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This report, dated 1983, is very interesting. Issued by the UNCTAD, it shows legal regime of Marine Insurance in France and Latin America.

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TD/B/C.4/ISL/27/Rev.1

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Legal and documentary aspects of the French and Latin American Marine Insurance Legal Regimes

UNITED NATIONS

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
Geneva

Report by the UNCTAD secretariat

UNITED NATIONS
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Preface

This publication is composed of two parts: part one concerns the legal and documentary aspects of the French marine insurance legal regime, and part two concerns the legal and documentary aspects of Latin American legal regimes. Both parts previously constituted separate documents which were prepared for the seventh session of the UNCTAD Working Group on International Shipping Legislation, held from 11 to 19 December 1980, for its work on drawing up a set of standard marine insurance clauses as a non-mandatory international model. They are reproduced in a single volume for convenience of reference.

Contents

Abbreviations

c.i.f. cost, insurance, freight
F.A.P. Sauf : franc d'avarie particulière, sauf (free of particular average, unless) F.P.A. free of particular average
P.P.I. policy proof of interest
R. I. S. F. règlement intégral sans franchise (entire adjustment without deductible)

Explanatory notes

Short title

The 1906 Act Marine Insurance Act, 1906, of the United Kingdom of Great Britain and Northern Ireland

Cargo policy (used in part one : Police française d'assurance maritime sur facultés (French Marine Insurance Policy (Cargo)), dated 10 August 1968, amended on 14 September 1970 and 1 December 1978

Hull policy (used in part one) : Police française d'assurance maritime sur corps de tous navires à l'exclusion des navires de pêche, de plaisance, des voiliers et des navires à moteur auxiliaire (French marine hull insurance policy for all vessels other than fishing vessels, pleasure boats, sailing ships or vessels equipped with auxiliary engines), dated 1 January 1979

References

The Institute Cargo Clauses, Institute Time Clauses: Hulls and Lloyd's S.G. Form are reproduced in the annexes to Legal and Documentary Aspects of the Marine Insurance Contract (United Nations publication, Sales No. E.82.II.D.5)

Part One : Legal And Documentary Aspects Of The French Marine Insurance Legal Régime

Background

The present report was originally issued in October 1980 as document TD/B/C.4/ISL/30 for consideration by the UNCTAD Working Group on International Shipping Legislation at its seventh session, which was held from 1 to 19 December 1980.
At its sixth session, the Working Group, after considering another UNCTAD secretariat report entitled Legal and Documentary Aspects of the Marine Insurance Contract[1], unanimously resolved in resolution 3 (VI) of 26 June 1979, to: (a) examine the existing marine insurance policy conditions and practices used in national markets covering international business; (b) investigate the different legal systems governing marine insurance contracts; and (c) in the light of these studies, and bearing in mind the suggestions contained in sections V and VI of the secretariat report, draw up a set of standard clauses as a non-mandatory international model[2].
The work of drawing up a set of clauses as recommended in resolution 3 (VI) commenced at the seventh session of the Working Group. As a result of the decision taken at the ninth session of the Committee on Shipping, held from 1 to 12 September 1980, the seventh session of the Working Group was devoted to hull insurance. As background documentation for the session, the UNCTAD secretariat submitted to the Group two complementary studies, one of which is the present report and the other a report entitled "Legal and documentary aspects of Latin American marine insurance legal regimes"[3].
At its seventh session, the Working Group formulated two composite texts as a basis for work on a set of risk clauses and one composite text as a basic for work on a collision liability clause. It was resolved that the eighth session should be dedicated to continuing the work on hull

[1] TD/B/C.4/ISL/27/Rev.1 (United Nations publication, Sales No. E.82.II.D.5).
[2] The report of the Working Group on its sixth session is contained in document TD/B/C.4/ISL/28.
[3] Part two of the present document.

insurance and to commencing work on cargo insurance (resolution 4 (VII) of 19 December 1980)[4].

Chapter I - Introduction

1. The Working Group on International shipping Legislation, in its resolution 3 (VI) of 26 June 1979[5], adopted at its sixth session, held from 18 to 26 June 1979, recommended to the Committee on Shipping chat work be undertaken within the Working Group, at the expert level, to formulate a set of standard clauses for marine insurance contracts by:
(a) Examining the existing marine insurance policy conditions and practices used in national markets covering international business;
(b) Investigating the different legal systems governing marine insurance contracts;
(c) In the light of these studies, and bearing in mind the suggestions contained in sections V and VI of the report by the UNCTAD secretariat[6], drawing up a set of standard clauses as a non-mandatory international model.

2. In response to the views expressed at the sixth session of the Working Group and in order to assist the work to be undertaken within the Group, the UNCTAD secretariat has prepared a report analysing the French marine insurance legal regime. Because of the limitations of time and restrictions on the length of documentation, the present report is not intended to be a comprehensive analysis of all aspects of the French legal regime. Rather, it is intended as an aid to the Working Group in its investigations of the different marine insurance legal regimes, and it can also be used as reference material when drawing up international standard clauses. Thus, the report analyses major aspects of the French legislation and standard policy forms for hull and cargo insurance, as well as certain market practices affecting marine insurance policies, including a reference to the situation in French-speaking African countries.

3. The present report is based largely on information provided by an expert from the French marine insurance market, acting in the capacity of consultant to the UNCTAD secretariat.

Chapter II The French Marine Insurance Legal Regime

A. The legislation

4. Before reviewing the legislative base for marine insurance contracts in France, it is first necessary to point out that marine insurance has a separate legislative base from non-marine insurance. Whereas marine insurance was until recently governed by provisions in the Civil Code of 1803 and the Code of Commerce of 1807, the latter being directly inspired as to marine insurance by the Ordonnance sur la Marine published by Colbert in 1681, non-marine insurance, which has its origins in the nineteenth century, is governed by the law of 13 July 1930. It is expressly stated in the 1930 law that it concerns only non-marine insurance and that it is not applicable to marine insurance.

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[4] The report of the Working Group on its seventh session, with the composite texts, is contained in document TD/B/C.4/ISL/32.
[5] 'See the report of the Working Group (TD/B/C.4/ISL/28), annex 1.
[6] Legal and Documentary Aspects of the Marine Insurance Contract (United Nations publication, Sales No. E.82.II.D.5).

1. Before The Législative Reform of 1967

5. As a general rule, the provisions of the Code of Commerce on marine insurance were of an optional nature in the sense that the parties to a contract were free to agree on other dispositions. However, there were certain limits to this freedom in that the law prohibited agreements which changed the nature of the obligations arising from such contracts of insurance. Thus it was required that the contract be one of indemnity, aleatory in nature, and in good faith.

6. The insurance must be aleatory in nature in that there must be an uncertain event, the occurrence of which will automatically place in operation the obligations of the contract, provided that there is an equal chance of gain or loss by each of the parties[7].

7. The insurance contract must be one of indemnity in that the assured can receive payment under the contract only to the extent that he proves that he has experienced a loss.

8. The absence of good faith on the part of the assured was severely penalized by article 348 of the Code of Commerce, where it was stated, in effect, that all non-disclosure and misrepresentation on the part of the assured which diminished the insurer's assessment of the risk, or which changed the subject-matter, annulled the insurance. Furthermore, the insurance was null even if the non-disclosure or misrepresentation had no influence on the loss or damage of the insured object. French courts rigorously applied the terms of article 348 so that marine insurance contracts were declared null even when the non-disclosure or misrepresentation was caused by simple ignorance or negligence on the part of the assured in the absence of any fraud or bad faith.

2. The Law of 3 July 1967 and the Decree of 19 January 1968 on Marine Insurance

9. The reform is the outcome of a commission composed of lawyers, judges and practitioners, and is contained in Law No. 67-522 of 3 July 1967, and Decree No. 68-64 of 19 January 1968.

(a) General observations

10. There are three main substantive divisions of the new law, which are set forth below:

(a) The general rules setting forth the nature and character of the law;

(b) The rules common to all types of marine insurances relating to:

(i) The conclusion of the contract;

[7] ' Article 1104 of the Civil Code; see also article 1964.

(ii) The obligations of the insurer and the assured;
(iii) The adjustment of the indemnity;

(c) The rules for particular types of marine insurance, ie.:

(i) Hull insurance;
(ii) Cargo insurance;
(iii) Liability insurance

11. Article 1 of the 1967 law sets forth the principle that it governs all insurance contracts which have for their object the coverage of risks relating to maritime transport. In this respect, it should be noted that article 54 sets forth, in effect, that when part of the transport is effected by land, river, or air, the rules of marine insurance are applicable to the whole of the transport[8]. Consequently, the law governs transport involving a maritime mode from one inland point to another, even if loss or damage occurs on land. There is thus a unified legal regime applicable to all the transport, whether it is preliminary or successive to the ocean voyage.

(b) Imperative provisions

12. The 1967 law is to a certain extent optional in its application in that it presents itself as a legal base upon which the parties to the insurance contract can establish and organize their agreement with a degree of freedom. Although article 2 lists 14 imperative provisions, the effect of which cannot be altered by the parties to the contract, the other provisions of the law, which represent a substantial majority of the total number of provisions, are optional in the sense that their effect can be altered by the will of the parties as expressed in their contract of insurance. This approach is the opposite of that of the non-marine insurance law of 1930 which, because of the perceived disequilibrium of the economic power and competence of the parties, was conceived as a protection of the assured and thus contains essentially imperative provisions from which the parties cannot derogate in their contract. Since the same disequilibrium between the parties was not considered to exist to the same extent in marine insurance, the law of 1967 has a considerably more flexible approach which is in keeping with the legislation of most other countries having national marine insurance legislation.

13. The imperative provisions of the law of 1967 are as follows:

(i) Article 3, which provides that all legitimate interests, including anticipated profits, are insurable, but, for there to be a right to claim the benefit of an insurance, a loss must have occurred.
(ii) Article 6, which governs the effect of omissions or inexact declarations at the time of entering into the contract.
(iii) Article 7, which deals with the assured's obligation to notify the insurer of all modifications of the risks which occur during the period of the contract.
(iv) Article 10, which provides for the nullity of the

[8] This provision is similar, in result, to section 2 (l) of the Marine Insurance Act, 11906 (hereinafter referred to as the 1906 Act) of the United Kingdom of Great Britain and Northern Ireland, which permits the extension of a marine insurance contract by as express terms or by trade usage, to cover inland water or land risks incidental to the sea voyage.

insurance contract when the assured fraudulently contracts for a sum that is higher than the actual value of the insured object.
(v) Article 12, which provides for the nullity of insurance contracts when two or more policies have been entered into for a total sum in excess of the actual value of the insured object, when there has been an intention to defraud.
(vi) Article 13, first paragraph, which provides that where two or more insurance contracts are entered into for a sum in excess of the value of the insured object without intention to defraud, in order for the policies to be valid the assured must notify the insurers of the existence of the other policies at the time of making a claim. The second paragraph, which is not imperative, establishes for such cases a rule of proportional liability for each of the policies, based on their respective amounts, up to the value of the insured object.
(vii) Article 17, second paragraph, which prohibits an insurance covering the intentional misconduct or gross fault of the assured.
(viii) Article 21, which provides that when it is not possible to establish whether a loss was caused by a marine or a war risk, it is presumed to have been caused by a marine risk.
(ix) Article 24, which protects the assured against the suspension or cancellation of the insurance for non-payment of the premium by establishing an eight-day delay from the time of notification of such suspension or cancellation to the time it will take effect.
(x) Article: 25, which provides a certain amount of protection to good faith third-party beneficiaries of an insurance policy who acquire a policy before notification of a suspension or cancellation for non-payment of premium.
(xi) Article: 26, which permits insurers to cancel a policy for non-payment of premium in the case of bankruptcy of the assured, but protects a good faith, third-party beneficiary of the policy who acquires it before notification of the cancellation.
(xii) Article 32, which protects insurers against misrepresentations made by the assured in bad faith in relation to a claim by depriving the assured of the benefit of the insurance.
(xiii) Article 35, which establishes a two-year limitation of actions for claims arising out of the insurance contract.
(xiv) Article 40, which stipulates that the insurer is not responsible for loss or damage caused by intentional misconduct of the master.

14. The articles identified above are all the imperative provisions of the French law on marine insurance, the effects of which cannot be altered by the contract of insurance.

(c) Insurable interest

15. Article 3, one of the imperative provisions of the law listed in paragraph 13 above, lays the basis for the French law on insurable interest in marine insurance. In addition to setting forth a broad rule for determining what interests are insurable, it establishes the requirement that the assured must have experienced a loss before he can claim an indemnity from the insurance contract. As the law also stipulates that the indemnity cannot exceed the loss, the insured object cannot be insured for a sum in excess of its actual value (article 11)[9]. Furthermore, the law establishes the rule that a loss, once realized, cannot be indemnified more than once, even though there may be more than one marine insurance contract (article 13)[10]. Nevertheless,

[9] 'For the text of article 11, see footnote 42 below. A special rule exists in article 10 for cases involving fraud (see para. 13 above).
[10] A special rule exists in article 12 for cases involving fraud (see para. 13 above).

provision is made for agreeing on the value of the insured object at the time of entering into the contract, such value being binding on the parties at the time of a claim (article 41; see para. 74 below) and in such cases the insurance is valid for the full sum insured (article 11). Article 10, however, voids insurance contracts containing agreed values when the insurer can prove intent to defraud on the part of the assured in entering into the contract.

16. Article 42 of the 1967 law also permits hull insurances on a "safe arrival" (*bonne arrivée*) basis if the insurers on the hull agree[11]. Such insurance is similar to British P.P.I. policies[12] in that the existence of the policy is proof of the existence and amount of the incurable interest[13]. Under such policies the assured is freed of the obligation to prove hic incurable interest at the time of making his claim: the existence o: the policy itself is sufficient proof. However, unlike British law, which renders such policies void[14], thereby depriving the assured of any legal rights under the policy, the French law envisages their use. The effect of the French law is to reverse the burden of proof concerning the existence of an insurable interest for such policies, thereby requiring the insurer, if he contests the existence of a valid insurable interest, to prove that no such interest exists.

17. It should also be noted that the effect of article 9 of the 1967 law makes insurance on "good or bad news" terms (the equivalent to "lost or not lost" in British law) null if they are entered into when the assured knew of the loss or the insurer knew that the insured object had arrived safely[15]. As to insurance that is not on "good or bad news" terms, article 8 of the 1967 French law is applicable. It provides that such contracts are void if the news of the arrival or loss is known at the place where the contract was signed or where the insurer and assured were situated. In practice, the effect of the legislation on this subject is altered by the policy forms. In the case of both hull and cargo insurances, they are all treated in the same manner, whether or not on "good or bad news" terms. The cargo policy (see para. 29 below) in article 30 establishes for all insurance the provisions of article 8 of the 1967 law and the hull policy (ibid.) in article 19 alters the effect of article 8 by permitting the assured nevertheless to prove hic good faith, that he did not in fact know of the news.

(d) Insurance of acts of the assured

18. The law of 1967 contains two provisions, part of which are imperative provisions listed in paragraph 13 above, concerning the insurance of acts of the assured which should be analysed in view of their specific character and the fart that to a certain extent they provide a distinctive limitation on the scope of marine insurance cover under French law.

19. First, it should be borne in mind that the coverage offered by a marine insurance policy assumes that the assured will always act in a prudent manner, whether as a shipper or a

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[10] Article 42 reads: "The insurance for 'safe arrival' may be contracted, under penalty of being void, only with the agreement of the insurers of the vessel.
"when a sum is insured on this basis, justification of the insurable interest shall result from the acceptance of the sum thus covered.
"The insurer is liable only in the event of the total loss or abandonment of the vessel as a result of a risk covered by the policy; he has no right over the abandoned objects."

[12] 'For a description of P.P.I. policies, see Legal and Documentary Aspects ... paras. 101-104.

[13] 'See the second paragraph of article 42, reproduced in footnote 7 above.

[14] Section 4 of the 1906 Act.

[15] Section 6 of the 1906 Act and, in effect, section 84 (3) (b), are the equivalents in British law to article 9 of the 1967 law.

shipowner. Article 23 (2) of the 1967 law states that the assured "shall take ail reasonable tare over everything relating to the vessel or the cargo". It is this principle that is also found in the first paragraph of article 17, which states:

The risks insured remain covered even in 0,e event of fault of the assured or of hic land-based agents and servants, unless the insurer establishes that the damage is due to failure on the part of the assured to cake ail reasonable care to protect the subject matter from the risks which have materialized.

However, as a. result of this provision, it appears that the insurer must prove, in order to avoid the policy because of a Jack of reasonable tare, the existence of more than just a fault on the part of the assured, but rather a negligence which consists in having aggravated the risks to which the insured object is normally exposed[16].

20. Another aspect of the 1967 law dealing with the coverage of the assured's fault is contained in the imperative second paragraph of article 17, wherein the insurance of the intentional misconduct or gross fault of the assured is prohibited. The exclusion has been criticized by insurance experts on the grounds that although it may be against public policy to insure the assured's intentional misconduct, since the receipt of the benefits of an insurance for damage intentionally caused by the assured would be contrary to the purpose of insurance to protect against the risk, i.e. the chance, of an event causing damage, the same cannot be said about an insurance covering the assured's gross fault. The latter conduct, although involving serious negligence, does not involve the intention to bring about the destructive: consequences which in fact occurred. Thus, since the consequences of such conduct involve an element of chance, i.e. a risk, it is argued that it should be incurable. Such a position would then leave it to the contract of insurance agreed upon by the parties to determine whether or not such conduct should be covered by the insurance.

21. It should also be observed that article 40, which is an imperative provision, prohibits in ail hull insurances the coverage of loss or damage caused by the intentional misconduct of the master. This provision was inspired by tradition since it has always been so provided in hull insurances in the French market. However, it should be noted that the prohibition relates only to the insurance of loss or damage of the hull; thus it does not apply to liability insurance covering the consequences of the intentional misconduct of the master.

22. Article 40 has also been criticized as archaic and contrary to the interests of the assured. It has been asserted that it, is best left to the parties to the contract to decide whether or not such a risk should be covered by an insurance.

(e) Omission or inaccurate statement by the assured

23. The obligation to disclose to the insurer information relevant to the risk is enshrined in article 23, which states: "The assured shall: ... when the contract is being drawn up, state accurately ail the facts known to him which will enable the insurer to evaluate the risks he is covering; ..." In the case of failure to conform to this obligation, the 1967 law contains a new provision which alleviates the severity of article 348 of the Code of Commerce mentioned previously (see para. 8 above).

Article 6, which is an imperative provision, states:

[16] See Rodière, Droit maritime (Paris, Dalloz, 1979), para. 604

Any omission or inaccurate statement by the assured likely to lessen appreciably the insurer's estimate of the risk, whether or not it has affected the damage or loss of the subject-matter insured, shall on the application of the insurer, render the insurance null and void.
Nevertheless, if the assured produces evidence of his good faith, the insurer shall, failing a more favourable provision in regard to the assured, cover the risk proportionally to the premium paid in relation to what he should have been paid except in cases where he establishes that he would not have covered the risks had he been fully aware of them.
The premium is not repayable by the insurer in the event of fraud on the part of the assured.

24. It will be noted chat the old rule of article 348 has been maintained in the first paragraph. However, as a result of the second paragraph, if the assured can prove that the omission or inexact statement was made in good faith, that is, he did not intentionally mislead or fail to disclose relevant information, the insurance is not voidable by the insurer, unless the insurer can prove that he would not have accepted the risk had he been fully and correctly informed by the assured. In the absence of such proof by the insurer, he will be liable for losses under the policy, but any indemnity payable will be reduced in proportion to the amount by which the premium actually charged is less than the premium he would have charged had he been fully and correctly informed.

25. It is considered that since there are no tariffs for establishing premiums in marine insurance, the rule in article 6 for proportionally reducing the indemnity payable can give rise to disputes. An arbitration clause has consequently been inserted in the policy forms for both hull (article 34) and cargo (article 38) insurance to handle such situations.

26. For purposes of comparison with British law, it can be said that that law reflects the approach of article 348 of the Code of Commerce before the 1967 law. The British legislative provisions on non-disclosures and misrepresentations have been criticized by the UNCTAD secretariat[17].

27. There is also a continuing obligation of disclosure on the part of the assured as provided by article 23 of the 1967 law: "The assured shall ... declare to the insurer, in so far as he is aware of it, any increase of risk which has arisen during the period of insurance." In application of this principle, article 7 provides that any modifications during the contract, whether involving that which had been agreed at the time of entering into the contract, or the insured object, which lead to an appreciable increase of the risk, will result in the cancellation of the contract unless notification is given to the insurer within three days from the time when the assured knew of the modification, unless the assured can prove his good faith, in which case the rule on the proportional reduction of coverage in article 6 is applicable. If the increase of risk is not the result of an act of the assured, the insurance continues to be subject to an additional premium. If, however, the increase of risk is the result of an act of the assured, the insurer can either cancel the contract or charge a higher premium.

28. The British system does not have exactly the same continuing obligation of disclosure during the course of the contract. However, the 1906 Act provides for the use of warranties whereby the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled or that some particular state of facts shall or shall not exist[18].

[17] See Legal land documentary Aspects…., para 105-108
[18] See sections 33-41 of the 1906 Act.

The non-compliance of such warranties discharges the insurer from further liability under the contract. However, through the use of "held covered" clauses in the hull and cargo policies, the coverage can continue, in the case of certain breaches of warranties if prompt notice is given and subject to the payment of an additional premium[19].

B. The policies

1. Hull and Cargo Insurance

29. According to article 2 of the decree of 19 January 1968, the contract of insurance must be contained in a policy. The French market correctly uses two main policy forms for marine property insurance, one of which is designed for hull insurance and the other for cargo insurance, entitled: "French marine hull insurance policy for all vessels other than fishing vessels, pleasure boats, sailing ships or vessels equipped with auxiliary engines" (1 January 1979); and the "French marine insurance policy (cargo)" (10 August 1968, amended 14 September 1970 and 1 December 1978). In addition, there are two policy forms for liability insurance, which will be discussed separately.

(a) Contents of the policy

30. Article 3 of the decree of 19 January 1968 states that the contract of insurance must indicate the date on which it is entered into. In practice, policies indicate not only the date but also the hour. It must also indicate the place where it was entered into as well as the name and place of the parties to the contract and, if applicable, the fact that the contract is entered into for the benefit of another. Additional information includes the object or interest insured, the insured and excluded risks, the time and place of these risks, the sum insured, the premium and a clause, if agreed, that the policy is to order or to bearer. In practice, policies contain considerably more information than is specified in the decree. A brief analysis of a select number of the clauses of the hull and cargo policy forms is given below.

(b) Scope of the insurance

31. There are two principal variations on the Scope of cover offered by both the hull and cargo insurance policy forms: these are "all risks" conditions and "F.A.P. Sauf" (*free of particular average, unless*) conditions. Nevertheless, the parties to the contract are free to agree on different conditions and there are standard clauses designed for attachment to the main policies which offer several variations to the two standard coverages mentioned.

(i) Included risks

32. "All risks" conditions are provided in both hull and cargo insurance by setting forth a broad grant of coverage against all types of risks and then restricting the scope of this cover by setting forth exceptions to its application. The exceptions, or excluded risks, will be dealt with in the next section of the report (see paras. 53-64 below). The broad grant of cover appearing in

[19] For example, article 5 of the Institute Time Time Clauses: Hulls.

"all risks" conditions for both hull and cargo insurance is somewhat similar in form. Article 1, paragraph I, of the hull policy states:

Insurers are liable for loss or damage to the insured vessel, to the extent of its agreed value, arising front storm, shipwreck, stranding, collision, jettison, fire, explosion, pillage, and generally through all accidents and risks of the seas.

Article 2 (2) of the cargo policy states:

In "all risks" cover are Included at the risk of insurers in the conditions as set out in the present policy material damage and loss as well as loss of weight or quantity caused to the insured interests either by one of the hazards set out in paragraph 3 of the present article [which sets forth "F.A.P. Sauf" conditions] or generally by perils of the sea or events constituting force majeure.

33. It is the phrase at the end of each of these paragraphs which determines the nature and extent of the "all risks" coverage[20]. As a result, the scope of the coverage extends generally to "all accidents" and "risks of the sea". Thus, the insurers are liable for loss or damage to the vessel caused by all occurrences of force majeure, such as storms, and also by accidental] occurrences, such as collision, fire, explosion, breakage of machinery, bursting of boilers, etc.

34. It is of interest to note that there is a conceptual difference in the phrase "risks of the sea" in French and British law. According to French legal tradition, the concept of "risks of the sea" includes all that occurs as a result of the sea or upon the sea. However, according to the British legal regime, the concept of "perils of the sea" covers only fortuitous accidents or casualties caused by the seas. It does not include the ordinary action of the winds and waves and has been held not to include capture, bad stowage, theft, embezzlement by the master and mariners or scuttling, to name a few events which are incidental to a maritime voyage and may thus occur on the sea but are not caused by the sea[21].

35. As to cargo insurance, although worded differently, the approach of the French and British "all risks" coverage[22] " is generally the same, in that a broad coverage is given subject to enumerated exceptions. However, the British and French approaches to hull insurance are different. Unlike the French market use of a broad grant of cover subject to enumerated exceptions, the British policy forms enumerate the risks for which cover is granted[23]. The UNCTAD secretariat has previously indicated the advantages to the assured deriving from the use of a broad grant of cover subject to enumerated exceptions and has criticized the use of the "enumerated perils" approach[24].

36. It would appear that the enumeration of specific risks in article I of the French hull policy is in fart unnecessary because of the general grant of cover provided by the phrase "and generally against all accidents and risks of the sea". It is also important to note in this respect that whereas the general grant of cover at the end of the French clause expands the previous enumerated perils into an "all risks" cover, a somewhat similar wording at the end of the "perils" clause in the Lloyds' S.G. Form, namely, "and of all other perils"[25] has been judicially

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[20] These phrases reflect the substance of article 15 of the 1967 law, which provides: "The insurer is liable for physical damage occasioned to the subject-matter insured by any risk of the sea or by force majeure".

[21] See rule 7 of the Rules for Construction of Policy in the First Schedule of the 1906 Act; sec also V. Dover, A Handbook to Marine Insurance (London, Witherby and Co. Ltd., 1975), p. 262.

[22] See Legal and Documentary Aspects ..., annex V (Institute Cargo Clauses (All Risks)), clause 5.

[23] Ibid annex 1, "perils" clause Lloyd's S.G. Form, and annex 11 (Institute Time Clauses: Hulls), clause 7, "additional risk" clause.

[24] 'Legal and Documentary Aspects ..., paras. 119-121.

[25] Ibid., annex 1.

interpreted in a restrictive manner according to the *ejusdem generis* rule of construction, so that the phrase includes only risks of a similar kind or nature to these already enumerated.

37. As a result of the use of a broad grant of cover subject to enumerated exceptions in the French market, the assured in the case of a claim need only prove that the loss or damage occurred to the insured object during the period o1' the insurance, that it occurred within the geographic limitations of the policy, and the amount of the loss. The burden of proof is on the insurers to show that the loss was in fact caused by one of the enumerated exceptions.

38. As far as "F.A.P. Sauf" conditions are concerned, the approach used in hull and in cargo insurance must be distinguished. As to cargo insurance, "F.A.P. Sauf" conditions differ from "all risks" conditions in that the risks for which cover is granted are enumerated in this type of coverage. Thus, as in the case of the British "perils" clause, and contrary to the French "all risks" clause, "F.A.P. Sauf" conditions in cargo policies only cover loss and damage resulting from one of the risks Included in the restrictive enumeration in the policy. Unlike the "all risks" approach, where the burden of proof is on the insurer to prove that the loss was caused by a risk not Included in the policy, under "F.A.P. Sauf" conditions the assured must not only prove that the insured object was damaged within the period and within the geographic scope of the policy; he must also prove that the damage was caused by one of the enumerated risks.

39. "F.A.P. Sauf" conditions for cargo insurance are contained in article 2 (3) of the cargo policy, which reads as follows:

In the "F.A.P. Sauf" cover are Included in the risks insured within the conditions of the present policy, material damage and loss as well as loss of weight, or of quantity caused to the insured goods by one of the hazards set out in the following limiting list:

Collision, stranding or wrecking of the craft or carrying vessel, collision of this vessel or this craft with a fixed, mobile or floating object including ice; leakage of water causing the vessel to enter a port of refuge and there having to discharge at least three-quarters of its cargo; fire, explosion, dropping of the insured package itself during marine operations of loading, transhipment or unloading; derailment, collision, overturning, falling or breaking of the transporting vehicles; collapse of buildings, bridges, tunnels or other constructions, trees falling, breach of dykes or aqueducts, cavings-in, avalanches, lightning, flooding, overflowing of streams or rivers, breaking up of ice, tidal waves, cyclones or waterspouts, volcanic eruptions or earthquakes.

40. The list of risks in the "F.A.P. Sauf" conditions in the cargo policy comprises both maritime risks and risks usually associated with land transport. In all cases they involve major occurrences which tend to result, if not in total losses, at least in major casualties. It will be noted that, despite the similarity in titles, the approach of the clause in delimiting the cover is different from that used by the British "free of particular average" (F.P.A.) clause (clause 5 of the Institute Cargo Clauses (F.P.A.)). In very general terms, it can be raid that the British F.P.A. clause, while covering total losses and general average caused by insured risks listed in the "perils" clause, excludes particular average, even if caused by an insured risk, unless certain designated events occur[26]. If any of the events listed in the clause occur, then particular average is covered. On the other hand, the French "F.A.P. Sauf" clause, despite what is implied by its title "Free of particular average, unless" does not expressly exclude types of losses such as particular average; rather it simply offers a coverage for loss and damage, whether involving

[26] It also amplifies the perils clause, not only by dispensing with the normal rules of causation and making an indemnity payable for such loss or damage, which "may reasonably be attributed" to certain designated clients, but also by including additional insured perils, such as the collision or contact of a "conveyance", for example, a vehicle used during land transport, with any external substance.

total loss or particular average, caused by certain designated events which frequently, but not always, result in either total losses or at least major casualties. Thus, no coverage exists for loss or damage unless caused by one of the enumerated risks; however, when one of such risks occurs, the coverage extends so as to include total losses as well as particular average. Viewed in this light, it can be said that the French "F.A.P. Sauf" clause is in fact simply a perils clause with, unlike the British F.P.A. clause, no express role in delimiting the types of losses covered. This, however, is not to say that the type of insurance coverage offered by the two clauses is substantially different; nevertheless, for the purposes of drafting, it is important that the difference in approach is noted.

41. As to hull insurance, "F.A.P. Sauf" conditions, although rarely used, are contained in a separate clause IV designed for attachment to the general conditions. This clause reads in the relevant part:

Notwithstanding the general conditions, the present insurance is free of particular average except when such particular average results front collision, stranding, fire, explosion or impact of the insured vessel against a fixed, mobile or floating object.

It will be noted that the enumeration of events is more limited than its cargo insurance counterpart. Furthermore, the effect of the hull version of the clause more closely reflects the meaning of its title "Free of particular average, unless". Thus, the "risks" clause, that is, article 1, paragraph I of the hull policy form, which forms the basis of "all risks" conditions (sec para. 32 above) continues to apply to grant cover for general average and total losses, but particular average losses are excluded unless they result from certain designated events. Unlike its cargo counterpart, therefore, the full "F.A.P. Sauf" clause is not itself a risks clause but rather a clause which delimits the application of the cover granted by the risks clause in article 1 to certain types of losses[27].

42. As mentioned earlier, there are other possible variations on the scope of cover which may be agreed upon in the French market. For this purpose there are several standard clauses designed for attachment to the main policy, thereby altering the coverage offered by the general conditions. "F.A.P. Sauf" conditions for hull insurance, as described above, are one example. As for other examples, in cargo insurance, it is possible to have a coverage limited only to "Total loss and abandonment" (clause 1), "Total loss, abandonment and general average" (clause 3) or "All risks, but excluding loss of weight or quantity" (clauses 7 and 8). For hull insurance, it is also possible to have cover limited only to "F.A.P. Absolutely" (clause V). "Free of average absolutely" (clause VI), "Total loss and general average" (clause VII) and "Total loss and abandonment" (clause VIII).

43. Although in principle the hull and cargo policies provide insurance protection solely against the physical loss or damage of objects, the coverage nevertheless extends to certain expenses incurred by the assured. For example, article 2 (4) of the cargo policy stipulates that:

Expenses incurred following a covered risk in order to preserve the insured interest from damage or material loss covered by the policy, or to limit them, are also included in the insurance.

The undertaking of such conservation measures[28] is similar to the "sue and labour" concept in British law[29] and this provision, which includes such expenses within the coverage of the policy,

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[27] There does not appear to be a British equivalent to "F.A.P. Sauf" conditions for hull insurance, since the Institute Time Clauses: Hulls' ("F.P.A. Absolutely" and "Free of Damage Absolutely") exclude all particular average, on the one hand, and partial losses, on the other, in all cases.

[28] The obligation to undertake such measures is provided for in article 16 of both the cargo and the hull policy forms.

is very similar in effect to the "sue and labour" clause in the Lloyd's S.G. Form. Among the expenses included are those of reconditioning damaged cargo during the course of the voyage as well as the cost and risks of sending the cargo back to the place of manufacture for the purpose of repairing it. It is in the interest of insurers to assume these expenses in order to avoid further damage to the cargo, for which they would be liable. Coverage for other types of expenses can be found in article 2 (4) of the cargo policy, wherein it states that:

insurers guarantee the contribution of the insured interests towards general average arising from any event other than an expressly excluded risk.

44. Similar provisions exist in the hull policy. Article 16 (2) of the hull policy states:

Insurers will repay the expenses incurred relating to a risk covered in the policy, with a view to saving the vessel from any material loss or damage covered by the policy, or limiting such loss or damage.

As to general average, article 26 (I) states in the relevant part:

The vessel's contribution in general average is reimbursed by insurers subject to the deductible stipulated in the special conditions; ...

It should be noted that the article goes on to provide a rule for reducing the indemnity payable by virtue of the above-mentioned phrase when the agreed value of the vessel is less than its contributory value assessed for the purposes of general average (which is, generally speaking, the actual value of the vessel at the end of the voyage). This rule of reduction is similar in effect to section 73 of the I906 Act, which has been criticized in an UNCTAD secretariat report[30].

45. In the hull policy, additional provisions exist for general average in article 26 and reimbursement of salvage expenses in article 27. Furthermore, article 25 grants coverage for certain expenses when the vessel has been damaged by an insured risk in an area where repairs are either impossible or too expensive. In such cases, the wages and provisions for the crew, as well as any towing expenses to a port where repairs are possible or at least less expensive, will be reimbursed by the insurers on the condition that such transfers are made outside the commercial operations of the vessel.

46. The most significant extension of the hull policy beyond an insurance only for physical loss or damage of the insured vessel is provided by article 2[31]. This provision grants collision liability insurance coverage. The provision affords a broader coverage than that offered by the "running down" clause of the British conditions (clause 1 of the institute Time Clauses: Hulls), in that instead of being limited to a there-fourths coverage of liabilities arising only from

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[29] Section 78 of the 1906 Act.

[30] Legal and Documentary Aspects ..., paras. 152-157.

[31] " Article 2 reads as follows:

"insurers are further liable to the extent of an amount equal to the agreed value of the insured vessel, for third party claims exercised against the insured vessel following collision of the latter with a seagoing vessel, an inland navigation craft or a floating object not on a permanent mooring, or following contact of the insured vessel with any other property or installation.

"Cover is also granted, in respect of third party claims against the insured vessel for damages caused by its tenders, hawsers, anchors and chains whilst they are attached to the insured vessel, being handled or used in the vessel's service.

"The Cover for third party claims relating to loss of part or ail of the cargo or bunkers of any vessels, craft, units, properties or installations, is limited to reimbursement of losses incurred by the owners, representatives or beneficiaries of the properties lost. All other claims lodged against the insured vessel for damage or detriment as result of loss, jettison, spilling of ail or part of the cargo or bunkers of the vessel or of any other vessels, craft, units, properties or installations are excluded from the Cover granted by insurers.

"If a third party makes a claim against the insured vessel, and the shipowner does not invoke the limitation of liability to which he would be entitled to avail himself under the relevant legislation, the amount of the settlement for which insurers are liable should not exceed chat which they would have had to pay if such limitation had been invoked."

collisions with other vessels (up to there-fourths of the agreed value of the vessel), as is the standard version of the "running down" clause, the French clause provides for 100 per cent coverage (four-fourths) for collision liabilities (up to the agreed value of the vessel), which is not limited to collisions with other vessels but includes collisions with all types of fixed, mobile or floating objects such as dikes, piers, breakwaters, etc.

47. Until recently, it could be said that British conditions provided a more effective liability coverage by treating the "running clown" clause as a separate contract with its own limit of liability equal to the agreed value of the insured vessel, whereas French conditions grouped such liability claims together with ail other claims under the policy and applied the agreed value as the single limit of liability of the insurers under the policy. However, a new version of the hull policy (issued I January 1979) has established an equivalent approach to that used in the British market by creating a separate Fund for the collision liability clause which is equal to the agreed value of the vessel[32]. Consequently, insurers are liable under the new French hull policy for physical loss or damage to the vessel up to the agreed value and, in addition„ for collision liability claims under the policy up to the agreed value.

48. It should be noted that the liability coverage provided by article 2 of the French policy also includes the cost of wreck removal, damage occurring on land from the spread of fire resulting from a collision, and the financial loss arising from the loss of use of the other damaged vessel or object.

49. However, the last paragraph of article 2 places a limitation on the indemnity payable in certain circumstances by requiring the shipowner to attempt to limit his liability according to applicable law. If lie fails to try to do so, the insurer will use the limitation amount which could have been invoked by the shipowner as a limit on the indemnity actually paid. However, it is understood that if the shipowner tries and fails to limit his liability, then the liabilities will be reimbursed without reference to such limitation amount.

50. The French policy expressly excludes liability for personal injury or loss of life (article 4 (A) (8)), pollution damage (third paragraph of article 2) and liability arising from loss or damage to the insured vessel's cargo or contractual obligations (article 4 (A) (7)). Nevertheless, as will be indicated later (see paras. 93-94 below), there are additional clauses which can be attached as well as complete liability policies which can be used to supplement the liability coverage offered by article 2.

51. In the case of the insured vessel colliding with or receiving salvage services from another vessel under the same ownership, or in the case of a collision involving other property under the same ownership, the French policy form contains article 29, which is almost identical in its wording to the "sister ship" clause of British conditions (clause 2 of the Institute Time Clauses: Hulls), except as to collisions with property other than vessels. By this clause, in order to avoid the problem that a person cannot legally have a liability to himself, the vessels or property are treated, for the purposes of the insurance coverage, as being owned by separate persons. In order to avoid disputes on the liability issue in such a case, both the British and French clauses provide for arbitration.

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[32] Ibid.; see also article 31, cited in footnote 46 below.

52. As to the adjustment of collision liability claims, it should be noted that, although the French policy does not expressly provide for the use of the cross liabilities principle involving collisions where both vessels are to blame, as is expressly done in the British "running down" clause, it is nevertheless understood that as a matter of practice French average adjusters use the same system of cross liabilities.

(ii) Excluded risks

53. In the case of both "ail risks" and "F.A.P. Sauf" conditions, the hull and cargo policy forms contain enumerated risks which are excluded from the positive grants of cover already discussed. In the cargo policy, they are contained in articles 7 and 8[33] and in the hull policy, in articles 4 to 6.[34]

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[33] *Article 7.Risks excluded in all cases*
"The Underwriters are free from ail liability for claims arising from the following causes or from their consequences:
"1.Fines, confiscations, sequestrations, requisitions, violation of blockade, contraband, forbidden or clandestine trade, legal damages, distraint, seizures in execution and other seizures; the insurers also remain completely unaffected by any security which might have to be provided to relieve the insured packages from such seizures.
"2. Inherent vice of the insured object; grubs and vermin; sanitary measures or those taken for disinfection; effect of temperature; fermentation of liquids in barrels or drums unless it is established that this results from one of the risks covered by the policy.
"3.Acts or faults of the assured, the shipper, the consignee or of their servants, representatives, or other authorized persons; inadequacy or bad condition of the packaging.
"4.Delays in the forwarding or arrival of the insured interest; differences of market prize; any expenses of quarantine, or wintering, of lay-days or demurrage; warehousing, storage or any other expenses except chose indicated in article 2; claim resulting from the prohibition of export or import, as well as from ail obstacles preventing the business or commercial operations of the assured or of his representatives or other authorized persons.
"5. Damage caused by the insured objects to other goods or to persons.
"6.Damage caused directly or indirectly by explosion, release of heat, irradiation from transmutations of the nucleus of atoms or from radioactivity as well as damage due to the effects of radiation caused by the artificial acceleration of particles.
"Article 8.Risks excluded unless otherwise provided for
"Unless specifically agreed, and with a special premium, insurers are also free front liability for the following risks and their consequences:
"A. Civil or international war, hostilities, reprisals, torpedoes, mines and ail other engines of war, and generally ail accidents and fortunes of war as well as acts of sabotage or terrorism having a political character or relating to war.
"It is specifically provided that if it is not possible to ascertain whether an accident arises from a war risk or a sea risk it is to be considered as arising front a sea risk.
"B. 1. Piracy.
"2. Capture, prize, arrest, seizure, distraint, molestation or detention by any Government and other authorities.
"3. Riots, civil commotions, strikes, look-outs and other similar events.
"C.Risks of theft in general and looting; disappearance of ail or part of the insured objects unless such disappearance arises from a covered risk."

[34] *Article 4*
"A.Insurers are not liable for:
"1.Any event of whatsoever nature resulting front the violation of a blockade, contraband or trade of a prohibited or clandestine nature;
"Any fine, confiscation, sequestration or requisition;
The consequences of:
"Fault on the part of the shipowner and his executives in the fleet management, that is: Managers, Branch Managers, Superintendents, Heads of Technical Departments;
"Fault by the owners' land-based agents, either by fraud or by wilful misrepresentation;
"Wilful misconduct of the Master.
"2.Loss or damage arising from an inherent vice or "Wear and Tsar", as well as from the replacement or repair of parts affected by a latent defect;
"3. Wormholes on parts of the vessel not protected by metal sheathing, as well as damage caused to such parts by shipworms or other molluscs;

54. There are two fundamental principles behind most of these exclusions. First, as has already been pointed out, a basic concept of the French law is the obligation on the assured to take ail reasonable tare to protect the insured object from harm. Furthermore, it must be remembered that both the hull and cargo policies are primarily insurance for physical loss or damage of the insured objects themselves arising from their exposure to maritime risks to the exclusion of ail financial or commercial loss, as well as damage stemming from the inherent nature of the objects insured. Generally speaking, the majority of the exclusions in both hull and cargo policies reflect the application of these principles. Also excluded arc what are generally considered to be "war and strikes risks", so that the plain form of the policy relates only to what are considered to be "marine risks".

55. Some of the exclusions which are of particular interest are considered below.

Fault of the assured

56. Before considering the enumerated exclusions, it is first important to note that both hull and cargo policies envisage the continuation of cover in the event of certain types of fault. For hull insurance, the second and third paragraphs of article 1 provide: "These risks continue to be covered in the event of ... fault of the master, the crew or pilots ... [and] in case of fault of the shipowner's land-based agents and servants". However, in article 4 (1), it can be seen that the policy excludes in effect the consequences of: certain types of faults (*fautes caractérisées*) of the shipowner and his management personnel, faults of land-based agents of the shipowner of a malicious or fraudulent (*dolosif ou frauduleux*) character, and intentional misconduct of the master[35]. This aspect of the exclusion from coverage is largely influenced by articles 17 and 40 of

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"4. All expenses connected with winter lay-up, quarantine or lay-days, as well as consequences of ail sanitary measures or disinfection;
"5. Detriment other than physical loss or damage directly affecting the insured interest, such as lay-up, delay, variations in rates of exchange, and obstacles to the business of the Assured;
"6.All consequences for the vessel of acts, of whatsoever nature of the Master or the crew, when ashore;
"7.All claims by any party for whatever cause, for damage or detriment relating to the cargo or to the commitments of the insured vessel;
"8. All claims arising from loss of life or injury, or from personal accident or bodily harm;
"9.Losses caused by the direct or indirect effects of explosion, release of heat, irradiation emanating from the transmutation of atomic nuclei or front radioactivity, as well as losses due to the effects of radiation caused by the artificial acceleration of particles.
"B. It is expressly agreed that Insurers shall at no time be liable for:
"1.All bottomry premiums as well as consignment brokerage and advances of funds incurred in any place other than a port of refuge;
"2.Seizure or sale of the insured vessel in any place and for whatsoever reason, as well as costs of any bond which may be issued in order to obtain release from such seizure."
Article 5
"Insurers are exempt from liability for loss or damage arising front civil or foreign war, hostilities, reprisals, mines, torpedoes or other engines of war, and generally from ail accidents and risks of war, as well as from acts of sabotage and terrorism having a political nature or being connected with war.
"It is specifically provided that, if it is not possible to establish whether the origin of the loss is a war risk or a risk of the seas, it shall be regarded as resulting from a risk of the seas."
Article 6
"Insurers are also free from liability for loss or damage arising front:
"(a) Piracy;
"(b) Capture, prize, arrest, seizure, restraint, molestation or detention by any government or other authority whatsoever;
"(c) Riots, civil commotions, strikes, look-outs or other similar events."
[35] Ibid.

the law of 1967 (see paras. 19-21 above), although it will be noted that the policy makes certain refinements in the texts. In implementing the reasonable care standard found in the first paragraph of article 17, the policy form excludes the consequences of the "*fautes caractérisées*" of the shipowner and his management personnel, which in effect refers to faults which constitute clearly demonstrated and indisputable negligence.

57. The cargo insurance policy continues the coverage in the event of the fault of the master, crew or pilots (article 2 (4)), but it then excludes the consequences of all "acts or faults of the assured, the shipper, the consignee or their servants, representatives or other authorized persons ..." (article 7 (3)).

Inherent vice or defect

58. The hull policy (article 4 (A) (2)) expressly excludes: "Loss or damage arising from an inherent vice or 'wear and tear', as well as from the replacement or repair of parts affected by a latent defect." However, it is important to distinguish the effect of this exclusion from the third paragraph of article 1, where it is provided that the risks continue to be covered "in case of latent defects of the hull or machinery". These two clauses must be read together to understood that the insurers will cover damage caused by an accident resulting from a latent defect, but they will not cover the replacement or repair of the defective part itself[36]. French jurisprudence has interpreted the concept of inherent defect, and in so doing distinguished it from latent defect, as referring to:

... any cause of loss or damage relating to the state of the vessel or its fittings, such as faulty construction or repairs, faulty instruments, inadequate equipment, etc. ..., in short, any defect inherent in the vessel which is likely to impair its seaworthiness, with the exception of latent defects which the shipowner is unable to discover; whereas an inherent defect presupposes a certain degree of fault or negligence on the part of the shipowner or his servants and agents in putting or maintaining the vessel in a seaworthy condition, ...[37]

59. The existence of an inherent defect in the vessel does not automatically constitute grounds for an insurer to avoid the policy if, for example, the inherent defect played only a secondary or subsidiary role in the occurrence of damage[38]. Also, if a loss has been caused equally by an insured peril, such as negligence of the crew, and an inherent defect, such as a "*faute caractérisée*"of the shipowner in maintaining the vessel (for example, failure to follow maintenance instructions of a classification society), French courts may reduce the indemnity payable by the insurers by half[39].

60. For cargo insurance, article 7 of the policy form excludes liability for claims arising from "inherent vice of the insured object". The concept of inherent vice in reference to cargo includes not only any defects in the goods but also any particular characteristics of the cargo resulting from the nature of the cargo itself. An example of this latter type of inherent vice can be found in perishable cargo, such as fruit and vegetables. It is interesting to note in connection with such

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[36] This treatment of defective parts is the same as that given by British conditions under the "Inchmaree" clause (clause 7 of the Institute Time Clauses: Hulls).

[37] "*Jean Jacqueline*", Cour d'Appel de Rouen, 2 October 1969 (Le droit maritime français, No. 256, April 1970), p. 213. The failure of the shipowner to follow the instructions of a classification society regarding the maintenance of the vessel is considered by French tribunals to attest to the existence of a fault or negligence on the part of the shipowner to maintain the vessel in a good state of navigability. See "*Scravick*", Cour d'Appel de Rennes, 18 February 1974 (ibid., N°. 306, June 1974), p. 355.

[38] *« Jean Jacqueline »*, op. cit.

[39] For example, "Adrien Pla", Cour d'Appel de Paris, 9 January 1973 (*Le droit maritime français*, No. 294, June 1973), p. 345.

perishable merchandise that there are limits in the extent to which the inherent vice exclusion can be relied upon by insurers. It is generally admitted that, since insurers are advised of the type of cargo insured, they will be aware of its perishable nature. Thus, they will not be able to avoid liability on the grounds of inherent vice when such perishable goods decay because of the occurrence of an insured risk. For example, insurers will be liable for the decay of fruit on board a vessel which, because of damage resulting from, say, a collision, is repaired at a port of refuge and is thereby delayed. It should be noted that this coverage of decay damage occurring as a result of delay caused by an insured peril exists despite the exclusions in article 7, paragraph 2, of the consequences of inherent vice and in paragraph 4 of the consequences of "delays in the forwarding or arrival of the insured objects"[40].

61. It is understood that the basis on which cover is granted in the above example stems simply from the French market opinion referred to above, that is, since the insurer is aware of the characteristics of the cargo he is insuring, he should not be able to use the inherent vice exclusion when an insured risk occurs which permits those characteristics to operate, and, in spite also of the express delay exclusion, this approach is maintained even if the characteristics manifest themselves as a result of a delay caused by the insured risk. It is important to note from the above analysis that the treatment of decay damage manifesting itself during delay caused by an insured peril under French conditions is in direct contrast to the treatment given such damage under British conditions. In the general context of physical loss resulting from delay caused by an insured peril, both the failure of British conditions to provide such coverage in a standardized clause and the failure to make the exclusion of such coverage very clear have been criticized by the UNCTAD secretariat[41].However, in reference to the treatment of decay damage to perishable goods under French conditions in the particular situation described above, since the consequences of both inherent vice and delay are expressly excluded, it would appear desirable to have an express reference to the treatment of this type of loss for the information of the assured, particularly in view of the contrary treatment in British conditions.

War risks

62. The hull (articles 5 and 6) and the cargo (article 8) policy forms both exclude loss and damage resulting from civil or international war, piracy, capture, arrest, detention, etc. by any Government or other authorities, as well as riots, civil commotions, strikes and other similar events. The assured can obtain coverage for such risks through special agreement with the insurers, and upon the payment of an additional premium. The coverage for such risks reflects exactly the exclusions mentioned in the respective policies. In the case of hull insurance, such coverage can be arranged on either a voyage or an annual basin.

63. As to cargo insurance, it is important to note that war risks coverage can either be limited to the maritime mode only, which is the approach of the British market in the use of the "waterborne" clause, or it can be from warehouse to warehouse, the coverage commencing with the moment when the goods are loaded on the first means of transport and ending with their unloading at the place of destination.

Theft

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[40] See footnote 29 above.

[41] Legal and Documentary Aspects ..., paras. 182 and 185-188.

64. The exclusion of theft in cargo insurance by article 8, paragraph C, results in a significant difference between French "ail risks" cargo conditions and those offered by the British market's "all risks" version[42]. Consequently, it is necessary to obtain specific theft coverage when insuring under French conditions, and it is understood that it is the usual practice to do sol at least as to general cargo (sec para. 81 below).

(c) Time and place of the risk covered: duration of the risks for cargo insurance

65. Article 9 of the cargo policy form, called the "warehouse to warehouse" clause, governs the duration for which the goods will be covered in their transport[43].
As a result of this clause the goods remain covered from the moment they leave the warehouse of the shipper, which could be at an inland point, until they reach the warehouse used by the assured at the final point of destination, which could also be inland. Thus, the policy covers not only perils of the sea during the ocean transport, but, also land transport risks to which the goods are exposed during their inland journey.

66. Article 10 of the cargo policy, however, restricts the application of the warehouse-to-warehouse cover by terminating the cover when the assured interrupts the transit or takes advance delivery of the goods before they have reached their designated destination[44]. Article 11, on the other hand, constitutes an extension of the warehouse-to-warehouse clause in that it continues the cover in the case of any interruptions or prolongations of the voyage which might occur beyond the control of the assured, such as deviations, trans-shipments, etc., until the goods can be forwarded to the final point of destination or the assured takes advance delivery. To the extent that such occurrences result in an aggravation of the risks borne by the insurers, they are entitled to charge additional premium[45].

67. To a large extent, the British and the French warehouse-to-warehouse clauses are similar in effect. The British version is incorporated in article 1 (the "transit" clause) of the Institute Cargo Clauses and should be read in conjunction with article 2, the "termination of adventure" clause. There are, however, certain important differences. For example, article 9 of the French

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[42] However, British F.P.A. conditions are not substantially different from standard French conditions, since pilferage is not a listed peril in the perils and F.P.A. clauses. Nevertheless, theft, as used in the British perils clause to mean theft by violence, is covered by British conditions but apparently not in standard French conditions.

[43] Paragraph 1, which covers the general application of article 9, reads as follows:
Duration of risk: The underwriters are on risk for the period starting at the time when the insured cargo, ready for forwarding, leaves the warehouses at the first starting point of the insured voyage and ending when the laid cargo enters the warehouses of the consignee or his representatives or other authorized persons at the place of destination of the said voyage. The expression "warehouses of the consignee or his representatives or other authorized persons' shall include any place, whether belonging to them or not, where they place cargo on arrival.
"In any case, at the place of destination, the cover by insurers, in warehouses, public or private docks, bonded warehouses or on the quayside, cannot, without special agreement and premium, exceed a period of thirty days counting from the moment when the insured cargo bas begin discharged from the transporting vessel or other means of transport, this period is reduced to fifteen days when the place of destination is an inland place."

[44] Article 10 reads: "Any taking of delivery of the insured goods by the assured, the shipper, the consignee or their representatives or other authorized persons before the time when the period of being on risk should normally end under the terms of the present chapter shall end such period for insurers."

[45] " Article 11 reads: "The risks insured remain covered under the same conditions without additional premium in the case of direct calls, and, where appropriate, with additional premium in the case of ail other calls, deviations or transhipment as well as in ail cases of extension of the normal duration of the insured voyage. No additional premium shall be due when these facts arise front a risk covered by the policy."

policy provides that the cover will cease 30 days after discharge from the vehicle of transport, or 15 days if the destination is inland. The British transit clause stipulates that the coverage will cease 60 days after the goods are discharged from the oversea vessel. It is important to note that under the French policy the time period does not begin running until discharge of the goods from the last vehicle of transport, which could thus be from a truck or other means of transport at an inland point, whereas under the British clause the period, although longer, always commences at the time of discharge at the port. There are also differences in the treatment of the situations when the insurers can charge more premium for prolongations of the transport. Article 11 of the French policy refers to several situations, whereas article 2 of the Institute Cargo Clauses is restricted to situations where the voyage is considered terminated at a point other than the designated destination.

(d) Types of policies

68. The traditional policy has been the voyage policy, which is limited to a specific insured voyage and subject-matter. It is now relatively uncommon to use a voyage policy in either hull or cargo insurance.

69. For cargo insurance, it is possible to have what is termed a declaration policy (*police à alimenter*), which is used for commercial contracts comprising various shipments to be spread out over an indefinite period. Rather than conclude a specific policy for each shipment, the assured subscribes to one policy indicating a total value for all the merchandise to be sent and the number of shipments. Before each shipment the assured informs the insurer of the nature, composition and value of the shipment. The shipment is covered by the insurance and the value of each shipment is applied to the total value of the insurance until it is exhausted. Another possibility for cargo insurance is an open policy (*police d'abonnement*) which is concluded in advance for a designated period of time, usually for one year. Such open policies are designed to cover automatically ail shipments made by the assured up to a stated maximum value per shipment. The assured in turn is obligated to apply to the policy all the shipments concerning it by declaring them to the insurer with the aid of a counterfoil book.

70. A "third party shipper" or "bailee" policy (*police tiers chargeurs*) is issued by shipping companies and forwarders for cargo that their clients have requested them to insure in addition to transporting the cargo concerned or arranging to have it transported. In form, this type of policy is similar to an open policy except that the assured in name, that is the shipping company or forwarder, is not obligated to apply all shipments to such policy, but only those for which his client has requested insurance.

71. Upon application of a shipment to the policy subscribed, the insurers issue a certificate of insurance for each shipment. The certificate attests that the designated goods are insured under the terms and conditions indicated thereon. In case of loss or damage of the goods, the original of the certificate must be submitted to the insurers before any indemnity is payable. The certificate is frequently required by banks, particularly involving documentary credits. It can be made out to a named person, to his order or to bearer. The certificate of insurance is, in effect, an attestation that these goods are insured as specified. Nevertheless, it is subject to the full terms and conditions contained in the actual contract of insurance. It should also be noted that article 25 of the 1967 law, one of the imperative provisions previously discussed (see para. 13

above), protects a third-party holder of a certificate of an insurance subscribed for his account from the effects of a suspension or cancellation of the insurance for failure to pay the premium when such party has become a beneficiary of the insurance before the notification of suspension or cancellation.

72. For hull insurance, the policy is usually subscribed for a period of I2 months. Nevertheless, it is also possible to obtain longer-term contracts (*contrats de durée*) lasting for two or three years.

(e) Insured and agreed values

73. Cargo insurance utilizes what is referred to as an "insured value", whereby the actual value of the insured object is ultimately determinative of the indemnity payable despite the existence of a value, that is, the insured value, stipulated in the policy[46]. Thus, article 12 of the cargo policy form indicates that the insurers have the right to request, at the time of a claim on the policy, that the assured prove the actual value of the goods. If the insured value is in fact greater than the actual value, then the insured value is reduced to the actual value, increased by 20 per cent. The policy indicates that the actual value is determined by the invoice value augmented by all expenses and insurance premiums relating to the shipment of the goods. It thus corresponds in practice to the c.i.f. value plus 20 per cent[47].

74. In hull insurance, the insured value is an agreed value and is determined contractually by the parties to the contract. As indicated in effect by article 41 of the 1967 law and article 12 of the hull policy form, the agreed value established for the vessel is mutually binding on the parties, except in the case of an exaggerated overvaluation[48]. Thus, the hull insurance policy is valid up to the full amount of the insurance purchased, i.e., the sum insured, regardless of the actual value of the vessel[49]. Although in principle the parties are not free to establish an agreed value which is higher than the actual value of the vessel, nevertheless the agreed value does not necessarily correspond to the market value of the vessel, which is susceptible to significant fluctuations depending on general economic conditions.

75. The agreed value of the vessel determines the limit of the insurers' engagement on a per voyage basis. That is to say, after each occurrence during a voyage giving rise to a claim, the

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46 This approach reflects the first part of article 11 of the 1967 law, the full text of which reads as follows: "In the absence of fraud, the policy is valid up to the real value of the property insured and, if it has been agreed, for the whole of the sum insured."

47 " Article 12 reads in the relevant part:

"l. Authorized proportions of over-evaluation: Notwithstanding all agreed values, insurers may in case of any claim for damage or loss require justification of the actual value and in case of exaggeration reduce the amount of the insured value to chat of the true value plus twenty per centum thereof.

"The effective value is determined by the invoice on purchase (or failing chat, by the current prices of the insured goods at the time and place of consignment), as well as by the charges, insurance premiums included, relating to the insured consignment."

48 Article 41 of the law of 1967 states: "when the insured value of the vessel is an agreed value, the parties mutually forbid any other estimation, except as provided for in articles 10 [instances of fraud] and 30 [relating to indemnity for general average contributions and salvage expenses]". A similar provision, in effect, can be found in section 27 (3) of the 1906 Act.

Article 12 of the hull policy states of the agreed value, in the relevant part, "the parties waiving mutually all the other estimates, except in case of exaggerated overvaluing [*majoration anormale]* and subject to the contents of the first paragraph of article 26 and to article 27 [applicable to general average contributions and salvage]".

49 This approach reflects the second part of article 11 of the 1967 law: "and, if it has been agreed, for the whole of the sum insured".

amount of the insurance is reduced by the indemnity payable. Nevertheless, in a time policy, where there are several voyages during the policy, the amount of the insurance is reconstituted automatically at the end of each voyage (since the agreed value applies in full to each voyage). Thus, the insurers are at risk up to the agreed value for the next voyage, as if there were as many distinct policies as there are voyages. However, in order to avoid situations where the amount of insurance is inadequate to cover the vessel for the rest of the voyage after an accident has occurred giving rise to a claim, the policy provides that the amount of the insurance will be automatically reconstituted for the duration of the voyage after each accident, but that an additional premium will be payable for the amount reconstituted, calculated on the number of days necessary to complete the voyage after the accident[50].

76. As was indicated earlier (sec para. 47 above), the agreed value in the hull policy now provides for a separate fund equal to the agreed value for collision liability claims and another separate limit of the agreed value for claims under the policy for physical loss or damage of the vessel. It should also be observed that the agreed value of the vessel serves as a basis upon which the premium for the marine hull insurance policy is calculated, the premium being determined as the function of the particular rate applied to this value.

(f) Deductibles

77. The determination of the level of the deductible is approached on a case-by-case basis in negotiations with insurers and the assured, and the level set is the result of the appreciation of the risk and often of the assured's desire to lower the premium (which can be achieved by accepting to bear a greater proportion of potential future claims under the policy in the form of a deductible).

78. In hull insurance, the deductible is applied on a basis which is equivalent to the British market "all claims, each accident" approach (*par navire et par événement*). The policy thus applies the deductible to all types of claims arising out of a single accident, including collision liability claims, salvage and general average, except for claims for total loss or abandonment for which no deduction is made. It is understood that, as is the case under British conditions, the deductible is applied to claims for expenses arising from conservation, or "sue and labour", measures[51]. This practice has previously been criticized by the UNCTAD secretariat on the grounds that since such conservation measures operate to the benefit of the insurer, it is unjust chat the insurer should apply a deductible to such effort[52].

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[50] Article 31 of the hull policy reads as follows:
"Insurers' liability is limited, for each voyage, to the vessel's agreed value, for loss and damage covered by article 1 and to a sum equal to the vessel's agreed value for Third Party claims covered by article 2.
"However, the sum insured shall be reinstated automatically after each casualty subject to the payment of an additional premium calculated on a daily basis for the time required to complete the voyage after the event in question. During periods of lay-up described under paragraph 3 of article 21, the additional premium will be calculated per each fifteen commenced days for the remaining period of lay-up following the casualty.
"In all cases giving rise to claims under this police, Insurers shall only be liable pro rata to the sum subscribed hy each of them."
[51] For an explanation of "sue and labour", or conservation, measures, see para. 43 above.
[52] Legal and Documentary Aspects ..., para. 148.

79. In addition to the use of a uniform level deductible, which can be obtained by the attachment of, for example, the additional clause IX[53], it is also possible to have a deductible consisting of two different amounts, the application of which will depend on the nature of the occurrence giving rise to the claim. This variable type of deductible can be obtained by the attachment of additional clause III "*Assurance tous risques*"[54]. Through the use of this clause, there would be one level of deductible to be agreed upon which would be applicable to claims arising from certain major listed occurrences: collision with a vessel as well as with fixed or floating objects, stranding, fire and explosion. There would be another higher level deductible applied to all other events resulting in particular average claims. As is the case with clause IX, claims for total loss and abandonment, under clause III, would be adjusted without application of a deductible.

80. Based on the wording of the French hull policy form, there would appear to be a certain practical difficulty in determining when a series of occurrences are sufficiently connected to be treated as one occurrence for the application of one deductible, or several separate occurrences each with its own deductible. This same difficulty exists in British conditions, which apply a deductible to "each separate accident or occurrence" (clause 12 of the Institute Time Clauses: Hulls), and it has previously been suggested by the UNCTAD secretariat that the phrase needs clarifying language to assist its application in difficult situations, such as multiple contacts during a single canal transit or ranging operation[55].

81. As to cargo insurance, it is present practice to insure general merchandise on the following conditions: "All risks + theft, entire adjustment without deductible (R.I.S.F.)". Nevertheless, there is a certain tendency on the part of large exporters and importers, who have floating or open policies, to accept, if not seek, deductibles in order to eliminate small claims, which unduly hurt their claims statistics, with the resulting impact on their premium rate. As opposed to the insurance of general merchandise, bulk cargo, such as ore, coal and petroleum products, is usually on "F.A.P. Sauf" conditions with the use of a deductible.

82. To the extent that a deductible is utilized in cargo insurance, article 22 of the cargo policy form provides for a 5 per cent deductible, unless otherwise agreed[56]. In conformity with article 20[57], the deductible is applied on a per package basis so that in a shipment consisting of I00 equal packages valued as a whole at 100,000 francs, the total franchise of F 5,000 (5 per cent of

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[53] Clause IX reads: "Payment will be made without deductible in the event of total loss or abandonment of the insured vessel. All other compensation due by the insurers on the vessel and for any one occurrence will be paid after deduction of a franchise of ...".

[54] Clause III consists of two paragraphs, the first of which is identical to clause IX, and the second of which reads: "The amount of such deductible will be increased to ... for any occurrence giving rise to a reimbursement for particular average and not resulting from collision, stranding, tire, explosion or impact of the insured vessel against a fixed, mobile or floating object."

[55] Legal and Documentary Aspects ..., para. 146.

[56] Article 22 reads as follows:

"Franchise is always independent of ordinary leakage, wastage or ordinary or natural loss, in so far as they are accounted for in the trade contract or, if not, by trading practice and which shall never be charged to insurers.

"It is calculated on the insured value which is used as a basis for settlement in accordance with article 20.

"In the absence of agreement to the contrary, material partial losses will be settled subject to the deduction of a franchise of five per cent. Nevertheless chose which arise from one of the events referred to in paragraph 3 of article 2 ["F.A.P. Sauf" conditions] shall be settled without franchise on all packages other than chose containing liquids. Particular average charges and general average contribution will also be settled without franchise."

[57] "Article 20 reads: "In ail cases giving rise to claims against insurers, settlement will be made separately on each package, whether or not it forms part of a load, except for cargoes shipped in bulk, on which it will be calculated per hold and per individual account."

the insured value) is split up into I00 individual deductibles of F 50. Thus, damage to a package amounting to F 500 would result in an indemnity payable of F 450. Also, since the deductible does not apply to total losses, a loss of a package is a "total loss" by the terms of article 20 and will thus be indemnified without application of a deductible. Furthermore, the deductible is inapplicable to dry cargo insured on "F.A.P. Sauf" conditions as well as to all claims for particular charges and general average contributions.

83. As to the treatment of recoveries from third parties responsible for damage which has been indemnified by the insurers and to which, thus, the insurer is subrogated[58], it is understood to be the practice in the French market to treat the existence of a deductible as granting the assured a co-insurer status so as to permit a proportional allocation of the recovery between the insurer and the assured on the basis of the respective amounts of the loss borne by each. This is in direct contrast to British conditions, in which it is provided that the insurer shall receive all of the recovery up to the full claim paid, and only after this amount is reached will the assured receive any of the recovery to offset his deductible[59]. The approach of the British conditions has previously been criticized by the UNCTAD secretariat as being inequitable[60], and it was recommended that the proportional distribution approach used in such markets as the United States of America, Norway and France should be adopted. However, although the French market uses the preferred approach, it is not contained in either the 1967 law or the policy clauses: it is applied only as a result of market practice. In view of the need to provide as much certainty as is reasonably possible in the insurance contractual relationship, it is suggested that an appropriate clause be inserted in the policy forms.

(g) Survey of loss or damage

84. It is pointed out in both the hall and cargo policy forms that the assured is obligated to preserve the insured object from further damage once an accident has occurred and to preserve any right of recourse against other persons who might be liable for the loss or damage. It is also indicated in both policies that the assured is liable for his negligence in preserving or failing to take the necessary measures to preserve the insured object and possible rights of recourse[61].

85. Verification of the loss or damage of the insured object involves the use of claims agents (*commissaires d'avaries*) who, at the request of the assured, determine, through the use of a surveyor, the nature and extent of the loss or damage, its cause, and, in the case of hull insurance, the work necessary to repair the vessel[62]. The claims agent can also assist the assured in preserving his rights of recourse against third parties responsible for the loss or damage. In determining the loss or damage to the insured object, it is important to note that the claims agent does not determine whether and to what extent the insurer is liable under the policy. There are, nevertheless, exceptions to this principle in certain places where the marine insurers have given the claims agent the role of *agent payeur,* whereby the claims agent has not only the responsibility for determining the loss or damage, but also the power to determine the indemnity payable under the policy and to pay the indemnity.

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[58] Article 33 of the 1967 law sets forth the subrogation principle by providing, in effect, that the insurer who has paid the insurance indemnity acquires, up to the extent of his payment, ail the rights of the assured arising from the damage which had given rise to the indemnitv.

[59] As a result of the fourth paragraph of clause 12 of the Institute Time Clause,: Hulls.

[60] *Legal and Documentary Aspects* ..., paras. 171-174.

[61] See footnote 24 above.

[62] Article 18 of the cargo policy and article 23 of the hull policy

86. Both the hall and the cargo policies establish time-limits within which the process of verification of the loss or damage must be initiated. For the cargo policy (article 19), it is set at 30 days from the time the goods are discharged at the destination point, or 15 days if discharge is at an inland point, subject to the penalty of not being admitted after these dates. For the hull policy (article 23), it is set at 30 days from the arrival at the port at the end of the voyage during which the damage occurred.

(h) Adjustment of damage and loss claims

87. In settling claims by determining the indemnity payable, it should be noted that there is a fundamental distinction between an average adjustment (*règlement en avaries*) and an adjustment on the basis of abandonment of the property (*règlement en délaissement*).

(i) Average adjustment in cargo insurance63

88. The insurers reimburse for the damage or loss determined by the claims agent or surveyor on the basis of the value of the insurance. In the case of shortage (loss of packages, for example), the adjustment of the claim is made on the basis of the individual value of each article or package insured. In the case of damage (average) for which the claims agent or surveyor has accorded a depreciation in terms of a percentage, the determination of the indemnity payable by the insurer is obtained by applying this percentage depreciation to the value of the insurance for the goods. In the event that the damaged goods are sold publicly or privately after damage, the proceeds of the sale are deducted from the value of the goods in an undamaged state at the place of sale. In comparing the remaining value to the value of the goods in an undamaged state, the rate of damage is then obtained. The indemnity is calculated by applying this rate to the value of the insurance. Lastly, if the insured object has been repaired, the insurer indemnifies the cost of the repairs up to the value of the insurance.

(ii) Average adjustment in hull insurance[64]

89. The indemnity payable for damage to the vessel is based on the completed cost of repairs. In other words, for all claims submitted to insurers, the damage must be repaired and the cost of the repairs must be substantiated by paid invoices, that is, already paid by the assured himself, before an indemnity is paid. However, in practice, French marine insurers settle instalment payments for major repair work payable by the assured to the extent of the progress of the repairs without waiting for the submission of ail the paid invoices for the completed repairs. Although this practice alleviates what would otherwise be a substantial burden on shipowner assureds, the policy does not contain a provision giving the assured any right to such advance payments on account. The absence of such a clause in British policies has been criticized in a previous UNCTAD secretariat document[65].

90. In addition to the cost of repairs, reimbursement is given for accessory expenses to the extent that they are inevitable consequences of the repairs, such as the costs of entering or

[63] Articles 20 and 21 of the cargo policy.
[64] 'Article 23 of the hull policy.
[65] " Legal and Documentary Aspects ..., para. 162.

leaving port, pilotage and towage fees, the cost of drydocking, etc. Insurers also reimburse the amount of general average contribution and salvage incumbent on the assured[66]. Furthermore, since shipowners frequently hesitate to demand general average contributions from cargo interests when relatively small sums of money are involved (in view of the expensive and time-consuming nature of a full general average adjustment), the policy provides that in cases where the amount of admissible damage or expenses does not exceed F 250,000, the entire amount will be borne by the insurer, thereby relieving the shipowner of the need to claim general average contributions from the cargo interests[67].

(iii) Adjustment on the basis of abandonment

91. The adjustment of claims on the basis of abandonment of the vessel or cargo presents an exceptional method of settling a claim. Under the French system, this method of adjustment can be used only in the cases specifically provided for in the policy. Article 24 of the cargo policy envisages four possibilities: (1) loss without news; (2) a sale of goods in the course of the voyage because of damage; (3) the carrying vessel is not in a condition to continue the voyage and (4) the claim for loss or damage attains three quarters of the insured value. Article 22 of the hull policy form provides for two possibilities: (1) disappearance or total loss of the vessel and (2) unseaworthiness of the vessel resulting from one of the risks covered by the policy. If' the amount of repairs equals or exceeds the agreed value, and if the vessel is condemned as a result, it is deemed to be unseaworthy and may be abandoned to the insurers.

92. In both cargo and hull insurance, the insurers, when presented with a request to abandon, always reserve the right to accept or refuse the abandonment[68]. If they accept if, they settle the claim on the basis of a total loss, that is, they indemnify the assured for the full value of the insurance, and they become the owners of the insured object. If the insurers refuse to accept the abandonment, they still settle the claim on the basis of a total loss, but the ownership of the property remains with the assured.

2. Liability Insurance Policies

93. It has been pointed out previously (see paras. 46-52 above) that the hull policy form offers limited liability coverage in article 2 for collision liability claims. There are also additional clauses offering more extensive liability coverage for property or death and personal injury claims. Nevertheless, these additional clauses do not offer independent coverage by themselves; rather they require the existence of a hull policy to which they can be attached, and they do not apply for certain risks until the amount of the liability insurance coverage in the basic hull policy has been used up. Furthermore, with certain exceptions they do not relate to contractual claims.

94. For these reasons, the French market issued in 1972 two policies offering for fixed premiums a certain liability coverage, usually furnished by Protection and Indemnity (P and I) Clubs. One of these policies covers the assured's liabilities arising out of the existence of the insured object as a vessel, such as claims for loss of life and personal injury, wreck removal,

[66] .Articles 26 and 27 of the hull policy
[67] Article 26 (4) of the hull policy.
[68] Article 24 (3) of the cargo policy and article 22 (3) of the hull policy.

quarantine expenses, etc. and the other policy covers liabilities resulting from the operation of the vessel as a commercial enterprise, that is to say, the assured's liabilities for loss or damage to cargo incurred in his commercial role as an ocean carrier of goods.

C. Market practices as to the placement of insurance

95. As a result of France's membership of the European Economic Community, the market practices relating to the placement of a marine insurance risk are now in the process of changing. Until 1 December 1978, marine insurance brokerage activities were in principle the monopoly of what were known as sworn brokers (*courtiers jurés*). However, the existence of such a monopoly was contrary to the Treaty of Rome and it was therefore eliminated. A private market agreement applicable to brokers is currently being drawn up which, it is understood, will establish minimum qualifications, a code of conduct etc., for brokers operating in thé market.

96. As to the setting of premium rates, there is an organ of the French Transport Insurance Association, a professional group comprising most marine insurers in the French market, which examines hull insurance proposals and advises on premium rates. There appears to be no obligation to adhere to the recommended premium rate.

D. The situation in French-speaking African countries

97. As a general rule, the policies and legislation in French-speaking African countries reflect the situation which existed at the time each country obtained its independence from colonial rule. Since the reform law of 1967 in France was enacted after the independence of those States, neither this law nor the revised policies which reflect the new legislation have been in force. The hull and cargo insurance policies based on the prior Code of Commerce and Civil Code provisions are used instead.

98. However, as of 1 January 1980, what is known as an "adaptation clause" has been introduced for possible use in hull insurance policies in these States if desired. It has been asserted that this clause will enable the new French hull policy forms of 1 January 1979 to be used. The clause adapts the provisions of the new French policy form to the legislative provisions locally in force by replacing the preamble of the policy form, which makes reference to the French insurance law, with the following text:

The present contract is governed by the laws and regulations in force in the State where the policy is entered into, to the extent that it does not alter their non-impérative provisions by the following conditions.

It is understood that this clause is in use in Gabon, Ivory Coast and the United Republic of Cameroon.

99. As to cargo insurance, the old French policy form of I7 August 1944 is used. Nevertheless, the essential provisions, in particular those relating to the types of conditions, have been taken over by the new French policy forms.

100. As in the case with French assureds, the assureds in those countries seek to obtain as wide an insurance coverage as possible. For both exports and imports, the cargo coverage "all risks + theft, R.I.S.F." is frequently requested. However, it should be noted that cargo from and to land-locked countries is generally insured only on "F.A.P. Sauf" conditions. The reason given for this

difference in treatment is that the breaking bulk of the merchandise which is undertaken in the course of land transport in Africa, as well as the accumulation of goods at certain border crossings, is viewed as an aggravation of the risks for the insurers, so that they grant only the more limited cover.

Part Two Legal And Documentary Aspects Of Latin American Marine Insurance Legal Regimes

Background

The present report was originally issued in October I980 as document TD/B/C.4/ISL/31, for consideration by the UNCTAD Working Group on International Shipping Legislation at its seventh session, which was held from I to 19 December 1980.

At its sixth session, the Working Group, after considering another secretariat report, entitled *Legal and Documentary Aspects of the Marine Insurance Contract*[69], unanimously decided, in its resolution 3 (VI) of 26 June 1979, (a) to examine the existing marine insurance policy conditions and practices used in national markets covering international business, (b) to investigate the different legal systems governing marine insurance contras and (c) in the light of these studies, and bearing in mind the suggestions contained in sections V and VI of the report, to draw up a set of standard clauses as a non-mandatory international model[70].

The work of drawing up a set of clauses, as recommended in resolution 3 (VI), commenced at the seventh session of the Working Group. As a result of the decision of the Committee on Shipping at its ninth session, held from I to 12 September 1980, the seventh session of the Working Group was devoted to hull insurance. As background documentation for that session, the UNCTAD secretariat submitted to the Group two complementary studies, one of which is the present report and the other a report entitled "*Legal and documentary aspects of the French marine insurance legal regime*"[71]. At its seventh session, the Working Group formulated two composite texts as a basis for work on a set of risk clauses and one composite text as a basis for work on a collision liability clause. It was resolved that the eighth session should be dedicated to continuing the work on hull insurance and to commencing work on cargo insurance (resolution 4 (VII) of 19 December I980)[72].

Chapter I Introduction

1. In its resolution 3 (VI) of 26 June 1979[73], adopted at its sixth session, held from 18 to 26 June 1979, the Working Group on International Shipping Legislation recommended to the Committee on Shipping that work be undertaken within the Working Group, at the expert level, to formulate a set of standard clauses to marine insurance contracts by:

(a) Examining the existing marine insurance policy conditions and practices used in national markets covering international business;

(b) Investigating the different legal systems governing marine insurance contracts;

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69 TD/B/C.4/ISL/27/Rev.l (United Nations publication, Sales No. E.82.II.D.5).

70 The report of the Working Group on its sixth session is contained in document TD/B/C.4/ISL/28.

71 Part one of the present document.

72 The report of the Working Group on its seventh session, with the composite texts, is contained in document TD/B/C.4/ISL/32.

73 See the report of the Working Group (TD/B/C.4/ISL/28), annex I.

(c) In the light of these studies, and bearing in mind the suggestions contained in sections V and VI of the report of the UNCTAD secretariat[74], drawing up a set of standard clauses as a non-mandatory international model.

2. In response to the views expressed at the sixth session of the Working Group and in order to assist the work to be undertaken within the Working Group, the UNCTAD secretariat has prepared a report analysing certain Latin American marine insurance legal regimes. In view of the number of countries in the region, it was decided to choose a few countries that would give some illustration of the legal regimes involved. The countries studied, which are Spanish-speaking, are Argentina, Chile, Colombia, Ecuador, Mexico and Peru.

3. As a result of the time constraints and restrictions on the length of documentation, as well as the difficulties experienced in obtaining adequate information, the present report is not a comprehensive analysis of all aspects of the marine insurance legal regimes studied. Rather, it is intended as a general aid to the Working Group in its investigation of the different marine insurance legal regimes and is thus limited to an analysis of certain major aspects of the legislation and standard policy forms for hull and cargo insurance, and to some market practices affecting marine insurance policies in the countries under consideration.

4. The report is based to a certain extent on information provided by an expert from one of the countries studied, who acted in the capacity of consultant to the UNCTAD secretariat.

Chapter II Legal and Documentary Aspects of Latin American Marine Insurance Regimes

A. The legislation

5. As a rule, the legislation governing marine insurance contracts is contained in a section of the national commercial code applicable to insurance contracts in general and in a separate section specifically applicable to marine insurance. In the case of Argentina, there is a general Insurance Act of 1967 applicable to all insurance contracts, including marine insurance contracts, to the extent that they are not contrary to specific laws or the nature of marine insurance, and also a special chapter referring to marine insurance in the Navigation Act of 1973. In Mexico, there are provisions on marine insurance in the Code of Commerce, in article 3 of the Insurance Contract Act of 1935, which is applicable to marine insurance to the extent that its provisions are not incompatible with the Code of Commerce, and in a specific chapter on marine insurance (chap. IV) in the Navigation and Maritime Trade Act.

6. Since the legal systems of all the countries analysed belong to the civil law tradition, the French Code of Commerce of 1807 and the Spanish Codes of Commerce of 1829 and 1885 have had a noticeable influence on them. However, special reference needs to be made to the marine insurance provisions in the Commercial Code of Colombia, Since they reflect in many respects the influence of the Marine Insurance Act, 1906 (hereinafter referred to as the 1906 Act) of the United Kingdom of Great Britain and Northern Ireland.

[74] Legal and Documentary Aspects of the Marine Insurance Contract (United Nations publication, Sales No. E.82.II.D.5).

1. Essential Elements of the Contract and contents of the Policy

7. It is generally required that the marine insurance contract be evidenced in writing and embodied in a policy[75]. However, under article 11 of the Argentine Insurance Act, the marine insurance contract is deemed to be concluded upon the agreement of the parties and the policy is considered as a means of evidence. Furthermore, under article 515 of the Chilean Code of Commerce, verbal insurance contracts are valid on a provisional basis and the parties are authorized to demand the issuance of a policy.

8. Some commercial codes prescribe the essential elements of a contract, the absence of which will render the contract null. The Colombian Code requires an insurable interest, an insurable risk, a premium and a conditional liability of the insurer (article I045). The Ecuadorian Code provides for a similar list, but specifies in addition an insurer, an applicant for insurance and an amount insured or the insurer's limit of liability (title XVII, article 2). The Chilean Code does not contain such a list, but instead provides that if there is no insurable interest, or if the premium has not been stipulated, the contract is null (articles 5I8 and 541). The Peruvian Code does not expressly lay down the essential elements of an insurance contract, but it does stipulate that, in order to be valid, the marine insurance contract must be in writing and signed by the contracting parties[76]. Article 2 of the Argentine Insurance Act and article 426 of its Navigation Act require an insurable interest and, in hull insurance policies, a declaration of the value of the vessel.

9. Most of the national laws considered in the present report specify the data which the policies should contain, such as the names of the insurer and assured, whether the assured is contracting on his own behalf or on that of another, the subject-matter insured, the value of the subject-matter to be insured, the insured risks, the premium, the amount of insurance (the sum insured) and the commencement and termination of the risk[77].

2. Imperative provisions

10. Most of the laws of the countries studied, by and large, leave the parties free to agree upon insurance conditions as they choose, apart from a few imperative provisions with which compliance is required. Some legislation specifies in one article which provisions are imperative and thus not alterable by contract, as in the French marine insurance legislation of 1967[78], whereas other legislation does not appear to do so. Within the time available, the UNCTAD secretariat has been unable to identify all the provisions of the legislation studied which are considered to be imperative. Nevertheless, it has been informed that the Commercial Code provisions stipulating the essential elements of the insurance contract listed above (para. 8) are imperative, as are also the Argentine Navigation Act requirement chat hull insurance contracts

[75] For example, the Codes of Commerce of Colombia (articles 1(136 and 1046), Ecuador (title XVII, article 6), Mexico (article 812) and Peru (article 750).

[76] Code of Commerce (article 750). It appears that coverage is granted in practice when the contracting parties agree on the terms of the insurance whether or not the policy has been issued.

[77] See the Codes of Commerce of Colombia (article 1047), Chile (article 516), Ecuador (title XVII, article 7), Mexico (article 813) and Peru (article 751).

[78] For example, the Mexican Insurance Contract Act, which provides in article 193 that ail the provisions of the Act are imperative except those which expressly provide for the parties Io agree otherwise, and the Argentine Insurance Act, which gives a list of imperative provisions in article 158.

shall be null unless the value of the vessel is declared (article 426); the stipulation in Peruvian and Mexican law that the marine insurance contract shall be null if it is effected on the lives of the crew or passengers, on crew wages, on illegal goods, on goods subject to a bottomry loan, on vessels habitually engaged in smuggling, or on objects for which a false valuation has been knowingly set[79]; the prohibition in the Codes of Commerce of Colombia (article I055) and Ecuador (title XVII, article II) against providing insurance for fraud, gross negligence or purely facultative acts by the assured; and the requirement in article 750 of the Peruvian Code of Commerce that, to be valid, the marine insurance contract must be embodied in writing in the policy.

11. Furthermore, from an analysis of the wording of the relevant provisions, there would appear to be several other imperative provisions in the legislation studied. For example, the prohibition, in article 552 of the Chilean Code of Commerce, against providing insurance for the personal acts of the assured, and the requirement in articles 518 and 541 that the marine insurance contract will be valid only if there is an insurable interest and a stipulation of the premium, appear to be imperative, as does the Argentine Navigation. Act requirement in article 417 that marine insurance contracts relating to a period before they were entered into must state on the policy that the transport has commenced or that the assured is unaware of the fact, as well as the latest news received concerning it. As to the identification of other national imperative provisions, it would appear that, in view of the diversity of national legal systems and the complexity of the subject, the most effective means of obtaining a comprehensive international survey may be to obtain the advice of marine insurance experts from the countries represented at the Working Group as each subject is dealt with by it.

3. Insurable interest

12. The Peruvian Code of Commerce does not expressly require the assured to have an insurable interest for an insurance to be valid, nor does it indicate the time at which an insurable interest must be vested in the assured, that is, whether the assured must have an insurable interest at the time of entering into the insurance contract or only at the time of loss. Furthermore, there are no judicial decisions on the issue. Of the other legislation studied on this point, most contain provisions expressly requiring the existence of an insurable interest for the marine insurance contract to be valid[80], and most stipulate that the marine insurance contract is a contract of indemnity, thus preventing the assured from profiting from a loss[81].

13. Actual definitions or descriptions of what constitutes an insurable interest vary from country to country, though all have the common goal of identifying those interests which are considered to be legitimate subjects of insurance. Article 5I8 of the Chilean Code requires the assured to have an insurable interest at the time of entering into the contract, whether as owner, co-partner, trustee, usufructuary, lessee, creditor or custodian, or generally in any way which would make him interested in the preservation of the object insured. Article 1083 of the Colombian Code states that any interest is insurable if it is capable of being subject to a

[79] 'Codes of Commerce of Mexico (article 856) and Peru (article 794). See also the Code of Commerce of Chile (articles 522 and 1218).

[80] Insurance Act of Argentina (article 2), and Codes of Commerce of Colombia (article 1045) and Ecuador (title XVII, article 2). Generally speaking, the incurable interest must exist at the time the contract is entered into, and continue to exist until the contract is terminated. Sec, for instance, the Insurance Act of Argentina (article 81) and the Commercial Code of Ecuador (article 29).

[81] Codes of Commerce of Chile (article 517), Colombia (article 1088), and Ecuador (title XVII, article 32).

monetary evaluation and any person whose property may be directly or indirectly affected by the occurrence of a risk has an insurable interest. Article 27 of the Ecuadorian Code contains a description of insurable interest, which is generally reflected in article 60 of the Argentine Insurance Act and article 85 of the Mexican Insurance Contract Act as any economic interest that a person has in preventing an accident.

14. Before dealing with the issue of whether marine insurance policies can be assigned, it should first be noted that all the legislation studied contains general provisions regulating the continued application of the marine insurance contract if the subject-matter of the insurance is sold[82]. Furthermore, hull insurance policies frequently contain provisions restricting the application of the policy in the case of a change of ownership of the insured vessel[83].

15. AU the legislation analysed envisages the possibility of assignment of marine insurance policies by providing that the policy may be made out to the order of the assured, in which case it can be transferred by endorsement[84]; article 13 of the Argentine Insurance Act and article 514 of the Chilean Code of Commerce permit in addition the use of bearer policies. In the event of an assignment of the policy, the assignee will have all the rights of the assignor in the policy and, similarly, the insurer will be able to rely on all the defences against the assignee that were originally available against the assignor.

16. All the laws of the countries studied provide for situations in which the parties enter into the contract of insurance after the occurrence of a risk or after the insured property has arrived safely at the point of destination. Under ail the laws, the contract of insurance will be null if the assured knew of the loss of the insured object at the time of entering into the contract, or the insurer was aware of its safe arrival[85]. Argentine, Chilean, Mexican and Peruvian law create a presumption of knowledge on the part of the parties to the contract if, in the case of Argentine law, the news of the loss or safe arrival has already reached the place where the contract was entered into, the domicile of the assured or the place where the assured gives orders for the entering into of the contract[86]; or, in the case of Mexican or Peruvian law, if there has been sufficient time to communicate the news to the place where the contract is entered into[87]; or, in the case of the Chilean Code of Commerce (article 1230) (on the assumption that news travels on the average of eight kilometres per hour), the news has arrived at the place of contracting.

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[82] See, for example, the Codes of Commerce of Chile (article 531), Colombia (article I107) and Ecuador (article 43); the Insurance Act of Argentina (article 82) and the Insurance Contract Act of Mexico (articles I06-108).

[83] " For example, article I3 of the Argentine general conditions for hull insurance (a standard set of general conditions exists for hull and cargo insurance, drafted under the auspices of the Chamber of Marine Insurance). Furthermore, article 429 of the Argentine Navigation Act provides that a change of ownership involving more than half of the value of the vessel or the transfer of the management of the vessel to a person other than the owner results in the termination of the contract of insurance as of the date of the transfer. See also article 30 of the general conditions used by Popular y Porvenir, Compania de Seguros, of Peru, in its hull insurance policy, Poliza de Casco y Maquinaria de Buque o Embarcacion, and article 36 of the general conditions used by Panamericana del Ecuador, S.A., in its hull insurance policy, Seguro de Casco y Maquindria de Buques. (It has not been possible to determine whether a standard set of general conditions exista in the Ecuadorian mark-et. The UNCTAD secretariat has used the policies issued by Panamericana for hull insurance as well as its cargo policy, Poliza de Seguro de Transportes, and reference has been made to them in the present report as Ecuadorian general hull or cargo conditions.)

[84] Codes of Commerce of Colombia (article 1051), Ecuador (title XVII, article 8), Mexico (article 817) and Peru (article 755).

[85] Navigation Act of Argentina (article 411); Codes of Commerce of Chile (article 1229), Colombia (article 1706), Ecuador (article 932), Mexico (article 859) and Peru (article 797).

[86] " Ibid. In addition, article 417 of the Navigation Act of Argentina provides that if an insurance is applicable to a period of time before the contract is entered into, the assured must stipulate in the policy that the transport has commenced, or chat lie is ignorant of the fact, and the last news received concerning it, otherwise the policy is null.

[87] See footnote 13 above.

Chilean, Mexican and Peruvian law specifically provide for insurance contracts on a "good or bad news" basis (the equivalent to "lost or not lost" in British law[88]. This, in effect, eliminates the presumption of knowledge otherwise created by the respective laws and thus makes such contracts valid, unless it is proved that the parties already knew of the loss or safe arrival before entering into the contract[89].

4. Insurable value

17. As stated earlier, the marine insurance contract is considered to be a contract of indemnity and consequently the assured should not profit by a loss. As a reflection of this principle, marine insurance uses the concept of the incurable value of an object, which is its actual value plus certain allowances, and acts as the basis for determining the proper indemnity payable to the assured for the loss of hic property.

18. The legislation analysed generally contains provisions specifying the factors to be taken into account in determining insurable value. In the case of hull insurance, some national legislation, such as that of Peru, does not specifically refer to determining the incurable value, and, in the legislation that does so, there is usually only a generalized reference to the value of the hull, its outfit, provisions and stores at the commencement of the insurance[90]. For cargo insurance, the Codes of Commerce of Mexico (article 829) and Peru (article 767) contain identical provisions which state that when the value has not been fixed in the policy, the insurable value shall be determined by commercial invoices and by declarations of brokers or experts on the basis of the price of the merchandise at the port of loading plus loading costs, freight and customs duties. In the national legislation of Argentina, Chile and Ecuador, the basic elements constituting insurable value are generally the same as those stipulated above, although reference is made to the insurance premium as well[91]. On the other hand, Colombian law states that insurable value shall be determined by the cost at destination plus a reasonable percentage for profit[92].

19. It is possible to stipulate a value for the subject matter of the insurance in the policy itself, and in the case of hull insurance in Argentina, in article 426 of the Navigation Act, it is a requirement for the validity of the contract. In British law[93], the use of an agreed value is binding on the parties as to the insurable value of the object, except in the case of fraud. Thus, with full insurance, the assured can recover the whole amount of the agreed value of an object totally lost even though at the time of loss the actual value was considerably less. Excessive

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88 See section 6 (1) of the 1906 Act.

89 Codes of Commerce of Chile (article 1230), Mexico (article 860) and Peru (article 798).

90 See, for example, the Navigation Act of Argentina (article 426) and the Code of Commerce of Colombia (article 1709). Such provisions are similar in effect to chat of section 16 of the 1906 Act. Sec also the Navigation and Maritime Commerce Act of Mexico (article 244).

91 Codes of Commerce of Chile (article 1220) and Ecuador (article 923) and the Navigation Act of Argentina (article 440). In the case of the Codes of Commerce of Chile and Ecuador, the reference to insurance premium is in place of customs duties.

92 '° Codes of Commerce (article 1709). Presumably what is meant by the term "cost" is "market value".

93 Section 27 of the 1906 Act. Agreed values are also binding under French law (sec articles 11 and 41 of the 1967 French law of marine insurance). However, in practice, they are used only in hull insurance and not in cargo. Sec TD/B/C.4/ISL/30 (reproduced in the present volume), paras. 73-76.

over-valuation may be grounds for voiding the entire policy on the basis of fraud, gambling or nondisclosure, but not for reducing the valuation[94].

20. The legislation analysed on this point does not treat the legal effect of a value stipulated in the policy in a uniform manner. In some, the stipulated values are treated as creating only a presumption of the incurable value. Thus, if the stipulated value is exaggerated vis-à-vis the actual value, the insurer will be able to reduce the amount of the insurance to the actual value even in the absence of any fraudulent intent on the part of the assured in fixing the value[95]. An exception to this approach is Colombia, where the Code of Commerce contains provisions, in articles I713 and 1752, that are similar in effect to the approach of British law; thus, under such law, the use of an agreed value stipulated in the policy is binding on the parties as to the insurable value. The Codes of Commerce of Chile and Ecuador, although establishing the general principle chat such stipulated valuations merely create a presumption of the insurable value, nevertheless have a provision which states that, once the insured object has arrived safety or has been subject to loss or damage, no reduction can be made in the value stipulated in the policy[96]. It is understood that it is the practice for insurers in countries where the value stipulated in the policy is not completely binding not to question the valuation in determining the indemnity except in cases of gross overvaluation vis-à-vis the actual value.

21. The principle that marine insurance is a contract of indemnity, thereby limiting reimbursement for loss of the insured property to its insurable value, is also reflected in the case of multiple insurance contracts covering the same object against the same risks. AU the legislation analysed contains provisions limiting the total indemnity collectable by the assured in such situations to the extent of the loss up to the actual value of the insured object, or agreed value in the case of Colombia[97]. Most legislation requires the assured to reveal all other insurance, either at the time of contracting (assuming he is aware of the fact) or at the time of making a claim on the policies[98]. The legislation of Chile and Peru makes the first contract in time valid for the risk, the other contracts being null except to the extent that the first does not cover the full insurable value of the object[99]. whereas the other legislation makes all the contracts proportionally liable[100].

5. Insurance of the acts of the assured

22. The national legislation studied differs to some extent on the question of the insurance of the acts of the assured. The Codes of Commerce of both Chile (article 1260) and Ecuador (article 955) exclude losses caused by an act of the assured. Article 410 of the Argentine Navigation Act

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94 Arnould's Law of Marine Insurance and Average, vol. 1, 16th ed., in M.J. Mustill and J.C.B. Gilman, eds., British Shipping Laws (London, Stevens and Sons, Ltd., 1981), pp. 292-294.

95 See, for example, the Codes of Commerce of Chile (article 534 and first paragraph of article 1222), Ecuador (first paragraph of article 925), Mexico (articles 823 and 827) and Peru (article 765, and article 761 as to profit); and the Argentine Navigation Act (article 426) (as to hull insurance, appraisal value is applicable unless there is proof of "considerable diminution" of real value). Proof of fraudulent intent m fixing the value usually nullifies the insurance.

96 Codes of Commerce of Chile (article 1222) and Ecuador (article 925)

97 Codes of Commerce of Chile (article 525), Colombia (articles 1092 and 1752), Ecuador (title XVII, article 36) and Peru (article 795); the Insurance Act of Argentina (article 68); and the Navigation and Maritime Commerce Act of Mexico (article 229).

98 'See, for instance, the Insurance Act of Argentina (article 67); the Code of Commerce of Colombia (articles 1076 and 1093); and the Navigation and Maritime Commerce Act of Mexico (article 228).

99 Codes of Commerce of Chile (article 525, but sec also article 526) and Peru (article 795).

100 Insurance Act of Argentina (article 67, but sec also article 69); Code of Commerce of Colombia (article 1092) and of Ecuador (title XVII, articles 36 and 37); and Navigation Act of Mexico (article 229).

provides that all interests of the vessel, cargo or freight can be insured against any risk of navigation, with the exception of risks originating in the intentional act (*hecho intencional*) of the owner of the insured interest. It also excludes, unless otherwise agreed, losses arising from the intentional misconduct (*hecho ... realizado con dolo*) or gross fault of the assured or his land-based servants and agents (articles 433 (hull) and 438 (cargo)). Article 1730 of the Colombian Code of Commerce excludes losses attributable to intentional misconduct (*dolo*) or gross fault of the assured, the person who took out the insurance or the beneficiary. The Mexican Insurance Contract Act relieves the insurer of liability for losses caused by the intentional misconduct or bad faith (*dolo o mata fe*) of the assured; however, it requires a mere fault of the assured to be covered by the insurer, the only exclusion permitted in the contract being for the assured's gross fault (articles 77 and 78).

23. As to the exclusion of losses arising from acts of the master and crew, Peruvian law excludes losses arising from the barratry of the master[101], unless otherwise agreed, whereas the Mexican Code of Commerce, in article 830, includes these, unless otherwise agreed. The Code of Commerce of Chile, in article 1260, and that of Ecuador, in article 955, exclude losses arising from the intentional misconduct (*dolo)* or fault of the master, unless otherwise agreed. The Colombian Code, in article I730, states that losses caused by insured risks are covered even if they originate in the intentional misconduct or culpable acts (*conducta dolosa o culposa*) of the master or crew. Under articles 432 and 433 of the Argentine Navigation Act, hull insurance coverage includes the consequences of the fault of the master, crew and pilots, but excludes, unless otherwise agreed, the consequences of their intentional misconduct (*actos dolosos*). In case of cargo insurance, it expressly stipulates, in article 439, that the insurance coverage shall include, unless otherwise agreed, losses rising from intentional misconduct (*dolo*) or fault of the shipowner, master, crew and pilots not involving the intervention of the assured.

6. Omission or inaccurate statement by the assured

24. The Code of Commerce of Peru, in article 376, provides that an insurance contract is null if the assured makes an inexact representation, whether or not in good faith, which could influence the estimation of the risks, or fails to disclose or conceals facts or circumstances that would influence the exception of the contract. Under this rule, the insurer may annul the contract, even when the non-disclosure or misrepresentation is unrelated to the cause of the loss. It appears therefore that the rule established under Peruvian law is similar to British law[102].

25. The Code of Commerce of Chile, in articles 556 and 557, lays down a fairly similar rule, as does the Mexican Insurance Contract Act, in articles 8-10 and 47-51. Mexican legislation expressly provides for the policy to be voidable by the insurer even though the non-disclosed or misrepresented information has had no influence on the loss. It also contains additional rules for continuing the insurance in certain cases, as, for instance, when the insurer provoked the non-disclosure or misrepresentation or he knew or should have known of the omitted or misrepresented information.

26. On the other hand, the Codes of Commerce of Colombia, in article I058, and Ecuador, in title XVII, article 14, provide, as to all insurance contracts, chat if the assured, in response to a

[101] `Code of Commerce (article 769). For a definition of barratry, sec footnote 60 below.
[102] See sections 17-20 of the 1906 Act

questionnaire proposal form, fails to disclose or misrepresents facts or circumstances, which, if known to the insurer, would have inhibited him from entering into the contract or would have made him stipulate more onerous conditions, then the contract is voidable by the insurer. If the nondisclosure or misrepresentation of such material information did not arise in convection with the use of a questionnaire proposal form by the insurer, then the contract will be voidable only if the non-disclosure or misrepresentation occurred as a result of the fault of the assured. However, under Colombian law, if the nondisclosure or misrepresentation occurred without the fault of the assured, then the contract is valid but the indemnity for loss will be reduced in proportion to the difference between the premium charged and the premium appropriate to the real nature of the risk. Under both laws, non-disclosure or misrepresentation will not nullify the contract if the insurer had the correct information at the time of entering into the contract, or if he later accepted it.

27. Under article 5 of the Insurance Act of Argentina, every non-disclosure or misrepresentation of information known to the assured, even if occurring innocently, which, in the opinion of experts, would have prevented the insurer from accepting the contract or would have made him modify its terms had he known the true nature of the risk, will render the insurance contract null. The insurer has there months after learning of the non-disclosure or misrepresentation to nullify the contract. However, if it is alleged that the nondisclosure occurred without an intent to deceive on the part of the assured, then the insurer has the option either of annulling the contract or of readjusting its terms in agreement with the assured (article 6). In all cases, however, if a loss occurs during the there-month period in which the insurer must annul the contract, the insurer is not liable for any indemnity under the contract (article 9). It would appear from this last provision that the insurer would also not be liable for any losses that occur before the insurer has knowledge of any nondisclosure or misrepresentation of material information. Nor does there seem to be any requirement that the loss be attributable to the non-disclosed or misrepresented information. It is not known whether there have been any court decisions interpreting this provision.

28. At least some of the legislation analysed contains provisions similar to these of French law[103] obliging the assured to notify the insurer of any subsequent increase of the risk after the contact has been entered into. For example, Colombian legislation[104] requires the assured to notify the insurer in writing of unforeseeable facts or circumstances which arise subsequent to the entering into force of the contract and which are of such a nature that had they existed before the contract was signed they would have had to be disclosed. If the modification of the risk arises from the will of the assured, the notification must be given 10 days before the event and if not, within 10 days after he becomes aware of the modification, it being presumed that he will be aware of the modification 30 days after it occurs. Upon notification, the insurer has the option of terminating the contract or of readjusting its terms. Failure to give timely notification results in the automatic termination of the contract.

[103] See part one of the present document, para. 27.

[104] Code of Commerce (article 1060). sec also the Code of Commerce of Ecuador (title XVII, article 16) and Insurance Contract Act of Mexico (articles 52 et seq.).

B. The policies: hull and cargo insurance

1. General observations

29. A distinctive feature of marine insurance policies in many Latin American countries is that locally drafted policy forms, which contain general insurance conditions based on national commercial codes, may be combined in one form or another with policy clauses used in the British market. The UNCTAD secretariat has previously identified some examples of this practice, citing, for example, en El Salvadorian policy which incorporated the "perils" clause of the Lloyds' S.G. Form with an express stipulation that British "doctrine, case law, practice and custom" shall govern its interpretation[105].

30. With regard to the countries analysed in the present report, it is known that British Institute Clauses are usually attached to hull and cargo policies in Argentina and Peru. It appears that the attachment of United States or British Institute Clauses is also permitted in Mexico. In connection with the attachment of the British Institute Clauses to Latin American general conditions, it should be noted that it is usual for attached portions of a policy to override the general conditions in the case of a conflict between the two.

31. The use of different national policy clauses, originating as they do in different legal bases in the common and civil law traditions and reflecting different national legislation, that is, the national commercial codes on the one hand and the 1906 Act and common law jurisprudence on the other, inevitably creates certain difficulties in interpretation, since neither set of clauses or conditions has been designed to be incorporated with the other. It has been asserted that this system of combining different sets of national clauses to form the legal basis of the marine insurance contract causes uncertainty and confusion whenever it is necessary to evaluate a certain coverage or to determine whether and to what extent a casualty is covered by the policy.

32. There is the additional problem of which law will apply to the respective components. The countries utilizing this mixed system appear to approach the issue differently. The case of the El Salvadorian policy has already been cited in this respect (sec para. 29 above). In the Argentine market, there is a clause in the standard general conditions which calls attention to the fact that the contract is subject to the Insurance Act of that country. The British Institute Cargo Clauses used are translated into Spanish with a virtually identical notation to the one cited in the El Salvadorian policy that British law shall govern its interpretation.

33. In the Peruvian market, while there is no standard set of general conditions at present[106], most of these make reference to the Code of Commerce in the application of certain of their provisions, and so it would appear that the parties to a contract incorporating such general conditions intend the Peruvian Code of Commerce to apply to its interpretation. The British Institute Clauses used in the Peruvian market are translated into Spanish, with the English version given on the reverse side, and with the name of the Peruvian Association of Insurers appearing at the top together with a reference to the Institute of London Underwriters and the identification of the relevant set of clauses. Unlike the Argentine market, however, there is no

[105] See Legal and Documentary Aspects ..., paras. 46-47.

[106] The Peruvian Association of Insurers, which comprises all insurance companies in the Peruvian market, is apparently in the process of drafting a set of standard general conditions for the market.

notation on the additional clauses expressly applying British law to the interpretation of the British Clauses. In the absence of any other stipulation in the particular conditions referring to British law, it must be assumed that the Peruvian Code of Commerce is used to interpret such clauses as well. However, it is known that there is a policy used in the Peruvian market which contains a set of general clauses existing in conjunction with a set of clauses resembling in large part the wording of the Lloyd's S.G. Form, to which British Institute Clauses are regularly attached. A provision in the general conditions of this policy form stipulates that "All questions of liability arising under this Policy are to be governed by the laws and customs of England insofar as they are rot in conflict with any stipulation of the Peruvian laws regarding internal public policy[107]." Another policy contains a provision in an annex to be attached to the particular conditions[108], which appears to apply Lloyd's usages, practices and customs in adjusting claims for loss or damage under "all risks" conditions, reference being made in the context to the British Institute Cargo Clauses (All Risks). However, regardless of stipulations in the policy referring to British law, in both the Argentine and Peruvian markets the imperative provisions of the respective national laws, as is indicated in the clause quoted above, would apply to the policy clauses in any case.

34. The analysis of the policies of the selected Latin American countries undertaken in this section is of necessity generalized in view of the number and diversity of the policy clauses. Moreover, owing to the number of policies involved, it was rot possible to include an analysis of the policies used in all the countries that were studied in the previous section on national legislation. Nevertheless, an attempt has been made to provide an overview of the scope of the general conditions of the various policies used in the region and their impact on the indemnity payable for loss or damage. Since what is established by the general conditions may well be altered by the attachment of additional clauses, including British Institute Clauses, this aspect has also been treated by the report whenever possible. In many instances, a proper analysis of the policy required a more detailed knowledge of the jurisprudence and market practice of the country or countries concerned than the UNCTAD secretariat was able to obtain in the time available, and in such cases this has been indicated.

2. Scope of the insurance

(i) Included risks

35. Judging from the policies analysed, there does rot appear to be any uniformity of approach to the granting of coverage among the countries studied. To take cargo insurance first, it may be said in broad terms, with certain inevitable qualifications, that the general conditions used in Argentine, Ecuadorian and Peruvian cargo policy forms apparently operate by setting forth a broad grant of coverage and then limiting it by enumerating the risks for which coverage is rot provided, whereas Mexican and Colombian policies provide coverage by enumerating the risks for which coverage is granted[109]. Nevertheless, it should be pointed out that in Peru there is no standardized set of general conditions for the market. Consequently, in addition to the

[107] Clause 20 of the general conditions used by El Pacifico, Compania de Seguros y Reaseguros, of Peru, in ifs Marine Open Policy.

[108] Article 27, annex to the particular conditions, applicable to floating policies, issued by Popular y Porvenir, of Peru.

[109] However, it should be noted that an additional clause exists in the Mexican market to provide cover for "all risks" by means of a broad grant of cover minus exceptions, which car be attached to the general conditions.

aforementioned policies which provide coverage through an "all risks" grant subject to exceptions, there is also a policy which reproduces the British Lloyd's S.G. Form and thus provides coverage by enumerating the risks in the manner of the British system.

36. In article 3 of a set of Peruvian general conditions for cargo insurance (those used by El Sol, Compania de Seguros General), it is stipulated that the policy covers, in respect of maritime risks, loss or damage of the goods insured caused by fortuity of *force majeure* as a result of: storm, shipwreck, stranding, collision, involuntary change of route, voyage or vessel, by jettison, fire and generally by all other accidents and risks of the sea[110]. The phrase at the end, "and generally by all other accidents and risks of the sec" is interpreted to refer to all other accidents and perils in a broad sense so that the effect of the clause is virtually that of an all-risks grant of cover as to maritime risks. This interpretation is consistent with what appears to be a general trend in civil law jurisdiction in the interpretation of such a phrase and is reflected in the legislation of some other Latin American countries[111]. Separate provisions set forth an option for coverage on F.P.A. or "total loss" conditions (articles 8 and 9 of the general cargo conditions used by El Sol). F.P.A. conditions apply unless agreed otherwise. However, under the terms of the relevant provision, particular average is covered if it results from shipwreck, stranding, impact, fire or collision.

37. Argentine general conditions[112] for cargo insurance contain as a risks clause the identical wording quoted above, interpreted in the same manner[113]. Separate provisions (clauses 7 and 8) set forth an option for coverage on "free of particular average" conditions in the came manner as the Peruvian conditions referred to above, or for coverage on "with particular average" conditions. However, the Ecuadorian general conditions for cargo insurance offer coverage in a different mariner. Article I, entitled "Forms of cover", states chat the insurance covers the risks to which the goods are exposed during the course of the insured voyage, unless expressly excluded. It then provides three alternative scopes of cover, "free of particular average", "with particular average" and "against all risks". Using the approach found in the French marine insurance market, the Ecuadorian "free of particular average" (as well as the "with particular average") cover does not exclude types of losses (average) as the title suggests[114], rather it merely specifies the risks for which cover is granted. Thus, article 2, entitled "Free of particular average", enumerates only those risks for which the coverage of loss or damage to the goods is granted. This is a distinct departure from the "all risks" minus exceptions approach, otherwise used by the market, but it reflects the approach used in the French market for F.P.A. conditions and the enumeration of the covered risks is, in fact, similar to that provided in the French cargo policy[115].

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[110] Special provision is made in article 5 for land transport for which coverage is limited to loss or damage caused by force majeure.

[111] As reflected in the Code of Commerce of Ecuador (title VII, article 929); sec footnote 50 below. Sec also article 768 of the Code of Commerce of Peru.

[112] 'These conditions continue to refer to the old provisions of the Commercial Code, although those were abrogated by the enactment of the Insurance Act No. 17.418 in 1967 and of the Navigation Act No. 20.094 in 1973. Nevertheless, in an introductory text to the general conditions or in a specially stamped notation, reference is made to the fart that the Insurance Act applies to the insurance of marine, air and land transport risks as provided therein.

[113] Clause 1; special coverage is provided in clause 2 for land and inland waterway transport.

[114] See part one of the present document, para. 40.

[115] Ibid., para. 39.

38. Article 3, entitled "With particular average", returns to the all risks minus exceptions approach by stating that coverage is given for loss or damage to the goods with the exclusion of designated risks, for which cover will not be granted unless expressly agreed otherwise. In this respect, it should be mentioned that, in the case of all three scopes of cover, a common list of exclusions limiting their scope in a uniform manner is to be found in article 6 of the general conditions. Thus, the special enumeration of excluded risks in article 3 is an additional list of exclusions designed to limit the extent of coverage only as to "with particular average" conditions. Lastly, article 4, entitled "Against all risks", states that coverage is extended to loss or damage of the insured goods (subject to the common list of exclusions in article 6). Presumably, this article, like article 3 on "with particular average", is to be read in conjunction with article 1, cited in the previous paragraph, which states that the insurance covers the risks to which the goods are exposed during the transport.

39. As to those cargo insurance policies that enumerate the risks for which coverage is granted, the Mexican general conditions analysed[116] stipulate the risks of fire; lighting; explosion; stranding, sinking or collision of the vessel; loss of complete packages falling overboard during loading, trans-shipment or unloading operations; and the contribution by the assured to general average and to salvage charges. For land transport, the policy stipulates Pire; lighting; explosion; fall of an aircraft; spontaneous combustion; collision; overturning or derailment of the vehicle or other means of transport; and collapse or breaking of bridges.

40. Colombian general conditions for cargo insurance[117] divide coverage into four sections: Total loss, Non-delivery, Pillage (Saqueo) and Particular Average. It is stated in the general conditions that total loss coverage is basic and is included in the coverages against Non-delivery, Particular Average and Pillage. The enumerated risks in total loss coverage reflect to a certain extent the Mexican enumeration for maritime and land transport, though stranding and collision of the vessel and collapse or breaking of bridges are omitted. On the other hand, there are added acts to extinguish fire resulting from lighting or explosion, jettison, and the falling overboard of complete packages during carriage in the vessel as well as loss of a complete package by such risks as flooding, collapsing of piers, earthquakes, volcanoes, cyclones, hurricanes and tornadoes[118]. Furthermore, the total loss cover also includes a subclause, entitled "Negligence and latent defects (Inchmaree)", which enumerates as additionally covered risks for goods carried on ocean-going vessels: bursting of boilers, breakage of shafts, latent defect in the machinery or hull, and fault or error in navigation or management of the vessel of the master, officers, crew, repairers or pilots[119].

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[116] Article 4, for maritime transport, and article 6, for land transport, of the general conditions issued by Seguros Internacional, S.A., Mexico, for cargo insurance, Poliza de Seguro de Transportes (hereinafter referred to as Mexican general cargo conditions).

[117] There appear to be some minor variations between the general conditions used by different insurers in Colombia, and as far as possible these have been reflected in the analysis. References are made to the general conditions for cargo insurance used by Compania de Seguros Generales, S.A. Pdliza Especifica de Transportes, and Aseguradora Grancolombiana, S.A., Poliza Automatica de Seguros de Transportes.

[118] The insurer undertakes to reimburse the assured for payments he is legally obligated to make under a "both to blame collision" clause in a bill of lading. Furthermore, there is a specialized definition of shipwreck (footnote to clause 1 (A) of the Colombian general conditions for cargo insurance).

[119] At least one insurer omits this aspect from the total loss coverage in its standard general conditions, but includes it in a set of general conditions, contained in an annex to the policy, which overrides the standard set.

41. Non-delivery and pillage coverage under the Colombian general conditions relates to non-delivery or disappearance resulting from misplacement and various types of theft. "Particular average" conditions cover certain types of damage sustained by cargo in the course of handling and carriage, such as the consequences of mishandling, improper use of hooks, salt water, etc. as well as spillage resulting from broken packaging.

42. As to hull insurance, the Mexican market uses a policy that enumerates the risk for which cover is granted, whereas the Peruvian and Ecuadorian markets utilize policies that grant cover on an all risks minus exceptions basis. (In Argentina, it is understood that the insured risks are determined in each case in the particular conditions or other attached clauses and that it is usual to attach either British or United States clauses.) Mexican general conditions for hull insurance provide coverage for the actual and constructive total loss of the vessel by enumerating the following risks: the force of the elements, explosion, lighting, stranding, sinking, fire and collision of the vessel[120]. There is also an additional set of clauses which can be attached to the general conditions, which grant cover for particular average caused by an enumeration of risks. These clauses reflect the risks listed in the general conditions, with the addition of handling, trans-shipment, unloading, etc. of cargo, and breakage, mechanical failure and wear and tear of any part of the vessel.[121]

43. Article I of the Peruvian policy analysed, the general hall conditions issued by Popular y Porvenir, understood to be used for most ocean-going vessels insured in the Peruvian market, covers total and constructive total losses caused by storm, stranding, shipwreck, collision, fire, forced change of route or voyage, jettison and, in general, all accidents and risks of the sea. As stated in connection with cargo insurance, the phrase at the end "and, in general, all accidents and risks of the sea" makes the clause an all-risks grant of cover as to maritime risks.

44. Ecuadorian general conditions, in covering total and constructive total losses as well as salvage expenses, follow the format described earlier in connection with the Peruvian policy by listing several specific risks and then referring generally to other accidents or risks denominated perils of the sea, with the exception of the exclusions stipulated in article 4[122]. The general conditions also cover damage to the vessel when caused by certain enumerated risks (shipwreck, stranding, collision or impact, and fire)[123]. Technically speaking, coverage for "damage" is based on the enumeration of perils approach. Nevertheless, in the context of the all risks grant of cover for total losses, the overall effect of the coverage is to grant an "all-risks" cover free of any damage (i.e., total losses only) unless caused by the specially enumerated perils (i.e., both damage and total losses are covered). Thus, the clause enumerating the risks against which damage to the vessel is covered essentially expands upon the type of losses covered by the policy and is not an expansion of the risk clause.

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[120] As well as general average contributions and salvage charges. General conditions, article 1 (a), issued by Seguros Océanica Internacional, S.A., of Mexico for hull insurance, Poliza de Buques (hereinafter referred to as Mexican general hull conditions).

[121] The clause makes it clear that repair or replacement of the broken, failed or worn part is not covered.

[122] Article 1 (a) of the Ecuadorian general conditions. Article 929 of the Code of Commerce states that risks of the sea are understood to mean those which are run by the insured objects (there follows a somewhat similar enumeration of specific risks as in the policy form) and generally, all accidents (casos fortuitos) that occur on the sea (en el mar), except as expressly stated in the policy.

[123] Article 1 (b) of the Ecuadorian general conditions.

45. Although relating primarily to providing insurance protection against physical loss or damage to insured objects, Latin American hull and cargo policies, as is generally the case in other countries' marine insurance policies, extend their coverage to certain expenses incurred by the assured. For example, policies usually set forth the assured's obligation to take all reasonable measures to protect the insured object from further harm after the occurrence of an accident, and provide for the reimbursement of such expenses[124]. However, in the case of Argentina, although not mentioned in the general conditions, the undertaking to reimburse the assured's expenses in such cases is provided by article 418 of the Navigation Act[125]. As to hall insurance, at least one policy, the general conditions issued by Popular y Porvenir of Peru, requires that such conservation, or "sue and labour", measures involving major expenses be undertaken only with the prior agreement of the insurer, unless the undertaking of such measures was of such urgency that consultation with the insurer was not practical. Failure to obtain such prior agreement would result in eliminating the insurer's obligation to reimburse such expenses (articles 24 and 25).

46. As an example of other possible expenses, general average contributions are also usually covered by cargo insurance policies[126]. Their coverage in hull insurance policies varies according to the policies, Mexican conditions automatically covering general average contributions and Peruvian and Ecuadorian policies excluding it, unless specifically agreed otherwise[127]. To the extent that British clauses are attached, the use of, for instance, the Institute Time Clauses: Hulls, includes such coverage (clause 8).

47. The most significant extension of the hall insurance policy beyond insurance for physical loss or damage of the insured vessel relates to the coverage of collision liabilities. None of the hall insurance general conditions analysed contained a clause automatically granting collision liability coverage. However, an additional clause, called the "Third party risk" clause (*clausula de riesgos a terceros*), exists in the Argentine market, and is designed to be attached to the basic hull policy. This clause, which is very similar in effect to the "running down" clause contained in the British Institute Time Clauses: Hulls (clause 1), grants coverage for collision liabilities arising from a collision of t he insured vessel with another vessel. To judge from the wording of the clause, it appears to offer supplementary coverage for collision liabilities in addition to the coverage offered under the basic hull policy for physical loss or damage to the vessel. The clause differs from the British "running down" clause in one notable respect, in that the latter stipulates a limit of coverage based on three-fourths of the agreed value of the vessel, whereas the Argentine clause leaves a blank space for this to be filled in on agreement with the assured, thereby permitting another proportion to be specified, such as fourfourths (100 per cent) of the

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[124] See, for instance, Mexican general cargo conditions (article 14), and general hall conditions (article 8); annex to the general conditions of La Fenix of Colombia (articles I3 and 15); cargo conditions (article 24) and general cargo conditions (article 19) issued by El Sol, of Peru; and general hall conditions (articles 24 and 25) issued by Popular y Porvenir of Peru. Argentine general conditions for cargo (article 19) and for hull (article 9) set forth the obligation to cake measures to protect the insured property front further harm but do not expressly provide for the reimbursement of the resulting expenses.

[125] At least one Peruvian policy does not provide for reimbursement of such expenses. The Peruvian Code of Commerce does not appear to contain a generally applicable provision obligating the insurer to reimburse the assured for expenses incurred while undertaking protective measures, though it does appear chat there are certain provisions applicable to specific situations under which reimbursement may be obtained, for example, articles 804 and 805.

[126] General conditions of Argentina (article 12), Colombia (article I (A) (b)), Ecuador (article 5 (a)), Mexico (article 4 (c)), and those issued by El Sol (article 19) and 11 Pacifico (article 14), of Peru.

[127] General conditions of Ecuador (article 16) and Mexico (article I (b)), and chose issued by Popular y Porvenir of Peru (article 1).

value of the vessel. The Argentine clause also contains a paragraph similar to the British "sistership" clause (clause 2, Institute Time Clauses: Hulls) covering situations where the insured vessel collides with another vessel owned by the same person. Under this clause, in order to avoid the problem that a person cannot legally have a liability to himself, the vessels are treated, for the purposes of the insurance coverage, as being owned by separate persons. Moreover, in order to avoid disputes, the clause provides for arbitration on the issue of liability.

48. In the Mexican market, there is an additional set of clauses for insurance of the civil responsibility of the assured for collisions (Endoso *de seguros de responsabilidad civil del asegurado por abordajes*), which grants coverage for collisions with other vessels for a certain percentage (to be agreed upon with the insurer) of the resulting liability up to the sum. insured. This set of clauses also includes a clause covering "sistership" type collisions.

49. If British clauses are attached, collision liability coverage can be obtained by the use of the Institute Time Clauses: Hulls (which contain the "running clown" clause in clause 1 or the Institute amended "running clown" clause.

(ii) Excluded risks

50. The risks expressly excluded in the marine insurance contract will, in principle, depend on how the coverage of risks is effected. If the contract uses the all risks minus exceptions approach, it is particularly necessary to exclude precisely every risk which it is not intended to cover by the contract of insurance. If, on the other hand, the contract enumerates the risks for which coverage is provided, there is no need in principle for risks to be excluded, unless it is intended to narrow the scope of cover granted by the enumeration of a specific risk. Frequently, However, such policies list exclusions merely to avoid any misunderstanding as to whether a particular risk is covered, even though it is not technically necessary to enumerate the exclusion.

51. In analysing the excluded risks in hull and cargo policies, it is important to bear in mind that such policies are primarily insurance for physical loss or damage of the insured objects themselves arising from their exposure to maritime risks, to the exclusion of all financial or commercial loss as well as of damage stemming from the inherent nature of the objects insured. Furthermore it is assumed that the assured will generally act in a prudent manner and take reasonable care to protect the insured object from harm. As has been pointed out in connection with the scope of insurance in the French marine insurance legal regime[128], it can generally be said that the majority of the exclusions in both hull and cargo policies reflect the application of these principles, although, as mentioned above, the extent to which they are actually expressed in the contract will depend on the manner in which coverage for the insured risks has been granted. Also excluded from all hull and cargo policies are what are generally considered to be "war and strikes risks", so chat the plain form of the policy relates only to what are considered to be "marine risks".

[128] Part one of the present document, para. 54.

52. Some excluded risks of particular interest are discussed below.

Fault of the assured

53. As to cargo insurance, all of the policies analysed which grant cover by the all-risks minus exceptions approach expressly exclude in one form or another loss or damage caused by the fault of the assured. Argentine general conditions (article 4), and at least one set of Peruvian general conditions, those issued by El Sol (article 12 (d)), exclude loss or damage resulting from the "negligence or bad faith" (*negligencia o infidelidad*) of the assured, his agents or their employees. Another Peruvian policy, the general cargo conditions issued by Popular y Porvenir, excludes the direct or indirect consequences of the act or fault of the assured or whoever acts on his behalf (article 7 (b)), and Ecuadorian general conditions exclude the consequences of any fault attributable to the assured[129]. Of the cargo policies analysed which grant cover by enumerating the risks (as in Mexico, Colombia and, at least in one case, in Peru), the fault of the assured is not generally excluded[130]. However, as in none of the policies analysed is it an enumerated risk for which cover is granted, it would appear that the fault of the assured is not generally a covered risk[131].

54. Most of the cargo policies analysed, whether granting cover by the enumerated perils approach or by the all risks minus exception approach, do not cover the consequences of certain types of misconduct or barratry[132] of the master or crew. The extent to which such conduct is excluded varies according to the policy, some excluding a wide range of intentional misconduct and negligence and others excluding only barratry[133]. However, Ecuadorian conditions do not expressly exclude such misconduct, though by F.P.A. conditions, which grant cover by enumerating the risks, it is net expressly covered either[134]. Colombian conditions, as noted earlier (see para. 40 above), expressly include the risk of loss or damage caused by fault or error

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[129] Article 6; also excluded are the consequences of violation of import, export and transit regulations, regulations of the carrier and false declarations.

[130] In some general conditions, the consequences of such acts as fraudulent declarations, illegal trade and violation of laws or regulations are excluded if attributable to the assured. Sec, for example, the general conditions of La Fenix of Colombia (article 3 (b)), and Mexican general conditions (article I1 (II) (a)).

[131] Special reference should nevertheless be made to article 78 of the Mexican Insurance Contract Act, which appears in this instance to be applicable to marine insurance contracts, wherein it is stated chat the insurer will be liable for accidents even when caused by fault of the assured (sec para. 22 above, last sentence). The fault of the assured may nevertheless have an indirect effect on the occurrence of a risk, and the issue of whether the resulting loss or damage is covered by the policy may depend on the local rules of causation. However, some policies, such as are found in the general conditions used by Popular y Porvenir of Peru (sec the relevant part of para. 53) exclude the direct and indirect consequences of the assured's fault.

[132] The definition of barratry varies according to the legal system. However, it is understood in Peru to refer to wilful misconduct of the captain or crew in benefiting themselves to the detriment of the shipowner and if is believed to have a similar meaning in other Latin American countries as well.

[133] " Article 7 (b) of the general conditions, Seguro de Transporte Maritimo o Fluvial, used by Popular y Porvenir, of Peru, excludes the risks of "barratry, negligence, imprudence or drunkenness of the master or of any other member of the crew". Article 5 (e) of the Argentine general conditions excludes the risk of "Barratry or any culpable act (hecho culpable) by the master of crew of the vessel, mutiny on board and damage arising from the abandonment of the vessel by its crew." Article 12 (d) of the general conditions used by El Sol, of Peru, contains the came exclusion but adds the word "strike" to the list of possible acts. Article 11 (I) (c) of the Mexican general conditions excludes simply "barratry by the master or the crew".

[134] Article 955 of the Ecuadorian Code of Commerce excludes intentional misconduct (dolo) or fault of the master or crew, unless otherwise agreed. As to "With particular average" and "Against all risks" conditions, which grant coverage by the broad grant of cover minus exceptions approach and do net exclude any type of misconduct by the master or crew, it appears chat such risks are covered. However, under F.P.A. conditions, which fait to include such risks in the enumeration of the risks covered, no agreement is made to cover them and the exclusion of article 955 appears to apply.

in the navigation or management of the vessel by the master, officers, crew, repairers or pilots[135]. At least one Peruvian policy (the Marine Open Policy used by El Pacifico), which includes wording from the British Lloyd's S.G. Form, expressly includes the risk of "barratry of the master and mariners".

55. As to hull insurance, Peruvian and Ecuadorian conditions exclude loss or damage caused totally or partially, directly or indirectly, by intentional misconduct (*actes dolosos*) or inexcusable negligence of the shipowner, master, officers of the crew and certain other agents[136]. Mexican conditions exclude physical loss or damage due to barratry of the master or crew, unless agreed otherwise, and also intentional misconduct (dolo) or gross fault of the assured, as well as violation by the assured of any foreign or national laws or regulations if such violation directly influenced the occurrence of the loss or damage[137]. The policy stipulates that Jack of due diligence by the assured to maintain the vessel in a seaworthy condition[138] and the loss by the vessel of its classification after the insurance has been taken out will be deemed to be cases of gross fault.

Inherent vice or defect

56. All the hull and cargo policies analysed exclude the consequences of inherent vice or defect, regardless of the manner in which coverage is granted. In cargo insurance, this is donc by reference to the general concept of "inherent vice", sometimes in conjunction with an even more general reference to the "nature of the goods"[139], and frequently with additional references to specific events which are normally considered to be included in the concept of inherent vice, such as "decay", "spontaneous combustion", etc[140].

57. As to hull insurance, the Ecuadorian and Peruvian conditions analysed exclude damage or loss resulting from inherent defect, whether latent or net, even if it contributed to a risk of the sea[141]. In Mexican general hull conditions, which grant cover by the enumeration of risks approach, no express reference is made to inherent or latent defects as insured or excluded risks. However, article 238 of the Navigation and Maritime Trade Act stipulates that the insurer will respond, unless agreed otherwise, for the damage or loss occasioned by latent defects of the object, unless he proves that the assured or the insurance agent knew of such defects or could have known of them if he had acted with normal diligence.

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[135] Clause 1 (A), "Negligence and latent defects (Inchmaree)", contained in total loss cover, the general conditions used by La Continental and the general conditions contained in the annex to the Transport Policy used by La Fenix of Colombia.

[136] Article 4 (d) of the Ecuadorian general hull conditions, and article 3 (d) of the general hull conditions issued by Popular y Pervertir, of Peru. Both policies (in articles 4 (g) and 3 (g) respectively), also exclude any consequence that the vessel may suffer as a result of any act of the master or crew on land.

[137] Mexican general hull conditions (articles 3 and 4). See Mexican Insurance Contract Act (articles 77 and 78); sec also the last sentence of para. 22 above.

[138] Article 6 of the general conditions, which details the obligations of the assured in this respect.

[139] See, for instance, article 6 of the Ecuadorian general conditions.

[140] Ibid.; sec also article 5 (a) of the Argentine general conditions; but see article 6 of the Mexican general conditions, which specifically includes spontaneous combustion (*auto-igniciôn*) as an insured risk in land transport.

[141] Ecuadorian general conditions (article 4 (e)) and general conditions issued by Popular y Porvenir, of Peru (article 3 (e)).

Delay in cargo insurance

58. All of the cargo policies analysed exclude loss or damage caused by delay. Argentine conditions and two sets of Peruvian conditions expressly exclude delay even if caused by an insured risk of the policy[142], and Ecuadorian general conditions (article 6 (a)) exclude the consequences of delay from "whatever cause". Two sets of Peruvian and Colombian conditions expressly refer to the exclusion of loss of market in connection with delay[143]. Mexican conditions simply exclude t he risk of delay without further qualification (article 11 (II) (c)).

Theft in cargo insurance

59. There is no uniform treatment of the risk of theft and/or pilferage in the general conditions analysed. Colombian general conditions offer specific covers for Non-delivery and Pillage (saqueo), which together appear to cover most forms of violent and clandestine theft of complete packages or portions thereof. As to Ecuadorian conditions, the risk of theft is specifically excluded only in "With particular average" cover but net in "Against all risks" cover, and it is net a listed risk in F.P.A. cover[144]. The other policies analysed generally exclude theft expressly, though it would appear that some differences exist as to the types of theft excluded[145], or fail to list it as a covered risk[146], depending on the approach of the policy in granting cover. Specific coverage is nevertheless possible, as indicated ed by the existence in the Argentine market of an additional clause covering theft, pilferage and non-delivery, which is designed to be attached to the general conditions upon the payment of a further premium, and also by additional clauses in the Mexican market covering theft and non-delivery. Coverage is also possible in markets using British clauses by attaching the Institute "All Risks" clauses or a separate Institute theft, pilferage and nondelivery clause, which is similar to the Argentine clause.

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142 ` ° Argentine general conditions (articles 5 (b)); general conditions used by El Sol of Peru (article I2 (h)); and the Marine Open Policy issued by El Pacifico, of Peru. It should be noted that both Argentine and El Sol conditions refer to delay in dispatch (retarde en la expedicion technically meaning the initial sending off of the goods as opposed to delay in the transit itself; however, it is believed that it has the latter meaning in the countries where it is used. It should also be noted chat the El Pacifico policy, which is largely based on the Lloyd's S.G. Form and is to be interpreted according to British law (see footnote 35 above, and the relevant part of para. 33) is clearer than British conditions on this point, since no reference is made in British policy clauses to the fact that the delay exclusion operates as provided by section 55 (2) (b) of the 1906 Act, even when the delay is caused by an insured peril. In this respect, sec also the Code of Commerce of Colombia (article 1731), and Colombian general conditions (see footnote 71 below).

143 General conditions issued by Popular y Pervertir (article 7 (d)), and the Marine Open Policy issued by El Pacifico, of Peru. Article 2 (J) of the Colombian general conditions refers to loss of market caused by delay and net specifically to physical damage caused by delay. Article 1731 of the Colombian Commercial Code states chat the insurer will net be responsible for any loss caused by delay even if the delay itself has been caused by an insured risk of the policy.

144 The additional list of exceptions intended to narrow the "with particular average" cover as compared with the "against all risks" cover lists "theft, pilferage and non-delivery" (robe, raieria y falta de entrega). For a description of the three types of Ecuadorian cargo cover, see paras. 37-38 above.

145 Article 5 (a) of the Argentine general conditions, and article 12 (g) of the general conditions issued by El Sol, of Peru, expressly exclude theft only (robo), whereas article 7 (d) of the general conditions issued by Popular y Porvenir, of Peru, excludes "theft, pilferage and nondelivery" (robo, rateria y falta de entrega).

146 As in the case of the Mexican general conditions and the Marine Open Poficy used by Et Pacifico, of Peru. It should be noted that the general conditions issued by El Pacifico incorporate the Lloyd's S.G. Form, but omit the word "thieves" (interpreted in British law to mean theft with violence) from the original wording of the S.G. Form.

War risks

60. All the policies analysed for both hull and cargo insurance, regardless of the approach used to grant cover, exclude what are commonly known as war and strikes risks. The usual practice is to require a special agreement for the coverage of such risks through the use of a separate policy or the attachment of relevant additional clauses based either on British Institute Clauses or on locally drafted clauses[147].

(iii) Use of British clauses

61. A brief description has been given above of the risks and exclusions stipulated in the basic policy forms containing locally drafted general conditions. To the extent that British clauses are attached to such general conditions, as is the practice in some of the countries studied (see paras. 29-34 above), the ultimate coverage for such risks will be altered. Thus, it will always be necessary to analyse the different components of the policy in conjonction, bearing in mind that the attached clauses, whether consisting of locally drafted clauses or British clauses, are invariably considered to override whatever is provided in the general conditions in the case of conflict between the two.

3. Duration of the coverage in cargo insurance

62. The legislation of the countries studied generally contains provisions concerning the commencement and termination of the risks for cargo insurance. As a rule, these provisions provide that the risk commences when the loading operation starts or when the goods leave land in order to be shipped and terminates when the goods are safely landed[148]. The Code of Commerce of Colombia, however, provides that the risk attaches from the moment the goods are in the custody of the ocean carrier at the place of origin until they are placed at the disposal of the consignee at the place of destination (article 1711).

63. However, in practice, the duration of the coverage of cargo insurance policies is almost invariably governed by an overriding provision in the policy itself. Argentine general conditions stipulate in article 6 that the risks commence from the moment that the goods are loaded in the place of their despatch and continue until they are placed on land at the point of destination. Additional provision is made for coverage up to 15 days while the goods are on board lighters or other craft used in the loading and unloading process as well as for continued coverage during delay in the departure of the carrying vessel, on condition that an additional premium is paid. However, article 6 is overridden, as in the case in other markets where British conditions are utilized, such as Peru, by the warehouse-to-warehouse clause contained in the transit clause (clause 1) (as well as the craft clause (clause 3)) of the Institute Cargo Clauses. Ecuadorian general conditions stipulate in article 9 that the insurance shall operate from warehouse to warehouse. It will commence with the loading of the goods on the vehicle which will initiate the transport, or, if there is no such vehicle, as scion as the goods are ready for shipment and leave the warehouse or place of storage at the point of origin, and terminate with

[147] For cargo insurance, local clauses covering strike risks and war risks have been noted to exist in Colombia, Mexico and Ecuador. There is a local clause covering strike risks for hull insurance in the Argentine market.
[148] See, for example, the Code of Commerce of Peru (articles 746 and 774) and the Argentine Navigation Act (article 437).

the arrival or discharge of the goods in the warehouse of the consignee. By the special attachment of an additional clause "warehouse to warehouse" (bodega a bodega), the general conditions as to the termination of the coverage are altered to reflect more closely the terms of the warehouse-to-warehouse clause found in British conditions, including provision for early termination of coverage short of the designated destination in the case of storage of the goods by the assured other than in the ordinary course of transit, distribution of the goods by the assured, or the lapse of 60 days following their discharge from the ocean vessel at the port of destination.

64. Colombian conditions[149], in extending coverage from the warehouse of origin to the warehouse of destination, distinguish between the application of the maritime aspect of the coverage and the complementary interior insurance coverage. The former terminates with the "nationalization" or payment of custom duties on the goods or on the expiration of 30 days following discharge from the ocean vessel, while the latter continues until the time of arrival at the final warehouse designated in the policy, or until the expiration of 30 days from the date of their "nationalization" or payment of customs duties. Mexican warehouse to warehouse coverage is provided by an additional clause, entitled "Warehouse to warehouse for maritime shipments", which extends coverage from the moment the goods leave the warehouse at the point of origin until they are delivered to the final warehouse at destination, or until the expiration of 15 days from the discharge of the carrying vessel if the warehouse is situated within the final port of destination, or of 30 days if it is outside the port.

4. Types of policies

65. Generally speaking, the legislation of the countries studied envisages the use of voyage policies, "round trip voyage" policies[150], time policies and, in some cases, floating or open policies for cargo insurance. As to cargo insurance, although not all legislation contains provisions governing floating or open policies[151], it is understood that open policies (*poliza abierta, flotante or automatica*) are in frequent use in the region and the current practices in connection with the use of such policies generally follow those existing in developed market-economy countries. Accordingly, special policy provisions exist relating, for example, to the obligation of the assured to declare all shipments coming within the terms set forth in the policy as well as the insurer's obligation to provide insurance coverage for all shipments so declared, to the issuance of a certificate of insurance, to cancellation of the policy, limit of liability per vessel, minimum standards for vessels used to transport the goods, etc. In the latter case, usually the Institute Classification Clause, or a variant thereof designed to achieve the same purpose, is applied to control the minimum standard of the vessels used as well as to increase the premium in appropriate cases.

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[149] General conditions, clause 10, "Commencement and termination of the risks", the form of which varies from company to company, involving in some cases the attachment of an additional clause.

[150] A round trip voyage policy is a type of policy in which the subject-matter is insured from the home port to the port of discharge and from that port to the home port or some other final port of discharge. Some legislation has special rules for cargo insurance, which provide for the reduction of premium in cases where the assured is unable to obtain sufficient cargo on the return trip. The Codes of Commerce of Chile (article 127I), Ecuador (article 965), Mexico (article 832) and Peru (article 770) are cases in point.

[151] The Code of Commerce of Colombia contains a provision (article 1050) describing the form of a floating policy and an "automatic" or open policy. The Argentine Navigation Act has certain provisions (articles 442 and 443) setting forth the rights and obligations of the parties to an open policy, such as, inter alia, the right of the assured to make declarations, or to correct declarations already made after the loss or arrival of the goods if the failure to make a timely declaration or the mistake in the original declaration was made in good faith.

5. The sum insured and agreed value

66. In addition to the provisions in national legislation concerning insurable values and the use and legal effect of agreed values, certain other provisions exist in the general conditions of marine insurance contracts concerning these aspects and, in general, the indemnity payable for loss or damage under the policy.

67. As to hull insurance, as a rule there do not appear to be specific provisions in the general conditions dealing with the legal effect of agreed values in the policy, so reliance is presumably placed on the relevant provisions of the national commercial codes or other applicable legislation (sec para. 20 above). However, all the hull policies analysed contain a provision stipulating that the sum insured is the maximum liability of the insurers[152]. Subsequent provisions, nevertheless, vary the effect of this sum as a limitation. Some policies stipulate that the sum insured is the limit of liability for the entire period of the policy, whereas others indicate that it applies on a per voyage basis, thereby creating a new limitation of liability for each voyage undertaken[153]. In either case, the sum insured is reduced after each claim on the policy; however, when the policies have c a limitation on a per voyage basis, the sum insured is automatically reconstituted at the end of each voyage so chat it applies in full for the next voyage as though there are as many policies as there are voyages. Those policies that establish the sum insured as a limit of liability for the entire period of the policy also contain a provision stipulating that the sum insured can be reconstituted after each claim to its previous full value by the repayment of an additional premium[154].

68. It will be seen from the above analysis that, under the general conditions studied, the system used for the treatment of the sum insured in the case of successive claims during the period of the policy more closely resembles the approach used in the French marine insurance legal regime[155] than that of the British legal regime, which treats the sum insured as the limit of liability of the insurers on a per accident basis[156].

69. As to cargo insurance, the predominant feature of the policies analysed is that the indemnity payable for loss or damage of the insured goods is generally based on their actual value. In this respect the policies also reflect the system used in cargo policies in the French marine insurance market[157] rather than the British system which utilizes an agreed value that is binding on the parties for the insurable value of the goods. Thus, cargo policies generally stipulate that the limit of the indemnity payable is the sum insured or, if less than the sum insured, the value of the goods at the commencement of the insurance augmented by freight and other expenses connected with the transport of the goods, the insurance premium and an amount (usually 10 per cent) representing the anticipated profit[158].

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[152] General conditions of Argentina (article 7), Ecuador (article 22), Mexico (article 14) and those used by Popular y Porvenir, of Peru (article l5).

[153] " The per voyage basis for the application of the sum insured is established by the provisions which state, in effect, that each voyage of the insured vessel will give rise to a separate adjustment, each adjustment being considered as if a policy existed for each voyage. See the general conditions of Ecuador (article 26) and those used by Popular y Porvenir, of Peru (article 17).

[154] See the general conditions of Argentina (article 7) and Mexico (article I5).

[155] See part one of thé présent document, para. 75.

[156] See section 77 of the 1906 Act.

[157] See part one of the present document, para. 73.

[158] " A typical provision is article 15 of the Argentine general conditions, which reads in the relevant part:

6. Deductibles and franchises

70. A deductible may be described as an amount which must be exceeded before a claim is recoverable, and then only the amount in excess is payable. It is to be differentiated from a "franchise", which is the amount that must be reached before a claim is payable, but once attained the claim is payable in full.

71. To the extent that British Institute Clauses are attached to Latin American policies, the provisions of those clauses will determine the existence and application of a deductible or franchise in place of any provisions in the general conditions of the policy. In hull insurance, the Institute Time Clauses: Hulls, establish a deductible, the amount of which is to be set by agreement of the parties (clause 12). The Institute Cargo Clauses vary according to whether F.P.A., "with average" or "all-risks" clauses are used. "All risks" conditions exclude any deductible or franchise. "With average" conditions refer to the percentage specified in the policy, and therefore reference would have to be made in this case to the general or particular conditions of the policy. Lastly, in F.P.A. conditions, the applicable clause (clause 5) is to be read in replacement of any clause in the general conditions establishing a franchise.

72. As to the general conditions of the hull insurance policies studied, the approach varies according to the country concerned. Generally speaking, Mexican and Peruvian general conditions apply only to total or constructive total losses and consequently do not provide for a deductible or franchise.

73. However, in respect of Mexican conditions, there is an additional set of clauses which can be attached to the general clauses granting cover for particular average. This set of clauses contains a dual deductible of 3 per cent of the value agreed in the policy or a sum agreed upon, whichever is less, but the deductible is not applicable to damage when the vessel has become stranded, has been sunk, burned or entered into a collision (see article 1: *Endoso de seguro de averia particular (buques)).* There is another additional clause, which can also be attached to the policy when the above set of clauses covering particular average are used, applying a deductible (of a sum to be agreed upon) to particular average Claims arising from each separate accident (*clausula de indemnizacion deducible (averia particular) (buques*)). Ecuadorian general conditions contain a provision (article 3) which envisages the possibility that the parties will agree to either a franchise (*franquicia no deducible*) or a deductible (*franquicia deducible*) and gives a definition of both terms. Argentine general conditions do not expressly provide for a deductible, though provision is made for "new for old" type deductions of one third of the cost of new parts. In a set of particular conditions studied, a type of deductible is provided for by a provision which states: "For this policy to be valid, the assured must agree that a sum of not less than ... of the total value of the damage or loss shah not be covered by this insurance[159].

"In any case of loss of or damage to goods, and even if the expressed value has previously been accepted, the Company will be entitled to require proof of the actual value, and if this appears exaggerated and the Company has not previously expressly approved a specific increase, it will be entitled to reduce the sum insured to the cost price plus 10 per cent. The cost price shall be determined by means of the purchase invoices or, where appropriate, by the current prices at the time of loading, increased by all the loading expenses, non-reimbursable freight and the insurance premium, but without interest."
Sec also the general conditions used by La Continental, of Colombia (article 7), those of Mexico (article 16) and those used by Popular y Porvenir, of Peru (article 17, and particular conditions, article 12).

[159] Issued by Antorchas Compania de Seguros, S.A. The amount is to be agreed upon by the parties to the contract.

74. As to the general conditions of the cargo insurance policies studied, both Ecuadorian and Colombian policies provide for the possibility of either a franchise or a deductible, depending on the agreement of the parties, and set forth a definition of both terms[160]. Argentine general conditions provide for the possibility of a coverage "free of particular average", unless caused by designated risks (i.e. "free of particular average unless") or "with average" conditions. In the former coverage, there is a deductible of 5 per cent applied to average claims for all liquids. As to the latter coverage, provision is made for a franchise, the amount of which is to be agreed upon by the parties[161]. In Peru, one set of general conditions, the Marine Open Policy used by El Pacifico, incorporates a modified version of the Memorandum of the British Lloyd's S.G. Form which applies a franchise to some commodities but makes others free of particular average. Another set of general conditions, those use by Popular y Porvenir of Peru, provides for coverage on "free of particular average unless" terms, without making provision for the use of either a franchise or a deductible. Article 14 of the general conditions used by El Sol of Peru establishes that when particular average is covered it is subject to a franchise, the amount of which is to be agreed upon by the parties, unless special provision is made for the use of a deductible. The policy also stipulates the percentages to be deducted in addition to the franchise for designated commodities so as to take into account natural transport losses (article 15). Lastly, Mexican general conditions do not appear to provide for the use of a deductible or a franchise.

C. Claims for loss or damage

75. The policies analysed generally contain provisions governing the obligations of the assured to give prompt notice to the insurers of any loss or damage[162]. Frequently, provisions are also inserted detailing the need to contact the claims agent (*comisario de averias*) of the insurer to undertake a survey of the damaged goods or vessel[163].

76. In determining the indemnity payable under a marine insurance policy, the claim is usually adjusted on the basis of the average, or damage, incurred (*accion de averia*) or on the basis of the abandonment of the property. Abandonment of the property results in the transfer of all the rights and liabilities of the property to the insurer and an adjustment of the claim as a total loss[164].

77. National legislation and some policies stipulate the rules for determining the adjustment of the claim on the basic of the damage incurred. National legislation generally sets forth the rules for determining the indemnity for hull insurance on the basis of an estimation of the necessary repairs or on the actual repairs undertaken, frequently providing for a "new for old"

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160 General conditions used by La Continental, of Colombia (article I8); and Ecuadorian general conditions (article 8); article 945 of the Ecuadorian Commercial Code provides for a minimum l per cent franchise.

161 See the Argentine general conditions (articles 7 and 8); article 438 of the Navigation Act provides for a 3 per cent franchise unless agreed otherwise.

162 For example, the Argentine general hull conditions (article 9), Mexican general hull conditions (article 9) and general cargo conditions used by Popular y Porvenir, of Peru (article 12).

163 See, for instance, Argentine cargo conditions (article 20), and Mexican general cargo conditions (article 15 (c)) and general hull conditions (article 10).

164 Some policies, such as article 22 of Ecuadorian general cargo conditions, stipulate that the insurer may decline to accept the property even after paying for a total loss.

type deduction of one third of the actual or estimated cost of repairs[165]. Rules are also laid down in either national legislation or the general conditions of the policy on determining an indemnity for partial loss or damage in cargo insurance. An example of such rules can be found in clause 9 of the Argentine general conditions for cargo insurance, which reads as follows:

> In the case of particular average on goods, the difference shall be ascertained between the cash return which the insured merchandise should have produced in the place of its destination, had it arrived in sound condition, and that obtained at the public auction after the damage suffered, or else, at the option of the insured, the deterioration in the merchandise shall be assessed by arbitrators, so that, in one or other of these ways, the percentage of loss can be determined, which percentage shall be indemnified by the company in respect of the quantity insured ...

78. With the exception of Colombia, most national legislation specifies the precise grounds on which the assured may abandon the insured property[166]. Policy conditions almost invariably contain a list of grounds for abandonment as well, in some cases expanding and in others narrowing the restrictive list of possibilities. For example, Argentine hull and cargo policies generally reflect the list of grounds provided by articles 457 and 460 of the Navigation Act, although with certain amendments, such as eliminating embargo or detention by order of a local or foreign Government as a ground for abandonment in hull insurance. Typical grounds for abandonment for hull insurance are shipwreck, total loss or the vessel being rendered absolutely unfit to navigate and unable to be repaired, lack of news, capture and damage or deterioration amounting to there quarters of the value of the insured property[167]. For cargo insurance, typical grounds are Jack of news about the vessel in which the cargo was transported, total loss resulting from shipwreck, material deterioration affecting there quarters of the value of the insured property, the impossibility of the goods arriving at their destination and sale of the goods owing to deterioration in a port other than the port of departure or destination[168].

79. Generally speaking, Colombian legislation more closely reflects the British legal regime than that of the other Latin American countries studied by making a distinction between actual total losses and a constructive total loss, a distinction not usually drawn in the other national legislation analysed[169], and generally reflecting the content of sections 56-63 of the 1906 Act.

D. Market practices as to the placement of insurance: the use of agents and brokers

80. While the use of insurance brokers in the Argentine, Colombian, Ecuadorian, Mexican and Peruvian markets is optional, their use is understood to be increasing in view of the complexity of marine insurance.

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[165] For example, the Argentine Navigation Act (article 435), and the Codes of Commerce of Colombia (article 1754) and Peru (article 784).

[166] For example, the Argentine Navigation Act (articles 457 and 460) and the Code of Commerce of Peru (article 802).

[167] See for example the general conditions of Argentina (article 2) and Ecuador (article 15).

[168] Argentine Navigation Act (article 460). Sec also the general conditions used by El Sol, of Peru (article 23) and, for a more restrictive list, the Ecuadorian general conditions (article 22).

[169] Although some policies expressly provide for the coverage of constructive total losses, defining the term to mean when the repair amount to these quarters of the value assigned to the vessel in the policy, as in article 2 of the Mexican general hull conditions, or when the damage caused by insured risks exceeds the value of the vessel in a state for normal navigation, as in article 2 of the general hull conditions used by Popular y Porvenir of Peru and article 2 of the Ecuadorian general hull conditions.

81. In the Peruvian local market, there is no clear distinction between an insurance broker and an insurance agent. In article 53 of the Argentine Insurance Act a distinction is drawn between an insurance agent, who, regardless of hic connections with an insurer, is authorized only to receive proposals for the conclusion or modification of insurance contracts, to deliver the documents issued by the insurer pertaining to the contract and to accept payment of the premium, and an agent institorio, who is authorized to enter into insurance contracts directly on behalf of the insurer (article 54). In Ecuador, insurance brokers are regulated by the General Insurance Companies Act of 13 March 1967, which stipulates that a broker is an individual professionally engaged to negotiate and obtain insurance contracts on behalf of an insurance company. Therefore, such brokers are not independent agents unrelated to insurance companies. However, there also exist what are called "insurance placement agencies", which are either corporation or individuals, apparently unconnected with any particular insurer, who undertake to negotiate and obtain insurance contracts with one or several insurers. Mexican legislation provides only for insurance agents operating on behalf of an insurance company, though it is understood that certain agents with large portfolios operate in the manner of brokers.

82. In the case of Peru, the professional qualifications for an insurance broker are known to be proof of Peruvian nationality and residence, compliance with tax commitments, the right to full exercise of civil rights, at least two years' experience in an insurance company or insurance producer enterprise, and proof of good conduct. In both Peru and Ecuador, insurance brokers are subject to control by the Superintendent of Banks and Insurance. It is understood that a draft law has been proposed in Argentina concerning the regulation of the activities of insurance agents which is currently being studied by the Legislative Advisory Chamber.

83. As a general rule, it appears that the applicable regulatory provisions do not require the posting of a guarantee or impose other types of financial responsibility. However, brokers or agents are subject to the imposition of sanctions ranging from warnings to the annulment of their licences to operate in the event of misconduct[170].

[170] For example, Supreme Decree No. 019-79-EF, of Peru (article 12); and Reglamento de Agentes de las lnstitutiones de Seguros, of Mexico, 29 September 1955 (articles 18-31)).