovered it from the P. & I. Club. Strict liability would not remove the necessity for cargo insurance by the shipper himself: a practical illustration of that is that in air transport where the liability is very nearly strict, cargo insurance by the shipper is still a necessity in the business world. There is one possible reservation in saying that the general feeling was that an insured bill of lading, or strict liability would not represent a saving of cost nor remove the necessity for cargo insurance and that is a possible reservation as regards the contract entered into in inter modal transport by a combined transport operator. I make that reservation because we have not discussed the special problems of inter modal transport.

There also has been little support for the other extreme, no liability upon the shipowner whatever the cause and however negligent he has been, however badly he has managed his shipping operation. On the other hand I think there has been support for the application of a no recourse agreement to lesser claims, where the expense of prosecuting recourse particularly in disputed cases will be greater than or a very large proportion of the amount recoverable on the claim. This is illustrated by the Scandinavian system just about to be introduced, which Mr. Kihlbom told us about, where up to a certain limit there was no recourse at all and beyond that limit there was a 50/50 recourse. What is happening there is really the converse of what has happened by legislation in quite a number of States of America and some provinces of Canada and in New Zealand where for damage up to a certain amount there is absolute liability upon the driver of the car, the motor insurer in effect, and for recoveries beyond that amount then the ordinary fault rule is applicable. It does appear to me that there is some room for development upon these lines, an extension of this kind of agreement to other markets. It may involve some education of cargo owners to make them realise that it is really in their interests because it will reduce the overall administrative costs of cargo claims. It may also involve some adaptation or some revision by P. & I. Clubs and by cargo owners of their rating system.

The next matter on which I think there has been some consensus is the deductible, the first dollar claim. There must be many minor claims where the cost of even writing the letter to the cargo insurer if analysed out exceeds the amount which can be recovered from the cargo underwriter. It would seem that there is scope for education of cargo owners in the economics of deductibles leading, one would hope, to the elimination of cover which does not contain a deductible of at least the average cost of writing the letters and making out the claim and the like.

Finally there has been some discussion about the possibility of reducing administrative costs by centralising recovery offices. I have found most interesting Mr. Rutherford's account of the economics of the centralised office which Lloyds has been able to create. I would suggest that this is another matter which is worth exploring remembering always that this too will have to be a matter of education. As Mr. Rutherford said, the marine offices in London have thought about the idea but up to the present have felt that the objections to it are greater than the advantages. No doubt there will be resistance to this kind of change but with the increasing costs of clerical labour, I would suggest that this is a matter on which it would appear from this Seminar, insurers, both cargo and P. & I. insurers, should concentrate their minds to see if there is not some worthwhile economy to be made that way.

May I turn now to the next subject, which is Mr. Healy's paper on collision. Obviously we cannot alter tort law and that is the system of law which governs collision damage. At first sight when we were considering this matter in the panel, we thought that a knock for knock agreement between Hull insurers was an attractive notion. Both ships may be insured in approximately the same markets, sometimes indeed by common underwriters in Lloyds and the fault system of liability is unlikely to act as a deterrent in collision cases — there is sufficient deterrent in the cost to the ship itself of collision, demurrage, the loss of the use of the ship while repairs are taking place. But I think it has emerged that this is not a practical solution of the problem. It is not a practical solution for a number of reasons.

One outstanding one is that demurrage, the loss of use, is not normally insured because it is so difficult to estimate the amount of the risk that it is with difficulty insurable. On the other hand liability for demurrage is insurable, so that a knock for knock in this field cannot have the result which lies at the root of any knock for knock system of enabling those who are parties to it to see that in their books in the end it will work out evenly.

Second, deductibles may in many cases be very large. They cannot be dealt with by the knock for knock agreement between Hull insurers. Then again there may be personal injury or loss of life which again would not come within the knock for knock agreement so that it would be difficult to prevent the collision claim which is so expensive a matter of administration and litigation. It does look as if the only scope for agreement between Hull underwriters in collision cases is an agreement reached after the event. But of course that is not knock for knock. Knock for knock is an agreement before the event as to what is to happen if the risk occurs: an agreement afterwards that each should bear his own damage is simply a settlement between underwriters of respective claims.

The third matter which I think did come out of the collision debate was that uniformity in the application of the fault rules is desirable; it limits forum shopping and to that extent at any rate a recent United States decision of the Supreme Court adopting the comparative fault rule and thus bringing the United States and Liberia into line with the convention countries is to be commended. However doubt was expressed, and it is a doubt I share, whether the comparative fault rule is better than the old rule of 50/50. We are landed with the comparative fault rule; it is our own fault because it was a CMI rule and so I may be in a minority of one when I say that I myself see considerable advantages in the old 50/50 rule.

I do not think that there is much I can say in summary upon that very interesting topic which Professor Bonassies discussed, the liability to third parties, generally in respect of port installations, bridges or pollution damage. There we are fixed with a system of law; there is no room for non recourse agreements or contractual modification, but a new thought did emerge from the discussion on that subject, namely that absolute liability, or very nearly absolute liability in many of the cases which exist in that field does have a deterrent effect, probably greater than ordinary fault liability.

Finally may I come to the last subject, that of Mr. Rein, global limitation? That after all was a matter which we were discussing at the Hamburg Conference and I do not propose to deal with that at length but two things I think were important that clearly came out of the discussion. The first is that unbreakability is essential to the value of a convention of this kind. Therefore if the limit is made breakable in the case of gross negligence (which is one of the alternatives in the IMCO draft) you will have destroyed the value of the convention because gross negligence is a term which has no definite meaning, at any rate in English law, and it leaves to the subjective judgment of the Judge such a width of appreciation that the certainty, any sort of certainty, has gone and the value of global limitation disappears.

One other thing emerged. There is no point in having a global limitation if the limit is put so high that it never comes into operation: we shall just be wasting our time in the three weeks allocated to the discussion of the IMCO draft if the ultimate result were one that the limit was so high that it never came into operation.

I think the third point which has arisen on that matter is that it is not really feasible to extend limitation to other interests beyond the shipowner for technical reasons as to the way the limit can be fixed.

May I just finish by saying this. We have not made, and I for one did not expect us to make in this Conference, any dramatic breakthrough. What I have got out of this conference myself, thanks to the speakers on the panel and the interveners from the floor, is that I have equipped myself with factual knowledge which I did not previously possess to enable me to undertake a better informed and critical examination of the system of apportionment of risk in maritime law. The examination we have been able to proceed with in these two days has left me with some thoughts as to ways of improvement which if only minor seem to me worth further consideration and exploring. I would like to express to the speakers on the panel particularly but also to all those who out of their expert knowledge have taken part in the discussions from the floor my great gratitude to them for directing my mind to those aspects of the matter where it does seem there is some reasonable prospect of reducing the cost of sea transport resulting from the way in which risks are apportioned which I, in my sectional interest as a consumer, hope that you who are concerned in sea transport will continue to explore.

## APPENDIX I

### APPORTIONMENT OF RISK IN MARITIME LAW

#### THEME OF SEMINAR

1. Loss by destruction or damage to property is a risk inherent in maritime transport; it forms part of the over-all cost of sea-borne trade. Unless the loss actually sustained remains where it falls, the administrative expense of transferring it to someone else by insurance or recourse must be added to the cost of the actual loss.
2. However the risk of loss from different causes in a particular maritime adventure is allocated by law between the parties interested, insurance spreads it (imperfectly) among the general body of shippers as insurance premiums or freight rates. It is recovered as part of the price of delivered goods.
3. The aim of the Seminar is to find out whether the aggregate cost of loss or damage is reducible by changes in current legal rules for apportioning risks or changes in current insurance practices.

#### CATEGORIES OF PERSONS SUSTAINING LOSS OR DAMAGE

4. The persons on whom loss or damage arising in the course of a maritime adventure falls in the first instance may be:—
  - (i) Parties to the same maritime adventure (i.e. shipowners and cargo owners).
  - (ii) Parties to some other maritime adventure (e.g. collision damage to another ship or cargo).
  - (iii) Strangers to any maritime adventure (e.g. pollution or other damage to property on land).

#### EFFECT OF INSURANCE ON TRANSFER OF RISK

5. Nearly all persons in Categories i and ii are insured (fully or subject to deductibles) in some marine insurance market against most maritime risks. The loss sustained by those on whom it falls in the first instance is transferred to their own insurers. Any further transfer is between insurers of cargo, hull and P and I as a result of recourse action by the insurer of the party on whom the loss fell in the first instance. In reality apportionment of risk is between insurers (except to the extent of deductibles); most of the overall cost of loss and damage to property is represented by the cost of insurance.
6. Paragraph 5 does not apply to ship or cargo owners who are self-insured; nor to persons in Category iii, though these may be insured in non-marine markets.

#### EXISTING LEGAL RULES ON APPORTIONMENT OF RISK

7. Legal rules on apportionment of maritime risks pay no attention to the reality of insurance, its cost or its economic consequences. Courts treat maritime adventures as if the parties were individual human beings morally responsible for fault and paying out of their own pocket any loss allocated to them.
8. Legal rules applicable to particular losses may be non-contractual or contractual in origin.
  - (a) Persons in Categories ii and iii are in no contractual relationship with those who cause their loss. Apportionment of risk is governed exclusively by national law but some degree of uniformity is achieved by international convention.
  - (b) Persons in Category i are in contractual relationship as parties to the same maritime adventure. Apportionment of risk can be dealt with by private agreement (in practice standard clauses) except to the extent that freedom of contract is restricted by national law (generally incorporating the Hague Rules).
9. So far as the rules of apportionment are derived from private agreement there is no legal obstacle to change by amending standard clauses. So far as apportionment is governed by national law the rules are changeable only by amendment of national law (preferably by international convention) but the same practical result in allocating loss between persons in Categories i and ii might be obtainable by insurers voluntarily abstaining from recourse action.

#### ARBITRARINESS OF EXISTING RULES

10. Because national law ignores insurance, rules on apportionment of risk are not directed to reducing to a minimum the over-all cost of the loss and the administrative expense of

dealing with it. Particular rules originated at different stages in the development of maritime trade. The result is a hotchpotch (listed in subsequent papers) devoid of consistent pattern or rational basis under modern conditions, particularly in the allocation of fault risk.

#### **RESISTANCE TO CHANGE**

11. The prevalence of insurance and the current practice of insuring cargo, hull and ship-owners' liability under separate policies and, sometimes, in different insurance markets reinforces the natural reluctance to disturb business practices based on existing legal rules or standard clauses. Past experience of the risk insured is the only safe basis for fixing premiums. Alteration of the nature of risk or transfer from one class of insurer to another is liable to unsettle markets.
12. Maritime lawyers and judges do little to counteract resistance to change. Their main concern is application of rules to the facts of particular cases. The questions they ask are "How?" rather than "Why?".

#### **QUESTIONS FOR SEMINAR**

13. Participants are assumed to know the answer to the question "How?". Subsequent papers include only a brief reminder of the existing rules. In discussions on different classes of risk, the task of the Seminar is to seek answers to three questions:
  - (1) How does the current allocation of loss from that class of risk affect the over-all cost of sea-borne trade of the kind in which the risk occurs?
  - (2) Is there any other way of allocating the loss that would be more economical?
  - (3) If so, to what extent could the more economical way be adopted voluntarily without conflict with national laws?

## RISK ALLOCATION IN PRACTICE TODAY — A SHIPOWNER'S VIEW

### 1. THE MARITIME RISKS — A GLOBAL ASSESSMENT

The seaborne cargoes in the world amount to about 3,300 million tons per year. Of this crude oil, iron ore, coal, grain, bauxite and phosphate represent 70%, which leaves roughly 1,000 million tons for the other products.

The total transportation effort expressed in ton-miles is 17,000 billion, which means that the average distance that one ton of sea-borne cargo is transported is 5,000 miles. This effort is performed by a world merchant navy of some 500 million tons deadweight. The annual bill for damage caused to these cargoes in transportation is probably somewhere around \$1,000 million, representing one dollar per ton of the 1,000 million tons "other products", and the annual costs of hull damage and total losses are also at least that amount, or around \$1,000 million, representing two dollars per ton deadweight.

Thus the total amount of the maritime risks that we are concerned with in this seminar add up to the staggering amount of \$2,000 million annually.

### 2. THE CARRIERS' INSURANCE COSTS — SOME KEY FIGURES

The cost structure of any ship operation can be divided into three basic elements: capital costs, running costs and bunker costs. The running costs amount to almost half of the total costs for a 3,000 ton coaster, whereas for a very large tanker they are one quarter of total costs and for a modern, fast container carrier only 15%.

The running costs contain the following basic elements: crew costs, insurance and self risks, repair and maintenance and provisions.

Insurance and self risk — in the form of self retention or deductibles — takes a very substantial part of the running costs: 38% for the 250,000 ton tanker, 21% for the 70,000 ton bulker, 25% for the 30,000 ton container carrier and 8% for the 3,000 ton coaster.

Of total costs to operate these vessels insurance is 9.5% or say \$3,500 per day for the tanker, 5.25% or \$1,000 per day for the bulker, 4% or \$2,500 per day for the container carrier and 3.5% or \$250 per day for the coaster.

### 3. INSURANCE AND CLAIMS ADMINISTRATION — OVERHEAD COSTS

The costs per vessel given can be taken as typical, but they of course vary widely, depending on type of trade, the flag and the quality of management.

It is even more difficult to establish a typical cost structure for the administration of these cost items in a shipping company. One thing is made abundantly clear by the figures already mentioned — their importance to the success or failure of a shipping venture is of such an order that they deserve a constant close watch by the management.

The company I am representing, is a Rotterdam based, medium sized liner shipping company. We are 2,000 employees and our annual turnover in pure shipping activities (leaving out stevedoring, trucking forwarding and other inland activities) is roughly \$100 million.

In our head office about 10 people are more or less directly involved in insurance matters and claims handling. In the whole organization one can estimate that about as many again would be involved, or a group total of 20 people. That is 1% of the employees and if one assumes their annual cost is \$300,000 this means 0.3% of the turnover.

The annual claims bill that they handle amounts to \$1.5 million in presented claims and the number of claims is 1,500. Thus the average claim is \$1,000 and our average costs for handling each claim is \$200.

Now this is a quite alarming figure, because one might safely assume that the number of other people involved, i.e. with the shipper and receiver of the goods, the cargo underwriter, the P and I Club and those involved in the recovery process amount to easily as many as those on the shipowner's side of the fence. This would then point to an administrative cost for handling each \$1,000 claim of close to half the amount of the claim.

Naturally this proportion very quickly diminishes when the claim amounts go up, but it also means that a very large number of cargo claims is worth less than the administration we lavish on them.

#### **4. WHO FINALLY PAYS THE CLAIMS?**

This is a very easy question to answer: the consumer pays the claims, but not only that, he also pays the administration costs involved and, here and there, profit elements worked into the system.

There are extensive and sophisticated risk allocation machineries constantly at work on both sides, that of the cargo producers through the premium assessment systems of the cargo underwriters and that of the transporters through the so called records system of the P and I Clubs. The larger risks are spread out, but over the long term bad performance hits the bad performer quite accurately and although there are numerous exceptions, one can be reasonably satisfied that each cargo movement is carrying its own costs.

There will always be maritime risks to be paid. They will always in the end be taken out as part of the price of the goods or of the freight and thus eventually paid by the consumer of the goods. The annual bill in the world economy is no less than \$2,000 million, probably more, and it is the duty of everyone concerned with transportation to reduce that amount.

#### **5. POSSIBLE SOLUTIONS — "NO LIABILITY?"**

There are two possible ways in which costs may be reduced as a logical matter: if the shipowner bears no liability or if the shipowner bears all liability then recourse and its attendant expense becomes unnecessary. Shipowners would not be happy with the first solution, no liability, for two reasons:

- (i) Shipowners, especially liner operators, regard the handling of claims as an important feature of their market image. The importance of the customer, the prevailing competitive situation in the trade and future shipping prospects are all things that from a strictly legal point of view have an irrational effect on the settlement pattern. That this is true is proven by the fact that in 1975 which was a bad year in the transportation business with declining carriages the cost of paid out claims rose even more steeply than in a normal year.
- (ii) If there were no liability on the shipowner and no recourse actions, damage prevention systems would inevitably suffer. It may be that well established national lines could not afford to let their prestige suffer by relaxing standards, but some ill-effect of "no liability" would undoubtedly be experienced.

#### **6. PRESENT LEVEL OF LIABILITY SATISFACTORY?**

Shipowners therefore feel there is benefit in imposing liability on the carrier but this is not to say that the present system is entirely satisfactory. The present system has the advantage that people have adapted to it and have learned to live with it.

Also, a considerable amount of money has been invested in producing court rulings which have undoubtedly clarified the law. Furthermore the system is not unfair — over a period it places the risks and costs where they are felt to belong. However, if a system produces an administrative cost of up to 50% of a claim it needs very close examination since there is a strong suspicion that a good deal of administrative ballast may have been accrued in the last 50 years.

#### **7. STRICT LIABILITY?**

It may be that the logical solution now would be to make the carrier fully responsible for the safe conduct of the cargo entrusted to him. He is now in a better position to take such responsibility than 50 years ago when the present system was set up not only from the cargo handling and ship management point of view but also from the point of view of cybernetics and cargo flow.

## **THE CARGO OWNER'S VIEW AND HIS INSURANCE REQUIREMENTS**

1. The Cargo Owner's interest should be considered from the point of view of the buyer since his interest is different from that of the seller. His quantum of interest is greater and his need for risk protection goes beyond that of the seller both as regards duration and geographical extent.
2. The buyer will require risk protection that is:—
  - (i) *comprehensive* in the sense that all transport risks are covered up until the time that the goods are brought within his own system of protection against fire and similar risks. It should also be comprehensive in the sense that he may cover whatever valuation he chooses;
  - (ii) *secure* in the sense that the party providing the protection should be identifiable and of recognised solvency. Also reimbursement should be made in the stipulated currency;
  - (iii) *simple* in the sense that only proof of loss is required for reimbursement and that no administrative complexity is involved in obtaining payment from the party providing protection.
3. The present system of cargo insurance which is established world-wide goes some way to meeting these requirements of the buyer. It performs the function of spreading the risk of loss or damage which would otherwise lie where it fell. However, like most mechanisms, cargo insurance is not perfectly efficient in the sense that its cost amounts to more than the aggregate of all losses suffered by Cargo Owners. Additional costs are involved and it is our purpose to examine their nature.
4. *Profit*: Profit is kept to a minimum by keen competition. Average profit seldom exceeds 5 per cent. Loss years are relatively frequent.
5. *Survey and settlement costs*: small claims can be accepted without survey but in the majority of cases a survey does prove necessary. The cost of survey varies but is reckoned to be from 8% to 12% of the amount of loss. Settlement fees to agents at destination also vary from about 7.5% in respect of small claims to 2.5% in respect of large claims. Both these elements together therefore cost some 10% to 20% of amount of loss in normal cases.
6. *Recourse expense*: Of the claims now paid by insurers slightly more than 20% are FPA claims which arise generally speaking from errors in navigation, fire or Acts of God. The Carrier is not normally liable for such losses except where unseaworthiness is shown and therefore no question of recourse arises. Of the other, the PA claims,
  - (i) many are not pursued because the place of loss or damage cannot be ascertained;
  - (ii) many are not pursued because the cost of recovery makes it uneconomic. A limit of \$100 is normally applied.

The result is that only a minor proportion of the claims paid by cargo insurers is ultimately transferred by way of recourse. The percentage varies from year to year with the trade, commodity and country involved. The range is from below 5% to approximately 20% by value of claims paid.
7. Investigation by sample has led to the belief that the cost of recourse actions is low and varies from about 0.15% to 2% of gross cargo premium volume. As the average rate of cargo premiums is about 0.25% this means that cargo insurers' recourse expense normally varies from 38 centimes to 5 francs per 100,000 francs insured value. (However no account is taken here of the carriers' costs of defending recourse actions.)
8. Of these three items of additional costs the element of profit cannot be reduced, nor can the cost of surveys and settlement without opening up the possibility of abuse. The cost of recourse could be eliminated by agreeing not to pursue recourse actions. However, it is for discussion whether in the long term this course would increase costs by taking away from Carriers the incentive to take care.
9. The above conclusions are believed valid under present circumstances. However if the measures proposed in Uncitral (as to which see Prof. Berlingieri) are implemented then a need for practical corrective measures will arise. It is inevitable that if the Carrier is made liable according to the much stricter scheme of liability adumbrated within Uncitral

then recourse actions will increase. Cargo Owners and Underwriters will have a legitimate interest in proving nautical fault wherever possible. Carriers cannot be expected to accept all claims made. More time and money will have to be spent on obtaining proof of extent and cause of loss.

10. Should such new circumstances arise and increased and wasteful expense fall on the Cargo Owner it may be that interest would develop in the notion of an agreement between Cargo Underwriters and Carriers or their P and I Clubs not to pursue recourse actions, or at least limit them as far as possible.



## INSURANCE OF SHIPOWNERS LIABILITIES

1. The liability of the carrier towards the cargo owner whose goods he carries has always been affected by technical developments and changes in commercial outlook. The boom in world trade and consequently in shipping at the beginning of the last century meant that a fast turn around became all important. As a result increased loss and damage to cargo occurred. Carriers who had until then been liable as common carriers therefore availed themselves of the freedom to contract out of negligence.
2. Everyone will be aware of the changes that have taken place in the last 100 years culminating in the 1924 Hague Rules. Everyone will therefore recognise that the rules governing shipowners' liability are arbitrary in their content and merely reflect current practice and attitudes. Since this is the case we must take care to ensure that the content of the law does not lag behind practice in particular trades. It is therefore worth examining the practices of current liner trading in order to discover whether the existing rules for marking off the field of recoverable damage are the most economically and commercially acceptable that can be devised.
3. The existing rules necessitate a dual system of insurance. One policy is effected by cargo owners with cargo underwriters. Another policy is effected by the shipowner with his P and I Association. This is not double insurance since each claim is paid only once by either the cargo underwriter or, after recourse action, by P and I Club. However this overlapping insurance must involve extra expense not only through the bringing of recourse actions by the cargo underwriter against the shipowner or P and I underwriter but also because both sets of underwriters have each to maintain separate departments each dealing with similar subjects, e.g. assured's claims records, underwriting, reinsurance, loss prevention etc. We must therefore ask whether this extra expense is justifiable.
4. Cargo underwriters have maintained that the only feasible alternative to the present system would be strict liability on the carrier but that this is unacceptable to cargo owners for the following reasons:—
  - (a) The cargo owner, instead of obtaining indemnification from the insurer of his choice, would have to bring his claim against a shipowner unknown to him.
  - (b) Claims settlement would be protracted.
  - (c) The cargo owner would be denied freedom of choice of the type of insurance (e.g. total loss only, All Risks etc.) and cover would cease to be "tailor made."
  - (d) The cargo owner would, notwithstanding imposition of strict liability on the shipowner, require cargo cover when cargo was outside the control of the shipowner. This would be expensive.
  - (e) The risk in cargo insurance is spread widely over a number of underwriters. If the shipowner is strictly liable the liability underwriter alone would bear the claims and the spread of risk would be severely limited.
  - (f) Cargo underwriters rate premium in accordance with the claims record of the assured and the value and type of cargo as well as the nature of the transit. This would not be practical for liability underwriters.
5. Many of the above points made on behalf of cargo underwriters do not bear closer examination. For example it may be worth considering the following, little appreciated facets of P and I Clubs:—
  - (i) In about 75% of all cargo claims considered by the P and I Clubs liability is clear (e.g. shortage through pilferage, wet damage caused by failure to close McGreggor hatches, admixture of petroleum products due to faulty valve operation, etc.). These cases are settled quickly, the only matter for consideration being quantum of damages. In the remaining 25% of the cases there are disputes as to liability, the right to limit, etc. In these cases the assistance of lawyers is sometimes required, particularly in the U.S.A.
  - (ii) Each owner is rated according to his record. In addition the rate is dependent upon the type of ship, trading area, crew and cargo carried. Another important consideration is the deductible accepted and the rules covered. The following three examples show the extent of variation which may occur depending on the type of ship in question and the owners' records:—
    - (1) V.L.C.C. 100,000 G.R.T. Premium varying from \$30,000 per annum to \$60,000 per annum.

- (2) *Liberian flag dry cargo ship* 12,000 G.R.T. Premium varying from \$40,000 per annum to \$50,000 per annum.
  - (3) *Liner ship continent Australia trade* Premium varying from \$100,000 per annum to \$150,000 per annum.
- (iii) The risk insured by P and I Clubs is widely spread by way of reinsurance. The basic purpose of the excess reinsurance is to obtain a steady level of claims costs from year to year by spreading the impact of exceptionally large individual claims. This is done in two ways. The first is the formation of the London Group Pool (composed of a number of U.K. P and I Clubs) whereby claims in excess of a basic retention (negotiated each year) are shared proportionately between all members of the London Group, thereby creating in effect, a single very large mutual Club, the members of which are themselves mutual Associations. This arrangement, being on a mutual basis and containing therefore no profit nor brokerage nor any significant administrative expenses, has a substantial steadying effect on claims levels at no additional cost to Members. However, even with the extremely wide spread of tonnage in the Group Pool, large individual claims could still have a disturbing effect on the total claims level. The Pool, therefore, in turn reinsures on the world market excess of its own retention. This reinsurance is a formal fixed premium commercial transaction. To give some idea of the approximate cost to the shipowner member of the reinsurances the same three examples used in the preceding paragraph will be used again.
- (1) *V.L.C.C.* Taking a premium of \$30,000. Pool and Market reinsurance costs approximately \$20,000 (or 66% of premium).
  - (2) *Dry Cargo Ship.* Taking a premium of \$50,000 Pool and Market reinsurance costs equal approximately \$15,000 (or 31% of premium).
  - (3) *Liner ship, continent Australia trade.* Taking a premium of \$150,000 Pool and Market reinsurance costs equal approximately \$45,000 (or 40% of premium).
6. However, the fact remains that P and I cover cannot normally be tailor made to the precise requirements of cargo and does not normally extend from place of manufacture or warehouse to destination. For these reasons cargo insurance is necessary to provide the flexibility required in world trade.
7. However, where technological change radically alters the nature of the operation of the carrier the practice of insurance and the content of the law should adapt to keep pace. In Through Transit operations the carrier often undertakes to carry from door to door and sometimes offers to carry on a "full liability" basis. In these cases there can be no justification for overlapping insurance and if cargo owners do not change their practice the insurance industry should attempt to reach agreement on means of saving unnecessary expense.

## THE APPORTIONMENT OF RISK BETWEEN SHIP AND CARGO UNDER BILLS OF LADING

### 1. AIMS TO BE PURSUED

Reduction of accidents and of CIF cost of the goods.

- (i) *Reduction of accidents.* Risk spreading through insurance, although it avoids the loss falling too heavily on any individual, does not eliminate the cost of the loss. Moreover, full compensation is never obtainable: the owner of the goods can in fact obtain either from the carrier or from the insurer the market value of the goods at destination at the time of arrival, but still has to procure substituted goods if those in question are not lost or beyond repair and this may require time and additional expense if prices have meanwhile increased. Deterrence is therefore important as a means to ensuring greater care in transportation. Liability insurance does not neutralize the deterrent effect, for rating of premiums and calls varies in accordance with the record of each owner.
- (ii) *Reduction of CIF costs of goods.* Overlapping insurance cannot be avoided for the following reasons. If losses were to rest where they fall, liability insurance could be eliminated but deterrence would disappear. If the carrier were to accept absolute liability or offer insured bills of lading, particularly in carriage by sea, insurance of goods would not disappear for shippers would still trust more their insurers and would still have to cover the risks for the periods preceding the taking in charge of the goods by the carrier and following their delivery to the receiver. Although economically unsatisfactory, subrogation is therefore a constituent element of the system.

### 2. CONSEQUENCES OF A CHANGE IN THE LIABILITY SYSTEM

- (i) Would increased liability, on account of increased cost of P and I Insurance, affect freight rates? In the liner trade, where freight rates are fixed by conferences, it seems likely that, after a transition period, the rates will be adjusted to the increased costs. In the tramping trade on the contrary, the possibility for the owners to spread the increased insurance costs forward to charterers will depend on the relative bargaining power of the parties and thus on the prevailing market conditions.
- (ii) Would increased liability affect cargo insurance premiums? Constituent elements of insurance premiums are:
  - (a) likelihood of loss or damage, less
  - (b) likelihood of transferring the loss onto the carrier or his P and I Club by recourse, plus
  - (c) general administrative costs.Analysis of these elements:
  - (a) Likelihood of loss or damage will decrease only if increased liability will act as deterrent.
  - (b) Likelihood of transfer by recourse will increase, but the cost of collecting the loss may either decrease or increase according to whether the new rules on liability are simpler or more complicated.
  - (c) The general administrative costs are likely to remain unaltered.

On the assumption that (a) and (c) will remain constant, insurance premiums will significantly decrease only if the cost of collecting the loss will also remain constant or decrease. Whether decrease of cargo insurance premiums would significantly exceed increase in freight costs ensuing from increased P and I insurance cost is very difficult to forecast.

### 3. A COMPARATIVE ANALYSIS OF RISK ALLOCATION UNDER THE HAGUE RULES AND THE UNCTAD/UNCITRAL NEW DRAFT CONVENTION

- (a) *Period of responsibility.* The increased period of responsibility should reduce the cost of recovering losses occurring between the taking in charge of the goods by the carrier and the commencement of loading and between completion of unloading and delivery. It would not on the contrary act as deterrent, for carriers very often cannot choose terminal operators and stevedoring companies.
- (b) *Basis of liability.* There is no change in the basis of liability which is still fault. The new provision has the undoubted advantage of eliminating the so-called "catalogue of exceptions" (Art. 4 r. 2 from a) to p) ) and of adopting a wording

similar, albeit not identical, to that of other international conventions on carriage of goods. Besides these marginal improvements, the new rule on liability does not materially differ from that in Art. 4 r. 2 (q) of the Brussels Convention. Therefore the change is not going to affect costs.

- (c) *Continuous duty of due diligence.* The purported abolition of the limitation of the duty to exercise due diligence to make the ship seaworthy at the time preceding the commencement of the voyage would certainly simplify the system of liability, by abolishing the doubtful concept of voyage and the distinction between management of the vessel and management of the cargo. Whether it would act as deterrence is questionable, for the carrier has already an incentive to ensure the seaworthiness of his vessel; he would in fact be the first to suffer the consequences of unseaworthiness. The change however is not as substantial as it might appear, for during the voyage the measures which can reasonably be required to avoid the occurrence and its consequences would certainly not be as strict as those which might be required when the vessel is in port. Moreover, whilst at present the problem of the non delegability of the duty to make the ship seaworthy is settled, the new wording may cast serious doubts on the future solution, for generally non delegable duties are statutory duties. The failure therefore to provide specifically for the obligation to make the vessel seaworthy might justify a negative answer to this problem.
- (d) *Abolition of exonerations.* The abolition of the exoneration from liability for faults of the servants of the carrier in the navigation of the vessel and fire would not, for the reasons set forth under para. c) above, have a deterring effect but would, in all likelihood, increase the prospects of recovery by recourse. However, the concentration of risks on the carrier would substantially increase the cost of liability insurance and such increase might possibly cause an increase in the freight cost well in excess of the corresponding decrease in the cost of insurance of goods. Moreover, this change would certainly increase litigation, both as regards claims of cargo against vessel and cargo contribution in GA; litigation would, in fact, extend to areas in which it practically did not exist, or was negligible.
- (e) *Burden of proof.* The new rules do not modify the basic principle according to which the carrier has the burden of disproving negligence. However, whilst under the Brussels Convention the carrier has the burden of ascertaining the *cause* of the loss or damage and then of proving that neither his fault nor that of his servants or agents has contributed to the occurrence, under the new draft convention the carrier has apparently only the burden of proving reasonable diligence. It follows that loss or damage from unknown causes would be borne by the owners of the goods.

#### 4. THE TEST OF JURISPRUDENCE

An old law, albeit far from perfection, may be preferable to a new law when its interpretation has been analysed in detail by the courts during a considerable time. This is the more so when we are confronted with uniform rules which may be subject to widely differing interpretations in the various countries. The Brussels Convention has undergone the most detailed scrutiny by the courts of a great many countries of the world and as a result most of its defects have been overcome through the intelligent work of clarification made by the jurisprudence which, particularly in recent years, has been mindful of the need of uniformity in interpretation. A change in the law, unless such as to definitely simplify the system of liability, will have dramatic negative effects for a number of years, until a substantial new body of jurisprudence is formed. Until such time, the small advantages that some changes might bring about would almost certainly be outnumbered by the disadvantages of the lack of a body of jurisprudence. Deformity may arise and only in the long run will it disappear.

## LE PARTAGE DES RISQUES DANS L’AFFRETEMENT

1. Ce qui caractérise le contrat d’affrètement c’est la liberté des parties. Elles peuvent aménager leurs conventions comme elles l’entendent. Alors que les contrats de transport de marchandises voient leurs conditions dictées par les transporteurs ; les conventions d’affrètement quel qu’en soit le type, sont débattues par les deux parties, directement ou par l’intermédiaire des courtiers. Il en résulte que dans aucune législation du monde à ma connaissance, il n’existe des règles impératives protégeant les intérêts des affréteurs. Il existe bien des règles légales concernant la responsabilité des fréteurs mais ces règles, plus ou moins sévères selon les systèmes de droit, se trouvent écartées pratiquement toujours par la Charte-Partie.

Certes, à lire rapidement la convention de Bruxelles de 1924 sur les connaissements, la différence ne paraît pas faite entre contrats de transports et contrats d’affrètement. Elle résulte néanmoins de l’article I litt.b. puisque celui-ci va s’occuper du sort des connaissements émis en vertu d’une Charte-Partie.

Aussi bien les diverses législations qui ont adopté la Convention de Bruxelles et l’ont plus ou moins bien, plus ou moins servilement adaptée à leur droit interne, n’imposent impérativement aux contrats d’affrètement proprement dit, les règles qu’elles imposent aux contrats de transport en faveur du destinataire et de l’expéditeur.

Sur la base de cette distinction fondamentale, le partage des risques tenant aux périls de la mer entre le fréteur et l’affréteur va varier suivant le type d’affrètement.

2. Ce qui de toute manière caractérise le contrat d’affrètement et ceci est vrai même du type qui se rapproche le plus du contrat de transport, le contrat d’affrètement au voyage, c’est que jamais le fréteur ne prend en charge la cargaison placée dans son navire.

En conséquence, la perte ou l’avarie des marchandises, chargées ainsi en application d’une Charte-partie au voyage, ne prouvent rien par elles-mêmes contre le fréteur. Dans la logique des choses, l’affréteur devrait, en pareil cas, pour obtenir réparation, prouver la faute du fréteur. Cependant, la loi française de 1966 qui, plus qu’aucune autre, a établi la distinction fondamentale entre les affrètements et les transports, a établi une présomption de faute contre le fréteur au voyage en pareil cas. Ce n’est pas une présomption sévère contre le fréteur puisque les fréteurs se libèrent de cette présomption en établissant qu’ils ont mis à la disposition de l’affréteur un navire en bon état de navigabilité ou encore que le dommage est dû à la faute nautique du capitaine ou de l’équipage.

3. Dans l’affrètement à temps qui souvent dure de nombreuses années, et même quand il ne dure que six mois ou 1 an, la prise en charge de la cargaison par le fréteur est absolument inconcevable. Pendant toute la durée de la Charte-Partie, il ne sait pas ce que transporte son navire ni sur quelle relation il transporte. Aussi la perte ou l’avarie des marchandises n’engage aucune présomption contre lui ; il n’est pas responsable à moins que le transporteur ne prouve qu’il a mis un navire en mauvais état de navigabilité à sa disposition.

La situation est encore plus claire dans l’affrètement coque nue où, moins encore dans le cas précédent, le fréteur ne sait à quel usage sert son navire.

4. Le partage des risques n’affecte pas seulement la responsabilité. Il faut le considérer encore sous le rapport du frêt.

Quand le navire ne parvient pas à destination dans l’affrètement au voyage ou qu’il disparaît ou ne peut plus servir à rien dans l’affrètement à temps, que devient le frêt ?

Les législations en général ne répondent pas à cette question et il faut se reporter au droit commun.

La loi française de 1966 précise cependant dans l’affrètement au voyage que la force majeure qui empêche pour un temps très court de sortir du port permet à l’affréteur de décharger la marchandise à ses frais, mais qu’il doit payer le frêt. (art. 15, décret de 1966) ; au cas où le navire s’arrête en cours de route, l’affréteur doit le frêt de distance (art. 16). Pour l’affrètement à temps, l’art. 23 du même décret précise que le frêt n’est pas acquis à tout événement et l’art. 24 qu’il n’est pas dû pour les périodes pendant lesquelles le navire est commercialement inutilisable. Ces mêmes dispositions pourraient sans doute jouer dans le cas d’affrètement coque nue.

Comme pour la responsabilité, ces dispositions sont supplétives de la volonté des parties. Dans l’affrètement au voyage, les chartes-parties stipulent que le frêt sera acquis à tout événement.

Par contre, dans les affrètements à temps et coque nue, les affréteurs ne manquent pas de stipuler que le frêt sera suspendu à l’occasion et pendant tout événement qui empêchera le navire d’être commercialement utilisable.

Comme on le voit, le partage des risques dans le cas d'évènement fortuit tend, du moins peut-être hors de l'affrètement au voyage, à être réglé de telle manière que l'affréteur ne doit rien quand il ne peut pas utiliser le navire.

5. Dans les cas où le navire n'est pas utilisable par suite des fautes du fréteur, le frêt correspondant ne lui est certainement pas dû. Lorsque l'avarie du navire tient à la faute du fréteur, le frêt reste dû au fréteur.

La règle ici tient à transformer la dette de frêt en une manière d'indemniser ce qui est la conséquence de la faute du contractant.

6. La théorie des avaries communes se présente dans l'affrètement comme dans le contrat de transport. Un sacrifice, imposé au navire dans l'intérêt de tous, sera supporté par tous les intéressés à l'expédition maritime. Un sacrifice imposé à la cargaison sera supporté également par tous.

Ceci doit-il être cependant réservé à l'affrètement au voyage ? Dans les affrètements à temps et plus encore dans les affrètements coque nue, le capitaine est le préposé de l'affréteur pour tout ce qui concerne la gestion commerciale du bâtiment et l'on conçoit plus mal que le sacrifice qu'il impose à la cargaison puisse être partiellement reporté sur le navire.

Néanmoins, si on adopte une théorie réelle de l'avarie commune, on contestera cette distinction et l'on s'occupera seulement de chercher quels sont les biens mis en risque ; la solution restera bien la même que pour un contrat de transport.

## APPORTIONMENT OF RISKS UNDER CHARTERPARTIES

1. The distinguishing characteristic of a charterparty is the freedom of the parties to contract as they wish. They can arrange the terms of the contract as they wish. While the terms of contracts for the transport of goods are dictated by the carriers, the terms of charterparties, of whatever type, are negotiated by the two parties, either directly or through brokers.

The result is that there is no legislation in the world, so far as I know, in which there exist obligatory rules protecting the interests of charterers. There are of course legal rules relating to the responsibility of the carrier under a charterparty, but the application of these rules, rules which vary in severity depending on the system of law involved, is practically always excluded by the terms of the charterparty.

Certainly, a quick reading of the Brussel's Convention of 1924 on bills of lading does not indicate that any distinction was made between contracts for the carriage of goods and contracts in charterparty form. There is however such a distinction in the Convention in Article 1(b) since this Article deals with the form of bill of lading issued pursuant to a charterparty.

In the same way the various legislatures which have adopted the Brussel's Convention and have adapted it, with varying degrees of faithfulness to the original, to their own domestic law, do not impose on contracts of affreightment properly so called, the rules in favour of the consignee and of the shipper which they insist on in the case of contracts for the carriage of goods.

On the basis of this fundamental distinction, the apportionment of the risks relating to the perils of the sea, as between the shipowner and the charterer, will vary depending on the type of charterparty.

2. In any event, what characterizes the charterparty, and this is true even of the type of charterparty which most resembles the contract for the carriage of goods, namely the voyage charterparty, is that the shipowners never assume full responsibility for the cargo placed in his ship.

Consequently the loss of or damage to cargo, loaded on the ship pursuant to a voyage charterparty, do not of themselves prove anything against the shipowner. If logical steps are followed in these matters, the charterer should, in order to obtain compensation in such a case, provide proof of fault on the part of the shipowner. However, the French law of 1966 which, more than any other, established the fundamental distinction between charterparties and contracts for the carriage of goods, provided that in such cases there should be a presumption of fault on the part of the shipowner carrying goods under a voyage charterparty. It is not a very onerous presumption for the shipowner since the latter can displace the presumption by establishing that he placed at the disposal of the charterer a ship in a seaworthy condition or that the damages were caused by error in navigation by the Master or crew of the ship.

3. In the time charterparty which often continues in force for a number of years, and even when it only lasts for six months or a year, it is absolutely inconceivable that the shipowner should accept responsibility for the cargo in this way. For the whole of the duration of the charterparty he does not know what cargoes are carried by his ship nor on what terms they are carried. Thus the loss of or damage to the cargo does not involve any presumption of responsibility against the shipowner; he is only responsible if the party for whom the cargo is carried can prove that the shipowner provided a vessel which was unseaworthy.

This situation is even more clear in the case of bareboat charters where the shipowner has even less information than in the example given above about the use which will be made of his ship during the period of the charterparty.

4. The apportionment of risks does not only affect responsibility. It must be considered also in relation to freight.

When the ship does not reach its destination when operating under a voyage charter, or when the ship disappears or can no longer be used for the purposes of a time charterparty, what becomes of the freight or hire?

There is no answer to this question in statutory law and it is necessary to refer back to common law.

The French Law of 1966, however, stipulates that in the case of voyage charters when force majeure prevents the ship leaving the port, though this force majeure may be of

short duration, the charterer may discharge the goods at his cost, but he must pay the freight (Article 15, Decree of 1966); when the ship cannot proceed during the course of the voyage, the charterer must pay the freight for the distance covered (Article 16). For time charters, Article 23 of the same Decree lays down that the freight or hire is not earned in all circumstances, and Article 24 provides that the freight or hire is not payable for periods during which the ship cannot be used by the charterer in the commercial sense. These same provisions could no doubt come into play in the case of bare boat charters.

As in the case of responsibility, these provisions are subject to the express wishes of the parties. In voyage charters, the charterparties stipulate that freight will be earned in any event.

On the other hand in time charterparties and bareboat charters, the charterers never fail to stipulate that freight or hire will be suspended on the occasion and for the duration of every event which may prevent the commercial use of the vessel.

As one can see, the apportionment of risks in the case of fortuitous events tends, at least perhaps outside the context of the voyage charter, to be regulated in such a way that the charterer pays nothing when he does not have the use of the vessel.

5. When the vessel cannot be used as a result of faults on the part of the shipowner, the relative freight is certainly not due to him. When damage to the ship can be related to fault on the part of the charterer, the freight remains payable to the shipowner.

The object of this rule is to transform the obligation to pay freight or hire into a method of indemnifying one of the parties for loss which is the consequence of a fault on the part of the other party to the contract.

6. The principles on which general average is based takes on the same aspect in the case of charters as in the case of contracts for the carriage of goods. A sacrifice, imposed on the vessel in the interests of all concerned, will be shared by all those interested in the maritime venture. Likewise a sacrifice imposed on cargo will be shared by all.

Is this however true only in the case of voyage charters? In the case of time charterparties and even more in the case of bareboat charters, the Master is the servant of the charterer in everything which concerns the commercial management of the ship, and it is more difficult to accept the conclusion that the sacrifice which the Master imposes on the cargo should be in part a matter for which the ship should be responsible.

However, if one adopts realistic principles on which to base general average, this distinction will be challenged, and the aim will be only to establish which are the interests at risk; the solution will then in fact be the same as in the case of a contract for the carriage of goods.



## L'AVARIE COMMUNE

- Introduction** L'avarie commune, c'est-à-dire les sacrifices extra-ordinaires faites et les dépenses extraordinaires encourues pour le salut commun, est la plus ancienne méthode connue de répartition des risques, bien plus vieille que l'assurance maritime. La répartition se fait entre le navire, le fret et la cargaison. Les règles sur l'avarie commune de York Anvers, un système adopté volontairement, en donnent les normes.
- Autres mesures de sauvetage** Si les mesures de sauvetage ont été prises uniquement en vue du navire ou de la cargaison, il n'y a pas de répartition des risques par le moyen de l'avarie commune ou par un autre système similaire. De tel frais sont uniquement à la charge de l'intérêt en question ou à son assureur.
- La police d'assurance et l'avarie commune** On admet en avarie commune certaines dépenses qui, normalement, ne seraient pas couvertes par les assurances sur corps ou faculté, si celles-ci ne disent pas qu'elles couvrent la contribution envers l'avarie commune. Telles les dépenses de l'armateur pour les salaires et l'entretien de l'équipage pendant un séjour dans un port de refuge; et pour la cargaison, les frais de déchargement, d'emmagasinage et de rechargement dans un port de refuge, encourus pour permettre la réparation des dommages du navire, qui ont nécessité la relâche dans un tel port.
- Nombre de règlements d'avarie commune** Vu le développement de l'assurance maritime, il est bien naturel de poser la question: est-ce que, de nos jours, on utilise toujours l'avarie commune comme une méthode de répartition des risques? Et si tel est le cas, cela se fait-il fréquemment ou rarement? Les statistiques de Lloyd des trois dernières années sur les règlements d'avaries communes qui leur sont notifiés, un total de 823 règlements (265 en 1973, 266 en 1974 et 292 en 1975), montrent que chaque jour de travail pendant ces années, une dépêche a été établie. Malgré les assurances, l'avarie commune en tant que méthode d'égalisation des risques est donc une réalité de nos jours.
- Montants de l'avarie commune** Il est plus difficile d'indiquer avec précision les montants admis en avaries communes. Essayons tout de même d'en dire quelque chose. En prenant comme point de départ les dépenses classées en avarie commune des règlements sortis de mon petit bureau à Göteborg au cours des trois dernières années, exprimées en dollars, il en ressort qu'un total d'environ 2 millions de dollars (\$1,977,635:71) a été classifié comme dépenses d'avarie commune. La contribution des navires à ces dépenses était d'environ 1,2 millions de dollars (\$1,186,020:88), soit 59,9%, et la contribution de la cargaison d'environ 800.000 dollars (\$787,121:62) soit 39,9%. Cette contribution de la cargaison était réduite par les montants des dommages subis par la cargaison et admis en avarie commune, s'élevant à presque 200.000 dollars (\$187,057:31). Les dépenses nettes de la cargaison envers le total d'à peu près 2 millions de dollars s'arrêtaient donc au chiffre d'environ 600.000 dollars (\$602,064:31), soit 30,45%. Notons que ces chiffres proviennent de 21 affaires seulement, traitées pendant trois ans. Il n'en est pas moins permis de dire que les montants répartis en avarie commune en général doivent être importants, d'autant plus qu'une simple transposition des résultats des 21 cas au 823 affaires connues par Lloyd pendant cette période donnerait un montant d'environ 75 millions de dollars (\$75,504,485:20) à répartir entre navire et cargaison. Remanier les chiffres de cette façon ne donne évidemment pas un résultat correct, mais confirme néanmoins la conclusion de ce que, malgré les assurances, la répartition des risques par l'intermédiaire de l'avarie commune a une grande importance.
- Coût de la répartition** Pour estimer correctement le coût de l'élaboration du compte rendu l'Avarie Commune, par rapport au montant total de l'Avarie Commune, il conviendrait d'étudier chacun des 823 cas qui s'y réfèrent. Ceci s'est révélé impossible.
- Une étude portant sur un très petit nombre de cas, entreprise à ma demande par un Assureur Coque Suedois a fait ressortir quelques 5 à 7 pour cent du montant de l'Avarie Commune en tant qu'honoraires et frais pour l'élaboration de l'Avarie Commune.
- l'imprécision de ces chiffres devraient être, quoi qu'il en soit, gardé en mémoire.

**Objections de la cargaison et le rôle des clubs P and I**

Il se peut que la cargaison refuse de payer la contribution à l'avarie commune, indiquée dans le règlement. Ou parce qu'elle n'accepte pas le classement des dépenses, objection plutôt rare, ou parce qu'elle conteste que le navire était en bon état de navigabilité. Si l'armateur, à cause de ce dernier genre d'objection, n'aboutit pas à obtenir de la cargaison la contribution envers ses frais, admis en avarie commune, il s'adresse à son assureur P and I afin d'obtenir la contribution de celui-ci. Il ne nous est pas possible de vous donner des précisions sur le nombre de ce genre de cas, et non plus sur les montants en question. Des recherches faites, nous avons gardé l'impression que les objections dépendent de beaucoup de la nationalité de la cargaison et moins du celle du navire.

**Évaluation de l'avarie commune**

Pour décider si l'avarie commune comme méthode de répartition des risques défend sa place dans la société d'aujourd'hui, il y a plusieurs points de vue qui comptent :

- (a) la répartition des risques en avarie commune ne se fait pas à cause d'une loi impérative, mais par un accord volontaire,
- (b) si les dépenses à répartir sont trop insignifiantes, si la disproportion entre la valeur du navire et celle de la cargaison est telle que la contribution deviendrait insignifiante, si l'irritation créée chez la cargaison, c'est-à-dire le client de l'armateur, devient trop évidente, dans tous ces cas-là l'armateur ne procède pas à une répartition en avarie commune,
- (c) même s'ils ne sont pas et ne peuvent pas être exacts, les chiffres que nous venons de vous soumettre démontrent que les montants dont il s'agit sont importants. Si une répartition ne se fait plus, ces chiffres viendraient se loger chez les assureurs respectifs. Il y a des personnes mieux situées que nous pour dire si les primes pour l'assurance sur corps et celles des assurances P and I augmenteraient, et si une augmentation de ces primes correspondrait à une baisse équivalente des primes pour l'assurance sur faculté.
- (d) si l'on supprime l'avarie commune, n'y aura-t-il plus aucune répartition du tout? Peut-être tout de même, car nous pensons que les armateurs voudront obtenir le déficit créé par la disparition de la contribution venant de la cargaison de la part de leurs assureurs P and I. Une répartition entre l'assurance corps et les clubs P and I ne peut guère se faire sans l'établissement d'un instrument de répartition qui ressemblerait de beaucoup à un règlement d'avarie commune. Nous n'insistons pas pour dire qu'il en serait ainsi partout, mais non plus que ce serait là que des exceptions.
- (e) si la répartition d'avarie commune est supprimée, les dépenses de déchargement, d'enmagasinage et de réchargement, par exemple, devenues nécessaires afin de permettre la réparation des dommages subis par le navire, se trouveront dans une colonne nommée "Les dépenses particulières de la cargaison". Il n'est pas difficile d'imaginer d'autres dépenses susceptibles de s'y trouver. L'armateur ne les obtient pas de son assureur corps et de son assureur P and I. Il essaiera certainement de se couvrir de ses dépenses par une demande adressée à la cargaison. Reste à savoir si à présent la police sur faculté couvre ce genre de frais.

**Attitude des parties intéressées**

Les parties intéressées n'ont pas exprimé le désir de supprimer l'avarie commune même pendant les travaux de la dernière version de 1974 des Règles de York et d'Anvers, seulement un désir de simplification, ce qui fut fait. Le projet de convention sur le transport des marchandises par mer qui a été voté à la réunion en Avril/Mai de l'Uncitral, stipule dans l'article 5 que le transporteur sera responsable des dommages ou pertes de marchandises à moins que le transporteur prouve que lui, ou ses préposés ont pris toute les mesures raisonnables pour éviter l'événement et ses suites.

Ceci semble à première vue être sans rapport avec l'Avarie Commune.

Mais ses conséquences (art. 5) s'il est finalement adopté par la Conférence Diplomatique permettront à la cargaison d'invoquer ce passage pour ne pas payer sa part de l'Avarie Commune, arguant que l'événement nécessitant l'Avarie Commune aurait pu être évité.

L'Armateur s'en remettra à son P et I Assurance pour obtenir la contribution non recouvrable par la cargaison.

Quand cette situation se sera présentée un certain nombre de fois les assureurs Coque et P et I pourraient bien trouver un accord par lequel les dépenses autrefois réparties entre le navire et la cargaison seraient réparties entre ces deux types d'Assurances.

Cela va-t-il, et jusqu'à quel point influencer sur les primes et le fret, ceci est à discuter.

## GENERAL AVERAGE

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|---|--|
| <b>Introduction</b>                                 | General Average (GA), that is to say extraordinary sacrifices or expenditure made or incurred for the common safety, is the oldest method of reallocation of risks, much older than marine insurance. The apportionment is made between ship, freight and cargo according to the York Antwerp Rules, a voluntary system that indicates the norms to follow.  |
| <b>Other measures to save property at sea</b>       | If the sacrifices or expenditures are made solely for the benefit of the vessel or of the cargo there is no reallocation of risks in general average or other similar system. Such expenditures or sacrifices will have to be borne by the interest in question or the underwriter of it.  |
| <b>Charges allowed in GA covered by insurance</b>   | Some type of charges are allowed in GA that would not as such be covered by the ordinary insurance of hull or cargo. Examples in respect of ships: wages and maintenance to crew in port of refuge; in respect of cargo: discharge, storage and reloading in port of refuge made to enable the vessel to repair accidental damage. They are now covered by the policy because of the provision that contribution to GA is covered.   |
| <b>Number of GA Statements</b>                      | In view of the development of marine insurance it is natural to ask: Does one today still resort to GA as a method of reallocation of risks? And if so, does this happen often or only rarely? From the reports that are issued by Lloyd's about statements issued and notified to them it appears that for the last 3 years a total of 823 Statements of GA was notified to them, (265 in 1973, 266 in 1974 and 292 in 1975). This means that every working day of the year in that period a GA Statement was issued. Thus in spite of marine insurance GA as a method of reallocation of risks is used also today.   |
| <b>Amounts involved in GA</b>                       | <p>It is much more difficult to give any precise figures as to the amounts allowed in GA. Taking as a point of departure the amounts classified as GA in the GA Statements issued from my small office in Gothenburg during the last 3 years and indicating the figures in dollars it appears that a total of about \$2 millions (\$1,977,635.71) was charged to GA. Ships' contribution towards that sum was about \$1.2 millions (\$1,186,020.88) that is to say nearly 60% (59.9%) and cargo's contribution was nearly \$800,000 (\$787,121.62) not quite 40% (39.9%). Cargo's contribution was reduced by allowance in GA for cargo damaged allowed in GA to the amount of some \$200,000 (\$187,057.31) making cargo net contribution towards the \$2 millions some \$600,000 (\$602,064.31) or net some 30% (30.45%).</p> <p>Please observe that these figures are the outcome of only 21 cases. It is nevertheless in order to say that amounts allowed in GA must be considerable; if the figures from 21 cases are made to apply to the 823 cases or notified to Lloyd's one would reach a total of \$75 millions (\$75,504,485.20) to be split up between ship and cargo. Obviously this calculation is not accurate and does not give a correct result but it does confirm the conclusion that in spite of insurance the apportionment of risk through the medium of GA is important.</p> |
| <b>Cost of adjustment</b>                           | In order correctly to assess the cost of preparing the GA Statement compared with the total amount classified as GA one would have to look into each of the 823 cases referred to. This has not proved possible. A survey on a very limited scale carried out at my request by a Swedish Hull Underwriter points towards a figure of some 5 to 7 per cent of the GA column as fees and charges for drawing up the GA Statement. The imprecision of these figures should however be kept in mind.   |
| <b>Objection of cargo and role of P and I Clubs</b> | Cargo may refuse to pay the contribution shown in the GA Statement for two reasons: Cargo may not accept the way the amounts are debited GA or not debited GA. These types of objection are rare. More often the objection is that in cargo's view the ship was not seaworthy. If the ship-owner because of this type of objection fails to collect the contribution due from cargo in respect of GA he will turn to his P and I Underwriter and ask to obtain the contribution from him.  |

## **Evaluation of GA**

To decide if GA as a method of reallocation of risks deserves a place in modern society the following factors should be taken into account:

- (i) the apportionment of GA is not made because of a mandatory law, but because of a voluntary agreement;
- (ii) if the amounts to be apportioned are too insignificant, or if the discrepancy between the value of the vessel and the cargo is such that the contribution to be obtained would be insignificant or again if the irritation caused to cargo, that is to say shipowners' client and customer, become too evident then the shipowners will not proceed with a GA apportionment;
- (iii) while it is true that the figures indicated are not exact they do show that the amounts involved are important. If there is no apportionment these figures would land on the shoulder of the respective underwriters. People more qualified than I will be able to tell us if the premiums for Hull and P and I would increase and if such an increase in premium would be accompanied by an equivalent reduction of cargo premiums;
- (iv) if GA is abolished will there be apportionment and reallocation of risks at all? I believe there will anyway. Shipowners will probably obtain from their P and I Clubs the deficit that follows from cargo no longer having to pay GA contribution. An apportionment between Hull Underwriters and the P and I underwriters will hardly be possible unless there is a statement that will be very much like a GA Statement. I am not prepared to say that this will be the situation everywhere nor that it will prove to be only the exception;
- (v) if the apportionment in GA is abolished expenditures for discharge, storage and reloading of cargo that have become necessary in order to repair accidental damage to ship may well land in a column called "Particular Charges to Cargo." It is not difficult to find other types or costs that may be put under that heading. What the shipowner does not recover from his Hull Underwriter or his P and I Club he will certainly try to collect by a claim directed to cargo. Whether the ordinary cargo policy would cover them I do not profess to know.

## **Attitudes of interested parties**

The interested parties did not express any wish to abolish GA during the preparatory work that resulted in the 1974 version of GA, only that GA be simplified — which was done.

The draft convention on carriage of goods by sea that emerged from the April/May session of Uncitral provides in Art. 5 that the carrier shall be liable for damage or loss to the goods unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences. This does not at first seem to have a bearing on GA. But the effect of it, if ultimately adopted by the Diplomatic Conference, will make cargo invoke this passage as ground for not paying GA contribution saying that the occurrence which necessitated the GA act could have been avoided. The Shipowner will go to his P and I Underwriter to obtain the contribution not collectable from cargo. When this has happened a sufficient number of times Hull and P and I Underwriters may well come to some general agreement on how items formerly apportioned between ship and cargo shall be apportioned between these two sets of Underwriters. Whether and to what extent this will affect premiums and freight, is for discussion.

## THE APPORTIONMENT OF RISK BETWEEN SHIPOWNER AND SHIPOWNER

### A. INTRODUCTION: A Review of the Currently Employed Methods of Apportioning Collision Risk, the Principal Risk Arising between Shipowner and Shipowner

1. Fault is the universally accepted basis of liability for collision damages.
2. In sole fault cases, the problems faced relate principally to computation of damages, including detention damages, and to limitation of liability — problems which would exist even under a "no fault" or equal division system, although not under a system of letting the losses lie where they fall.
3. Two basic systems of treating mutual fault cases are currently in operation:
  - (a) Letting the collision losses lie where they fall, regardless of fault, as in cases of contributory negligence under the common law. (This method is followed, *e.g.*, in some Latin American states).
  - (b) Apportioning the losses in accordance with the respective degrees of fault. (This system governs in the Brussels Collision Convention countries, and is now followed in the United States, and in Liberia, whose Maritime Law provides that where not inconsistent with Liberian statutory law, the general maritime law of the United States is deemed to be the general maritime law of Liberia.)

[The principal remaining difference between the law of the Brussels Collision Convention states and the law of the United States (and Liberia) in both-to-blame cases is that in the Convention states the non-carrying vessel is liable for a proportion of cargo loss and damage corresponding to its degree of fault, whereas in the United States (and Liberia) it is fully liable to the cargo interests, but is entitled to indemnity from the carrier in an amount proportional to the latter's degree of fault.]

### B. THE POSSIBLE ALTERNATIVES TO FAULT LIABILITY

1. Letting the losses lie where they fall, regardless of fault, *e.g.*, by the negotiation of "knock-for-knock" agreements among groups of hull and P and I insurers, similar to the agreements reached among the allied governments during World War II with respect to government owned vessels.
2. Imposing strict liability on each of two colliding vessels for damage to the other.
3. Dividing the damages equally, regardless of fault.

### C. THE ADVANTAGES AND DISADVANTAGES OF FAULT LIABILITY AND OF ALTERNATIVE SYSTEMS OF APPORTIONING COLLISION RISK

1. The interests to be considered in the adoption of changes in the fault systems presently in effect:
  - (a) Shipowners;
  - (b) Hull underwriters;
  - (c) Shipowners' Protection and Indemnity insurers;
  - (d) Cargo owners and underwriters;
  - (e) Passengers, crew members and other third parties;
  - (f) The public.
2. Advantages of the Fault System:
  - (a) Fairness, in that the owner of an innocent vessel has a right to be made whole by the owner of the guilty vessel.
  - (b) Encouragement of care in maintenance and manning, in order to avoid liability for collision damage to other vessels and to have a right of recovery for damage to one's own vessel.
3. Disadvantages of the Fault System:
  - (a) Expense.
    - (i) Investigation costs, including fees and travelling expenses of lawyers and others engaged to ascertain the facts.
    - (ii) Litigation expenses, including lawyers' fees and disbursements, travelling and other expenses of factual and expert witnesses, the cost of furnishing bank guarantees, surety bonds, or other security to avoid the arrest

of vessels, or to obtain the release of vessels actually arrested, and in certain jurisdictions, the cost of printing or otherwise duplicating the testimony and exhibits for purposes of an appeal.

- (b) Delay, including the time required in investigating, reporting, and obtaining instructions from shipowners and interested insurers; preparation of pleadings; engaging in "discovery" and other pre-trial proceedings; trying a collision case on the merits; preparation for, and argument of an appeal; references on damages, etc. In the heavier cases, delays in establishing fault, even where unavoidable, make it difficult to set premiums on hull insurance and supplementary "calls" under mutuai P and I insurance.
4. Advantages of letting the losses lie where they fall, e.g., by means of "knock-for-knock" agreements:
    - (a) Avoidance of the expense of investigating and litigating the merits and the damage issues.
    - (b) Avoidance of delay resulting from investigation and litigation.
  5. Disadvantages of letting the losses lie where they fall:
    - (a) Unfairness in depriving an innocent shipowner of a right of recovery and in shielding a guilty shipowner from liability.
    - (b) Reduction of incentive to exercise care in vessel maintenance and manning.
    - (c) Possible hardship to owners of small, uninsured or inadequately insured vessels, e.g., fishing vessels, lost or damaged as a result of faults of other vessels.
    - (d) A "knock-for-knock" agreement could result in inequity, as between underwriters insuring only well equipped, carefully maintained and properly manned vessels and underwriters who were less selective.
    - (e) Such an agreement could not be applied to detention damages sustained by a shipowner who was uninsured against "loss of earnings", or by one who was insured against such losses by underwriters not parties to the agreement.
  6. A system of dividing the damages equally, regardless of fault or innocence would have no apparent merit.
    - (a) It would be unfair to the owner of a small vessel of relatively little value, who would be required to pay a substantial amount to the owner of a large, valuable vessel in order to equalize the damages, even though the small vessel might be free of any blame.
    - (b) It would not eliminate the necessity of investigating the damages or litigating the damage issues in case of disagreement.
  7. *A fortiori*, a system of strict liability would have no apparent merit.
    - (a) Liability of one shipowner to another for collision damage is not subject to considerations such as exist where there is a contractual relationship between a shipowner and others, e.g., cargo owners, wharfingers, crew members or passengers.
    - (b) In the usual case, as between shipowner and shipowner, each party is more or less equally able to bear (or insure against) the risk of collision; the position is unlike that in cases where, because the ability of one party, e.g., a shipowner, to bear (or insure against) loss is substantially superior to that of another party, e.g., a crew member, the imposition of strict liability on the first party may be desirable and feasible.
    - (c) Such a system would be even more unfair than a system of dividing the damages equally, regardless of fault or innocence, as it would require an innocent vessel to pay all of the damages of a guilty vessel, no matter how heavy, less only the innocent vessel's damages, no matter how slight.

#### D. THE RELATIVE MERITS OF THE PROPORTIONAL FAULT RULE AND THE EQUAL DIVISION RULE IN BOTH-TO-BLAME CASES UNDER THE FAULT SYSTEM

1. The proportional fault rule is fairer to the vessel guilty of the lesser fault.
2. On the other hand, the proportional fault rule renders settlement on the merits more difficult to predict; under the equal division rule, on the other hand, settlement on the merits is relatively easy to achieve when material faults of both vessels are manifest, even though the degree of fault properly chargeable to each vessel may be in controversy.
3. Particularly in jurisdictions where special admiralty courts are not maintained, the proportional fault rule is more difficult to apply, as the court is required to decide

not only which vessel is to blame, or whether both are to blame, but in the latter case, what degree of blame is chargeable to each.

**E. POSSIBLE METHODS OF REDUCING THE COST OF APPORTIONING COLLISION RISK**

1. Administration costs might be reduced substantially by agreements among underwriting groups, *e.g.*, Lloyds Underwriters, the Institute of London Underwriters, the American Hull Syndicate, and the London Group of Shipowners' Protection and Indemnity Associations, providing for arbitration of collision cases involving vessels owned by their assureds and requiring the inclusion of corresponding provisions in policies and certificates of entry issued to their assureds. The latter would be necessary because of the fact that shipowners are frequently uninsured against detention damages, or insured therefor with underwriters other than their hull underwriters. In some jurisdictions, however, legislation might be required to make such agreements fully enforceable.

While such arbitration agreements would of course not be binding on cargo owners, personal injury claimants or other third parties, many collision cases involve no third party claims.

2. Legislation liberalizing rules of evidence might be sought in those states where testimony by deposition is not presently permissible, thus reducing the cost of presenting evidence.
3. Obviously the best way of reducing the cost of collision risk is to reduce the number of collisions, by equipping vessels with adequate anti-collision devices, by providing extensive training to the officers charged with the operation of such devices, and by imposing severe sanctions for disregarding the Collision Regulations.

## ALLOCATION DES RISQUES MARITIMES ET TIERS

1. Nous devons, d'abord, indiquer ici avec précision de quels "tiers" nous entendons parler.

Le mot "tiers" n'a pas ici son acception juridique habituelle – la personne extérieure à un contrat – ni même une acception juridique précise.

Il vise, concrètement, certaines personnes dont l'expérience a montré qu'elles peuvent subir un dommage du fait de l'exploitation du navire, qu'elles sont exposées aux "risques maritimes" – alors que ce n'est qu'exceptionnellement que, dans certains cas, leur propre activité peut être dangereuse pour les navires.

Parmi ces personnes, deux catégories sont particulièrement importantes :

Les propriétaires de structures terrestres (et notamment les ports) ;

Les victimes de dommages par pollution.

2. Si l'on s'interroge sur le régime juridique applicable à ces personnes, on est amené à faire trois constatations.

D'une part, ce régime est largement abandonné aux droits nationaux. Une convention comme la convention de 1969 sur la pollution par hydrocarbures apparaît l'exception.

D'autre part, ce régime tend à faire supporter les risques maritimes par le seul navire. Dans de nombreux droits nationaux, comme dans la convention de 1969, existent des règles de "responsabilité de plein droit", de présomption de responsabilité ou de présomption de faute, qui rendent l'armateur responsable du dommage causé aux tiers même en l'absence de faute prouvée.

Enfin, les règles appliquées en la matière sont le plus souvent des règles d'ordre public (*public policy*) qui ne peuvent pas faire, directement, l'objet d'aménagements conventionnels.

3. Au vu de cet état de choses, une allocation différente des risques peut-elle être envisagée, dans le souci d'efficacité et d'économie qui est celui de ce colloque ?

4. C'est l'opinion du soussigné qu'il n'est pas possible, ni sans doute souhaitable, de revenir sur la tendance des droits positifs à faire peser les risques maritimes d'abord sur le navire.

D'une part, les données du problème sont différentes, ici, de ce qu'elles sont en matière de transport maritime, d'affrètement, voire d'abordage.

Chargeurs, affréteurs bénéficient directement de l'exploitation du navire. Abordés comme abordeurs participent à la vie maritime – et il n'est pas anormal de laisser à la charge de chacun une partie des risques de cette vie.

Cette solidarité des intérêts n'existe pas à l'égard de la victime terrestre (voire du marin pêcheur victime) de la pollution – qui ne participe que très indirectement à la vie maritime.

Sans doute, il en est différemment pour les ports, mais même à leur égard une modification des tendances actuelles est-elle difficile à envisager. Car ils supportent déjà une partie du risque maritime, dans la mesure où la limitation de responsabilité leur est, souvent, opposable.

D'autre part, et c'est un élément que l'on ne peut pas ignorer, l'opinion publique n'admettrait pas un allègement de la responsabilité des armateurs – si même elle ne demande pas bientôt un renforcement de celle-ci.

Ainsi, les régimes de responsabilité objective que l'on relève ici apparaissent-ils comme inéluctables. Certes, on peut penser que, dans certains cas, ils pénalisent à l'excès les armateurs. Mais il faut reconnaître que le droit n'a pas été insensible aux légitimes intérêts des armateurs – en généralisant la limitation de responsabilité, laquelle, envisagée du point de vue des "tiers" traduit la prise en charge par la collectivité non-maritime de sa part du risque maritime.

5. Est-ce à dire que tout, ici, est, sinon parfait, tout au moins non-perfectible ?

Non, sans doute, et des aménagements peuvent certainement être envisagés. Nous avouons, cependant, ne pas apercevoir de lignes directrices générales au long desquelles ces aménagements pourraient s'organiser, tant les problèmes sont ici divers et complexes. Aussi, nous bornerons-nous à lancer – bien en désordre – quelques idées.

– Nous observerons ainsi qu'en ce domaine, comme en tout autre, une unification internationale est souhaitable. Il est remarquable de constater que certains aspects de la responsabilité des armateurs à l'égard des tiers sont unifiés – en matière de pollution, en



matière d'abordage –. On peut penser que certains litiges au moins seraient simplifiés, si l'unification s'étendait à l'ensemble des situations de responsabilité extra-contractuelle.

– Un autre thème à explorer : celui de la *canalisation* des responsabilités. Là aussi, on allègerait les litiges en reportant principalement les responsabilités sur tel participant, ainsi que commencent à le faire certaines législations en matière de dommages causés aux tiers par une assistance à un pétrolier. Certes, une canalisation absolue serait excessive (comme susceptible de faire perdre à ceux qui en bénéficient le sentiment de leur responsabilité). Une canalisation raisonnable paraît souhaitable.

– Enfin, on peut penser qu'il faut étendre le système du Fonds de garantie tel qu'amorcé par la Convention de 1971. En ouvrant assez largement aux tiers un droit d'action contre ces fonds, le système est propre à alléger les procédures. Il a aussi l'avantage de permettre d'associer à la prise en charge des risques maritimes les plus lourds – les risques de pollution par hydrocarbures ou autres substances nuisibles – les entreprises non maritimes qui, exploitant ces substances, participent directement à la création de ces risques.

6. En conclusion, une observation nous apparaît nécessaire : dans la recherche d'une meilleure allocation des risques en matière de dommages causés aux tiers, un élément doit être gardé constamment à l'esprit : c'est l'élément *prevention*. Répartir les risques, c'est-à-dire déterminer qui supportera un dommage constaté, c'est en quelque sorte reconnaître par avance l'échec de la communauté maritime, car aucun système de responsabilité, d'assurance, de fonds de garantie ne restituera les richesses détruites. Aussi, le meilleur système d'allocation des risques encourt-il la critique s'il ignore la prévention des risques.

## SHIPOWNER AND OTHER THIRD PARTIES

1. Since we have to deal with "other third parties", we must, first, clearly indicate of which "third parties" we are going to speak.

The word third parties actually applies, here, to some persons who, as experience has shown, may incur damage from the ship operation, who are exposed to maritime risk, although it is in exceptional cases only that their own action may, for some of them, endanger sea-borne trade.

Among these persons, two classes are of special importance:

- Owners of shore structures, and specially harbours;
- Victims of pollution damage.

2. If one look at the legal regime which applies to such "third parties", two preliminary remarks may be made:
  - (a) the rules which govern are broadly left to national laws. An international convention such as the 1969 Convention on oil pollution is rather unique.
  - (b) the rules which apply are often rules of public policy, thus unable to be changed or modified by agreement.
3. So far as substantive rules which govern the subject-matter are concerned, a trend clearly appears among the various national or international regulations, or drafts for future regulation. The law tends to put the burden of maritime risks primarily, if not exclusively, on the shipowner, through rules of strict liability, of presumption of liability or of presumption of fault.

Concerning oil pollution damage, the 1969 Convention, as well as several national regulations, put on the shipowner strict liability, which can be set aside only in exceptional cases, usually in cases of *force majeure*, fault of the victim or fault of the competent administration only. Concerning damages to harbour structures, or other shore structures, one may find, under various terms (such as shipowner liability as "gardien", presumption of fault, *res ipsa loquitur*), similar rules of law. In some national laws, the liability of the shipowner is more specially strict, in so far as any damage done to a public work is seen as constituting a penal offence, except in case of *vis major*. In the same manner, the duty of a shipowner to remove a wreck is, in most legal systems, made absolute, even if such shipowner was not to blame for the sinking of the ship.

4. Looking now at the cost of such liability in relation to third parties for sea-borne trade, there is no doubt that such cost is high. In most of the cases, all consequences of any harbour casualty, or any pollution accident, will be imposed upon the shipowner. The only alleviation to shipowners' burden will result from limitation of liability rules which apply in most cases, although not always (as in some cases of wreck removal).

It does not seem, however, that one can trace, in such cost, useless "administrative" expenses, which could be lessened. The strict liability rules which apply to the matter simplify the handling of litigation (or should simplify it). Such litigation usually concerns two parties only (or classes of party): the shipowner on one side, on the other the harbour authority, or the pollution victims. Legal costs should, therefore, remain as low as possible.

5. Bearing in mind such facts, may a different apportionment of risk be found, which could be more efficient and more economic?
  - (a) It is our opinion that it is not feasible, nor possibly desirable, to re-examine the tendency of legal systems to put the burden of maritime risks on the shipowner, as far as "other third parties" are concerned.

The elements of the problem are, here, different from what they are in matters of maritime transport, affreightment or even in collision cases. Shippers directly benefit from the ship operation. The victim of a collision is, himself, a party to sea-borne trade as much as is the colliding vessel; it is not illogical to apportion the burdens of such trade between themselves. Such interdependence of interests does not exist as far as shore victims are concerned, as such victims are not parties to sea-borne trade — the same can even be said of fishermen victims of some pollution. Indeed one could say that things may be seen differently as far as harbours are concerned, as they draw some benefit from maritime trade. However, even for them a change in the current trend is somewhat difficult to forecast. For they already carry some part of maritime risk, in so far as,

in many cases, their action for damages will suffer from limitation of liability, although they themselves cannot raise the defence of limitation against shipowners claims for damages — a discrimination some of them complain of most strongly.

On the other hand, one cannot overlook that public opinion will not accept the idea of lessening shipowner liability — as is shown by the legislative work in progress concerning pollution damage by substances other than oil.

Thus, the systems of strict liability one can find in our subject matter seem unavoidable. It may be felt that, in some cases, they place a hardship upon shipowners. But one must concede that legal systems have not been indifferent to shipowners interests — through limitation of liability schemes, which constitute the participation of the non maritime community in maritime risks.

(b) Is that to say that, in our subject matter, everything is, if not perfect at least not perfectible?

One cannot go so far, and changes can be thought of. We must, however, recognise that we are unable to find here any guideline along which such changes could be organised, in so far as the problems we deal with are different and complex. Thus, we will content ourself by laying down, somewhat at random, a few thoughts.

We shall first observe that, in this field as well as in others, international unification is highly desirable. Some aspects of shipowner liability toward third parties already are unified, as in matters of oil pollution or collision. It is possible that at least some litigation could be simplified if other extra contractual liabilities were unified.

Another possible way to explore: that of so-called "channelization". Here too, litigation could be simplified if not avoided by primarily putting liability on one person, usually exclusive of others. This is already the rule in some countries as far as salvor liability toward tankers is concerned. Absolute channelization would be dangerous, as liable to lessen the sense of duty of the one benefiting from it but reasonable channelization may be desirable.

Finally, it may be thought that the scheme of the Compensation Fund, as established by the 1971 Convention, could be extended to other fields. By giving an extensive right of action against the fund to third parties, such a scheme may lighten litigation. Such a fund also may allow the sharing of the most costly risks (i.e. pollution risks) among the non maritime firms which, by operating polluting substances, directly participate in, and benefit from, the creation of such risks.

6. In conclusion, we feel an observation should be made: in the search for a better apportionment of maritime risks concerning third parties one element must be kept in mind — prevention. To apportion the risk, i.e. to determine who is going to bear the burden of some ascertained damage, is, to some extent, to recognise in advance the failure of the maritime community; for no scheme whatsoever — strict liability; insurance; or fund — will give back lost riches. Thus, even the best scheme incurs criticism, if it ignores prevention of risks.

## **THE APPORTIONMENT OF RISK BETWEEN SHIPOWNERS AND THIRD PARTIES — THE HULL INSURER**

### **1. INTRODUCTION**

The fundamental purpose of Hull Insurance is to provide the Shipowner with indemnity against physical loss or damage to his vessel brought about by perils of the sea. In general, liabilities to Third Parties in respect of General Average contribution or for salvage charges are, in law, also recoverable from Hull Insurers as losses by the perils which gave rise to them, unless excluded by express provision in the policy.

Collision is a peril of the sea but the Shipowner's Liability to Third Parties arising from any such collision would not be recoverable under the Hull Policy were it not for the separate and distinct cover afforded by the Collision Clause (see Appendix V).

Briefly the clause in current use in London limits the cover it provides to three-fourths of the Owner's eventual liability up to an over-riding limit of three-fourths of the insured value of his vessel. It confines itself to the Owner's Liability for damages payable in tort and, by specific exclusion, endeavours to restrict the scope of the cover so provided to liability for loss of or damage to the other vessel or vessels and the property they carry on board.

The remaining one-fourth collision liability and the matters expressly excluded by the proviso to the collision clause are risks normally assumed by the Shipowners' Protection and Indemnity Club, whose terms of cover are generally tailored to accept such liabilities only insofar as they are not covered by the "usual Lloyd's policy with Institute Time Clauses Hulls (including the Running Down Clause) attached".

Thus for all practical purposes Hull Underwriters and the P and I Clubs may be considered co-insurers of the Shipowners' collision liabilities and it is usual London practice for Hull Insurers to leave the conduct of such collision cases in the hands of the P and I Club which, of course, bears the largest individual share of the risk. The procedure has many advantages and although conflicts of interest may arise from time to time they are usually resolved with a minimum of difficulty.

Of course, not all Hull insurances written in London are based on the three-fourths concept. Policies written with Foreign Conditions and non-navigating policies such as those covering Port Risks and Builders' Risks, normally embody a four-fourths collision clause. Indeed, it is now a fairly common practice in London for many Hull insurances to be quoted for on a four-fourths basis with a return of premium stipulated if three-fourths is preferred by the Assured. The premium "value" of the additional one-fourth is dependent upon many factors and consequently varies from risk to risk.

With regard to insurance practice the position of Hull Insurers is comparatively straightforward. Given an insurance on full conditions they would expect to deal with the Assured's claim for loss of or damage to his vessel in the first instance and, thereafter, would await any claim he might eventually make under the collision clause. In the meantime, however, and even though the Assured's Club might have charge of the collision negotiations, Hull Underwriters would expect the Assured to furnish continuous advice of the progress of the matters dealing with collision liability for the following reasons:

- (a) In the event of eventual claim under the collision clause Hull Insurers must be satisfied that the Assured is "liable to pay and has paid".
- (b) Hull Insurers' agreement in the collision clause also to bear costs is conditional upon their prior consent to any legal action.
- (c) The Assured's counter claim against the other vessel would include sums already paid by, or recoverable from, his Hull Insurers for loss of or damage to the insured vessel in respect of which Hull Insurers would be entitled to subrogation rights.

As a result Hull Insurers achieve a measure of control over the conduct of the collision negotiations and can, and often do, encourage settlements short of litigation.

However, it would be idle to pretend that Hull Insurers' interests are always compatible with those of the other parties involved. The Owners' claim for demurrage, the Clubs' position with regard to life and injury and crew liabilities, or removal of wreck problems, and the activities of the representatives of loss of life and personal injury claimants, particularly in America, all contribute to the complexities of the negotiation, make speedy and reasonable settlement more difficult to achieve and inevitably lead to increased costs and expenses.

2. Although it is widely believed that the costs incurred in collision cases are generally much too high it is almost impossible to obtain sufficiently comprehensive statistical information to support or deny that belief.

The factors affecting the conduct of most collision disputes are as varied as the vessels and circumstances which give rise to them. There is no easily identifiable pattern and a collision between two small craft in a congested harbour can produce greater consumption of time and energy and more argument, legal activity and consequent expense, in relation to the issues and amounts at stake than may be the case in many collisions involving larger vessels.

The problem is obviously not one for which there is a simple solution, bearing in mind the widely differing legal, commercial and sometimes, personal viewpoints of the parties having an interest in the outcome of any collision action or negotiation and who may be able to influence its conduct.

In order to clear my mind on the subject and to test my own beliefs, I examined all the collision claims submitted to my Office for settlement or advice during the period from the 25th June to the 9th July. The results may be interesting.

From the total of 40 claims only two reached the Courts. One was tried and settled the other, involving matters of principle, is in the process of Appeal in the United States. Three cases are subject to pending Arbitration and 21 others have been settled by negotiation. The remainder are the subject of discussion by the parties or their lawyers. Twenty-six of the cases included claims for detention. One of the older cases, concerning a collision in 1968, was set down for trial in 1971 but, before trial, the parties agreed to settle on a mutual fault basis. However, since then the matter has become bogged down in lengthy dispute over the elements of the opposing claims.

Only three of the case files gave any indication of the costs involved. In two of the cases, in which fault was readily and immediately admitted, the costs were nominal. In the third, a case which had been negotiated throughout by the Shipowner/Assured himself, the costs amounted to 31% of the eventual settlement but it must also be said that the final settlement demonstrated a considerable saving in comparison with the initial liability exposure.

3. It has been suggested that Hull Insurers might consider knock-for-knock arrangements as a means of reducing the problem. The idea has initial attraction insofar as it would seem to have had some success in motor insurance but on closer examination the differences in practice and circumstances between Motor and Marine insurance suggest that the suggestion would not gain much effective or lasting support in Marine circles.

It is easy to think of Marine collisions as merely larger scale versions of collisions on the road because all the ingredients of the one may be found in the other. The principal difference lies in the fact that Motor insurers operate within their own national boundaries and can take full advantage of the operating stability brought about by national legislation and control which conditions not only the activities of their Assureds, but also the conduct of Motor insurance generally.

On the other hand Marine collisions are international in all respects and it seems to me that until universal standards for all things Marine have been established and have gained general acceptance at all levels so that all Hull Insurers may be sure that knock-for-knock arrangements would have a chance of producing a break-even balance across their books in the long term, there will be few subscribers to the idea.

In any event the matter does not rest with Hull Insurers. It would appear that, in most cases, demurrage or loss of earnings is an important factor in collision case negotiations. This is usually an uninsured interest and is therefore of prime interest to the Shipowner in any collision negotiations. Since the Shipowner is entitled to recover his own vessel's physical loss or damage from his Hull Underwriters as soon as he can prove the claim, any knock-for-knock agreement between those Underwriters and other Hull Insurers would, in effect, merely amount to a waiver of their subrogation rights in the subsequent collision action or negotiation and, to my mind, would not materially alter the costs problem. It seems to me that, except in those cases where liability is clear and admitted, each Shipowner would still be entitled to pursue the other in respect of any uninsured losses and, therefore, would be entitled to seek the protection of the Collision Clause in their Hull Policies against any liabilities by way of damages which they might be left to bear.

It is also my belief that to be of any real value in positively reducing costs a knock-for-knock agreement would need the support of Hull Insurers and their Reinsurers on a world-wide scale if the costs saved in the primary collision dispute are not to be converted into costs of dispute between Insurers and Reinsurers. I do not believe that agreement on such a scale is remotely possible because, to my mind, the phrase "knock-for-knock" implies the possibility of an eventual balance between gains and losses,

and, whilst it is conceivable that, given general acceptance of the proposition, the major Marine Markets might achieve such a balance in their overall business, I fail to see what inducement the idea could offer to the individual Underwriters within those markets, unless their individual spread of business happened to coincide with the Market spread, or to their Reinsurers within the same Market or elsewhere, or to the many developing National Insurance Organisations in emergent countries.

Finally, it seems to me that any such agreement would be of little use if it could not be certain of application in a large number of cases. Simple cases are already resolved with the minimum of expense. The more complicated cases invariably involve innocent third parties whose rights to take whatever action they like, cannot be ignored, nor indeed can the right of the Shipowner himself who for a variety of reasons, including those of reputation, commercial relationship and insurance record, may prefer to have his liability put to the test.

4. In my opinion the solution is more likely to be found in the realms of the producers of International Maritime Conventions. For example, greater certainty in matters of limitation of liability could be achieved by unbreakable global limitation in adequate amount and would help to avoid the conflicts and exploratory litigation likely to be produced by separate conventions invoking separate limits.

Out of the forty cases to which I have already referred only five were concerned with limitation of liability and only one of the five was found incapable of resolution by negotiation. Urgent and willing acceptance of International Conventions by all maritime nations, and their early adoption into National Law would help to avoid the costs and delays often brought about by forum shopping.

When the costs associated with such things as collision liabilities are mentioned it is often forgotten that Insurers, Clubs, Shipowners and other interested parties need to maintain comparable technical staff to protect their interests and the costs must inevitably be reflected in their commercial charges. Uncertainty in the law can only add to those costs.

5. In conclusion I should make it clear that, in my experience, Hull Insurers are not normally averse to any reasonable proposition aimed at cutting costs and producing more positive insurance service. I believe that matters such as knock-for-knock are best left for adoption on an ad hoc basis — e.g. within a week of hurricane "Betsy" American Hull Insurers and London Hull Insurers had agreed to accept the occurrence as an "Act of God" and allow the losses to lie where they fell. Only two cases were pursued and both were pressed by other insurers. The result was a decision of "Act of God".

The collision between "Andrea Doria" and "Stockholm", the "Torrey Canyon" and the loss of "Seawise University" are further examples of cases in which the ultimate legal processes were avoided by negotiation with a consequent saving in costs and delay.

It is my belief that greater certainty and simplicity in international maritime law would enable Hull Insurers, their clients and all others concerned in maritime affairs, to improve and strengthen the process.

## GLOBAL LIMITATION OF LIABILITY

### 1. THE NEED FOR GLOBAL LIMITATION OF LIABILITY

A rational system of apportionment of risks can be achieved only to the extent the risks are insurable. The simplest way of arranging full insurance cover of a risk is to leave it to the person who suffers the loss to insure his own interest, which can always be quantified in advance. But in many cases it is desirable, for reasons of prevention, etc., to transfer the risk from the person who suffers the loss to the person who caused it or might have prevented it: damage to cargo must be made good by the carrier; damage to the ship caused by cargo becomes the cargo owner's liability; damage caused by collision to ship A must be borne by ship B. In all such cases the insurance cover must be effected by way of *liability insurance*.

Technically, this is a more complicated way of covering the risk because the interest which is being held covered cannot be quantified in advance. In liability insurance there is no maximal "*insurable interest*". The sum to be insured must be fixed arbitrarily, based on assumptions as to the maximum of liability which may be incurred. That sum may be so vast that it is partly uninsurable, or the cost of insuring it may be prohibitive. The problem is basically the same whether the insurer must put a ceiling to his exposure, or not (mutual insurance).

The problem can be overcome if the potential liability debtor is allowed by law to limit his total liability, arising from any one accident or occurrence, to a certain maximum, a *limitation fund*.

The system will not serve its purpose, however, unless the limitation is *unbreakable* to the extent the insurance cover is intact and the limitation fund available to the claimants.

But the law cannot accept that the limitation shall be unbreakable also in case of (insurable) misconduct on the part of the liability debtor unless the limitation fund corresponds to the highest amount which is *reasonably insurable*.

When this amount has been properly established it is in the interest of *economy* that the limitation is unbreakable.

### 2. THE PRESENT SYSTEMS OF GLOBAL LIMITATION OF LIABILITY

All the present — and past — systems of limitation of liability for maritime claims (the Conventions of 1924 and 1957, the lien and abandonment systems as well as the American Limitation Statute) reflect their common origin and original purpose: to encourage shipowners to embark on hazardous maritime ventures. In exchange they were given the privilege of limiting their financial responsibilities arising from the venture to the investment made in it (the ship) and the profit earned by it (the freight). The need for such encouragement ceased to exist many years ago. The fact that the institute of maritime limitation has still survived is partly due to "resistance to change". But the deeper reason — at least in our day — is that to a certain extent it satisfies, although in an imperfect manner, the need for a recognized insurable liability interest.

The systems are unsatisfactory

- (1) because the benefit of being able to insure a defined liability interest is reserved to carriers (shipowners, charterers, etc.) and not to other parties exposed to maritime claims;
- (2) because the protection is inadequate inasmuch that the limitation is breakable in case of simple (insurable) negligence;
- (3) because there is no necessary relationship between the limitation fund and the insurable liability exposure.

As long as the surrender of the "*fortune de mer*" was considered the fundamental principle justifying limitation, a "global" limitation fund for all claims subject to limitation was the natural thing. In recent years, beginning with the 1969 Convention on liability for oil pollution, there has been a trend towards piecemeal regulation of the right of limitation of certain types of liabilities. This will tend not only to make the total cost of insurance higher, but also to reduce the insurance capacity available for the general fund.

### 3. INSURANCE CAPACITY AND COSTS

The factors which determine the assessment of the limitation fund are the world capacity of liability insurance, and the cost to the assured of carrying it.

The *capacity* is limited. If we assume that the highest amount insurable for any one ship, any one incident, is in the region of a hundred million dollars, it is evident that this capacity is best utilized if all claims subject to limitation were to be satisfied out of one global limitation fund. Separate funds for various types of liabilities (pollution damage, passenger liability, etc.) will reduce the amount available for the global fund in extreme cases, for instance in case of a collision between a large tanker and a large passenger vessel. It is estimated that each of these separate funds would require capacity in the region of twenty-five million dollars, thus reducing the capacity available for the general fund to half of the total capacity.

The *cost* of carrying the insurance will increase with any fund which has to be established in addition to the general one.

It is clear, however, that all claims subject to limitation are not of equal importance. It is felt that compensation for personal injury should have priority over claims for property damage, etc. Such *priorities* can be given without affecting capacity or the cost factor.

#### 4. THE REVISION OF THE 1957 LIMITATION CONVENTION

The 1957 Convention is now under revision under the auspices of IMCO, and a final draft prepared by IMCO's Legal Committee will be submitted to a Diplomatic Conference at the end of this year. The Draft is conservative and reflects a strong resistance to change.

The Draft maintains the right of limitation in its traditional form, i.e. as a prerogative reserved for owners, charterers, managers and operators of ships. The only other maritime entrepreneur who is allowed to share in the benefit is the salvor who is not operating from a ship. This is strange because it is not suggested that the institute of limitation must be retained for the purpose of encouraging carriers to stay in business. Apparently, governments are reluctant to extend the institution beyond its traditional scope, and the difficulties in quantifying a fund for entrepreneurs other than carriers have been considered too great. The practical result of this attitude is that in cases where the rational solution is to transfer a certain risk by way of instituting liability one hesitates to do it if unlimited liability must be the result, for instance liability on cargo interests for damage caused by hazardous goods.

It is proposed that the limitation shall be virtually unbreakable which presupposes that the limits must be raised to the level of insurability.

The most important question, the magnitude of the limitation fund expressed in monetary units per ton, has been left open. This is natural because the amount cannot be determined until it has been decided how the fund shall be computed and what claims shall be subject to global limitation.

It seems to be clear that the tonnage unit will be the new gross ton. This means that if the present limits are retained unchanged the limitation fund will be increased by an average of about 40%. It is an open question, however, whether there will be separate funds for personal claims and property claims. One proposal is to have a joint fund for all claims, but a priority for personal claims. This is the solution best suited to take full advantage of existing insurance market capacity. It would mean that with the present maximum amount per ton the limitation fund in the large majority of cases where only property damage is involved would be more than three times what it is today.

A survey carried out by one of the leading international P and I clubs reveals that the excess of claims under the present systems of limitation only amounts to some 20% of the total claims. It is reasonable to assume, therefore, that there is market capacity for an increase of the limitation fund to a magnitude which would reduce limitation to a relief only to be invoked in case of catastrophe. The cost of such a rise would be tolerable for large and middle size tonnage, but burdensome for small ships. The proposal is to have a certain minimum fund and a decreasing amount per ton, in stages, for increasing tonnage.

The unknown quantity in the calculation of a sufficient fund is the effect of changes made in the selection of claims subject to global limitation.

Today, the carrier can invoke the defence of error in the navigation and management of the ship. If this defence is abolished it is fair to assume that the volume of limitable claims will be increased substantially. This will create a real cost problem for smaller ships. It should be seriously considered whether it is good policy to burden the limitation fund with the cost of error in navigation, particularly if cargo insurance must still be maintained with respect to damage resulting from fortuitous events.

Conversely, a "knock-for-knock" agreement between the major hull insurance markets with respect to (ship) collision damage would reduce the number of cases where limitation is invoked. Unless it is felt that collision damage must be apportioned by way of



liability for reasons of prevention, it seems clear that the rational solution would be not to burden the limitation fund with liability for a loss which is covered — without any problems — by damage insurance which is indispensable in any case.

If liability for a certain type of loss is excluded from the regime of global limitation, the result appears to be the same as if liability for such damage were abolished: the other claimants will get a bigger share of a given limitation fund. But the liability excluded must also be insured within the limits of the available market capacity, and the share of the capacity left for the global limitation is reduced. The IMCO Draft proposes that the separate regime for oil pollution liability in the 1969 Convention be retained, and the intention is to extend it to pollution by substances other than oil. It is not easy to understand that claims for pollution damage should be given preferential treatment compared with other claims, and if the global fund is increased above the oil pollution fund it is hard to explain why the global fund should not be available in cases where that would provide better compensation.

It is also proposed that *per capita* liability for passenger claims be excluded from global limitation, but made subject to a separate catastrophe limit. The effect on capacity and cost will be the same.

## APPENDIX II

### *Hague Rules 1924 — Article 3 — Paragraphs 1 and 2*

1. The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:
  - (a) Make the ship seaworthy;
  - (b) Properly man, equip and supply the ship;
  - (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

## APPENDIX III

### *Hague Rules 1924 — Article 4 — Paragraphs 1 and 2*

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of para. 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.
2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
  - (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
  - (b) Fire, unless caused by the actual fault or privity of the carrier;
  - (c) Perils, dangers and accidents of the sea or other navigable waters;
  - (d) Act of God;
  - (e) Act of war;
  - (f) Act of public enemies;
  - (g) Arrest or restraint of princes, rulers or people, or seizure under legal process;
  - (h) Quarantine restrictions;
  - (i) Act or omission of the shipper or owner of the goods, his agent or representative;
  - (j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;
  - (k) Riots and civil commotions;
  - (l) Saving or attempting to save life or property at sea;
  - (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
  - (n) Insufficiency of packing;
  - (o) Insufficiency or inadequacy of marks;
  - (p) Latent defects not discoverable by due diligence;
  - (q) Any other cause arising without the actual fault or privity of the carrier, or without the actual fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

## APPENDIX IV

### *Uncitral Draft — Article 5*

1. The carrier shall be liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

2. Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case.
3. The person entitled to make a claim for the loss of goods may treat the goods as lost when they have not been delivered as required by Article 4 within 60 days following the expiry of the time for delivery according to paragraph 2 of this article.
4. In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents.
5. With respect to live animals, the carrier shall not be liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage. When the carrier proves that he has complied with any special instructions given him by the shipper respecting the animals and that, in the circumstances of the case, the loss, damage or delay in delivery could be attributed to such risks, it shall be presumed that the loss, damage or delay in delivery was so caused unless there is proof that all or a part of the loss, damage or delay in delivery resulted from fault or neglect on the part of the carrier, his servants or agents.
6. The carrier shall not be liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea.
7. Where fault or neglect on the part of the carrier, his servants or agents, combines with another cause to produce loss, damage or delay in delivery the carrier shall be liable only to the extent that the loss, damage or delay in delivery is attributable to such fault or neglect, provided that the carrier proves the amount of loss, damage or delay in delivery not attributable thereto.

## APPENDIX V

### *Institute Amended Running Down Clause*

It is further agreed that if the Vessel hereby insured shall come into collision with any other vessel and the Assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision for

- (i) loss of or damage to any other vessel or property on any other vessel,
- (ii) delay to or loss of use of any such other vessel or property thereon, or
- (iii) general average of, salvage of, or salvage under contract of, any such other vessel or property thereon.

the Underwriters will pay the Assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the Vessel hereby insured, and in cases in which, with the prior consent in writing of the Underwriters, the liability of the Vessel has been contested or proceedings have been taken to limit liability, they will also pay a like proportion of three-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then unless the liability of the Owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each vessel had been compelled to pay to the Owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

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

- (a) removal or disposal, under statutory powers or otherwise, of obstructions, wrecks, cargoes or any other thing whatsoever,
- (b) any real or personal property or thing whatsoever except other vessels or property on other vessels,
- (c) pollution or contamination of any real or personal property or thing whatsoever (except other vessels with which the insured Vessel is in collision or property on such other vessels),
- (d) the cargo or other property on or the engagements of the insured Vessel,
- (e) loss of life, personal injury or illness.

