

A Commentary
on the
International Hull Clauses (01/11/03)

INTRODUCTION

Until 1824, Lloyd's and two insurance companies, the London Assurance and the Royal Exchange Insurance, were the only entities allowed by law to conduct marine insurance business in the United Kingdom. In the sixty years that followed, there was a great expansion in the number of insurance and shipping companies; both tended to develop their own clauses and so there was a multiplicity of clauses in existence, all attached to the historic S.G. form, which had its own origins in the 17th Century.

On the 4th April 1883 a meeting of the U.K. underwriting community was held at Lloyd's "to consider the details and phraseology of certain clauses usually inserted in Policies of Marine Insurance with a view to the general adoption of an established wording of these clauses."

A considerable number of Lloyd's clauses were adopted for general use a few months later, and in 1884 the Institute of London Underwriters was formed and, on the 8th December 1884, the ILU recommended the general adoption of three clauses for steamers. However, the first full set of Institute Time Clauses was not issued until 1888. As trade and other circumstances changed, new versions were introduced, latterly consisting of Hull Clauses dated 1.10.52, 22.7.59, 1.10.69, 1.10.70, 1.10.83 and 1.11.95.

The 1969 clauses included a major change, which was the switch from the attainable voyage franchise to the "each accident" deductible. The American clauses followed suit (AIHC 18.1.70) shortly afterwards.

In 1983, although the cover did not change materially, radical revision of the clauses was undertaken. The time honoured S.G. form disappeared and its key features were incorporated into the Institute Time Clauses, to produce a unified core policy document. Using the same format, a further set of clauses (1.11.95) were published, but found little favour.

Over the last hundred years, the Institute Time Clauses have become an international standard for period insurances on vessels, and this is reflected in the new title of "International Hull Clauses". The basis of their success has been providing the cover required by commercial interests, together with the greatest possible degree of certainty in the approach to claims.

The first version of the International Hull Clauses appeared in November 2002, after an extensive consultation exercise carried out by the Joint Hull Committee (JHC) which also involved considerable input from the Association of Average Adjusters. The discussion process continued after the IHC were issued, with members of the JHC drafting committee travelling to key maritime centres to explain the new clauses and receive feedback from world markets. Their intention was to carry out a review of IHC 2002 Clauses in the light of their initial reception, and this process has now been completed with the issue of IHC 2003. Although some minor alterations may still occur, it is understood that the intention is now for IHC 2003 to operate unchanged for some time, to enable markets to become familiar with their use as a recognised standard policy.

We also understand that Institute Time Clauses 1.10.83 and 1.11.95 will continue to be available for use if required. Further, it of course always remains open to the parties to

vary the terms of IHC 2003 if required, although we would always urge that any departures from standard wordings are considered with care.

This commentary will be updated periodically as experience of the application of the International Hull Clauses is gained in practice. We would welcome any questions or comments by e-mail to richard.cornah@rhl-ctc.com or via your regular contacts in any RHL office.

In view of the limited usage of Institute Time Clauses Hulls 1.11.95, our commentary is based on comparisons with the earlier 1.10.83 version, which still represents the almost universal standard. Some clauses are therefore referred to as “new”, although they have appeared in the 1.11.95 version, because they are unlikely to be familiar to many readers. Our comments are shown in *italics*.

We have referred briefly to the Norwegian Plan and the American Institute Hull Clauses, but space does not permit a full comparison of cover.

Our commentary uses the following abbreviations:

ITCH 83 - Institute Time Clauses, Hulls, 1.10.83

ITCH 95 - Institute Time Clauses, Hulls, 1.11.95

IHC 2002 - International Hull Clauses, 1.11.02

IHC 2003 - International Hull Clauses, 1.11.03

AIHC - American Institute Hull Clauses

IAPC - Institute Additional Perils Clause.

This commentary is divided into three sections.

Pages 3/4 - A summary of the differences between ITCH 83 and IHC 2003.

Pages 5 - A summary of the differences between IHC 2002 and IHC 2003.

Pages 6/48 - A detailed commentary on IHC 2003, including the full text of the Clauses.

For more information on RHL, our contact details are available on our website:

<http://www.rhlg.com/>

which also has links to the Charles Taylor Consulting and other sites. Additional publications include “A Guide to Hull Claims” and “A Guide to General Average”, copies of which can be obtained from any RHL office.

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Chairman,
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SUMMARY (1)

IHC 2003 COMPARED WITH ITCH 83.

The new Clauses are considerably longer than their predecessors for two reasons.

- The new clauses have incorporated a number of wordings normally found in Cover Notes, to produce a more self-contained document. These additions are highlighted in the full commentary but have little or no effect on the overall cover that would be provided to most Assureds.
- ITCH 83 incorporated a number of provisions that repeated important sections of the Marine Insurance Act 1906, so that the Assured could see in a single document both the positive cover and major exclusions. This approach has been continued in IHC 2003 with regard to procedural matters. Part 3 therefore contains Clauses that largely reflect existing law and market practices, again on the basis that having such matters clearly set out is of benefit to all parties.

The most significant changes in cover are:

Part 1

- | | | |
|-----------------|---|---|
| Clause 2 | - | Latent defect cover subject to the exclusion of the costs of correcting the latent defect, but 50% of common repair costs are allowed. |
| Clause 6.3 | - | Cover for legal costs in collision cases limited to 25% of Insured Value. |
| Clause 8 | - | No reduction of claim for General Average/Salvage if there is under-insurance. |
| Clause 9 | - | No reduction of Sue and Labour Claims in respect of under-insurance. |
| Clauses 10 & 11 | - | Provisions regarding navigation and use of vessel are no longer true warranties; no cover for losses during period of breach, unless Underwriters are advised immediately and terms agreed; cover resumes when breach ceases. |
| Clause 13 | - | Automatic termination following failure to comply with Class/ISM requirements, absent Underwriters' agreement. |
| Clause 14.2 | - | Absent Underwriters' agreement, automatic termination of cover on vessel sailing to be scrapped. |

Part 1 (Continued)

IHC 2003 COMPARED WITH ITCH 83 (Continued)

- Clause 14.4 - Underwriters not liable for losses attributable to breach of Statutory/Class requirements.
- Clause 17 - Replacement of anti-fouling on damaged or disturbed plating is recoverable.
- Clause 21 - Constructive Total Loss payable based on 80% of Insured Value.

Part 2

- Clause 40 - General Average Absorption Clause available as an option, claims thereunder payable without application of the deductible.
- Clause 41 - Optional Additional Perils Clause, including cover for latent defect costs excluded in Clause 2.

Part 3

- Clause 43 - Notice of claim required within 180 days of Assured becoming aware of loss/damage.
- Clause 45 - New provisions concerning investigation of claims.
- Clause 49 - Recoveries to be shared pro rata, including proportion in respect of deductible.

In addition the following Clauses often found in Cover Notes are now included:

- Clause 3 - Leased Equipment
- Clause 4 - Parts taken off

Optional cover in respect of Fixed and Floating Objects and 4/4ths Collision Liability is include in Part 3.

SUMMARY (2)

IHC 2003 COMPARED WITH IHC 2002

As a result of continuing consultation with insurance markets and Assureds, a number of further changes were made, of which the following are the most significant.

Part 1

- Clause 2 - The amended wording regarding latent defect cover and the treatment of common costs has removed an area of confusion. The basic cover will respond on a "pre-Nukila" basis, with 50% of common access costs being recoverable. Any costs excluded under Clause 2 will be recoverable if Clause 41 Additional Perils is included in the cover.
- Clauses 8 & 9 - There will no longer be any reduction in respect of under-insurance for General Average, Salvage and Sue & Labour Claims.
- Clause 17 - Cost of applying anti-fouling coating on damaged/disturbed plating is now recoverable.
- Clause 31 - The "cyber attack" wording has been omitted.

Part 2

- Clause 40 - The optional General Average Absorption Clause is now more closely modelled on the BIMCO standard clause. Special charges are now included and, most significantly, claims under the Absorption Clause are no longer subject to the deductible.

Part 3

- Clause 43 - The trigger for the 180 day period during which Underwriters must be notified of claims is now the Assured's awareness of loss/damage, rather than the accident/occurrence giving rise to the claim. This avoids potential difficulties, for example regarding damage discovered at a routine dry-docking some time after an incident.

COMMENTARY ON IHC 2003.

"These clauses are purely illustrative. Different policy conditions may be agreed. The specimen clauses are available to any interested person upon request. In particular:

- (a) in relation to any clause which excludes losses from the cover, insurers may agree a separate insurance policy covering such losses or may extend the clause to cover such events;
- (b) In relation to clauses making cover of certain risks subject to specific conditions each insurer may alter the said conditions."

(FOR USE WITH THE CURRENT MAR POLICY FORM)

INTERNATIONAL HULL CLAUSES (01/11/03)

PART 1 - PRINCIPAL INSURING CONDITIONS

1. GENERAL

- 1.1 Part 1, Clauses 32-36 of Part 2 and Part 3 apply to this insurance. Parts 2 and 3 shall be those current at the date of inception of this insurance. Clauses 37-41 of Part 2 shall only apply where the Underwriters have expressly so agreed in writing.
- 1.2 This insurance is subject to English law and practice.
- 1.3 This insurance is subject to the exclusive jurisdiction of the English High Court of Justice, except as may be expressly provided herein to the contrary.
- 1.4 If any provision of this insurance is held to be invalid or unenforceable, such invalidity or unenforceability will not affect the other provisions of this insurance, which shall remain in full force and effect.

The "optional" Clauses 37-41 in Part 2 relate to cover for liabilities in respect of fixed and floating objects, 4/4ths Collision Liability, lay-up returns, a General Average Absorption Clause and an Additional Perils Clause. Strictly speaking, the Additional Machinery Damage Deductible Clause 15.2 in Part 1 is also an optional clause in that, if it is agreed to have a NIL value when the insurance is placed, it will be of no effect.

Clause 1.2 is as before, and is helpful in establishing how courts outside the U.K. should interpret the Clauses. Clause 1.3 is new and will need to be deleted if the parties wish other jurisdictions to apply. If it is deleted, we would recommend that an alternative jurisdiction is specified, for the avoidance of doubt.

Clause 1.4 is new to the Hull Clauses but is found in many ordinary commercial contracts and is self-explanatory.

2 PERILS

- 2.1 This insurance covers loss of or damage to the subject-matter insured caused by
- 2.1.1 perils of the seas, rivers, lakes or other navigable waters
 - 2.1.2 fire, explosion
 - 2.1.3 violent theft by persons from outside the vessel
 - 2.1.4 jettison
 - 2.1.5 piracy
 - 2.1.6 contact with land conveyance, dock or harbour equipment or installation
 - 2.1.7 earthquake, volcanic eruption or lightning
 - 2.1.8 accidents in loading, discharging or shifting cargo, fuel, stores or parts
 - 2.1.9 contact with satellites, aircraft, helicopters or similar objects, or objects falling therefrom.

Various changes have been made.

ITCH 83 6.1.6 covering breakdown of or accident to nuclear installations or reactors apparently first appeared when it was thought vessels might be nuclear powered; only a few such trials were undertaken before cost and safety concerns put an end to the possibility. Such cover is no longer relevant and disappears from IHC 2003 - but see also exclusions regarding Radioactive Contamination etc. in Clause 31.

Cover in respect of accidents in loading etc. (Clause 2.1.8) has been moved and is no longer subject to the due diligence proviso in Clause 2.2; it has also been extended to include stores or parts.

Clause 2.1.9 now includes specific reference to satellites and helicopters, and such air-borne perils have now been separated from those relating to land conveyances and harbour installations (2.1.6).

- 2.2 This insurance covers loss of or damage to the subject matter insured caused by
- 2.2.1 bursting of boilers or breakage of shafts but does not cover any of the costs repairing or replacing the boiler which bursts or the shaft which breaks
 - 2.2.2 any latent defect in the machinery or hull, but does not cover any of the costs of correcting the latent defect
 - 2.2.3 negligence of Master, Officers, Crew or Pilots
 - 2.2.4 negligence of repairers or charterers provided such repairers or charterers are not an Assured under this insurance

2.2.5 barratry of Master, Officers or Crew

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

- 2.3 Where there is a claim recoverable under Clause 2.2.1, this insurance shall also cover one half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby.
- 2.4 Where there is a claim recoverable under Clause 2.2.2, this insurance shall also cover one half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby.
- 2.5 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 2.2 should they hold shares in the vessel.

Clause 2.2.1 differs from ITCH 83 (6.2.2) in that the exclusion of the cost of repairing or replacing the boiler or shaft is now explicit. In practice there is no difference in coverage since ITCH 83 covered only damage "caused by" such events, i.e. the consequential damage. If you wanted to recover the boiler or shaft itself, the claim had to be based on another peril.

Latent defect cover is now given a specific clause of its own (2.2.2), with additional words excluding the cost of correcting the latent defect. This change has arisen from a case called the "Nukila" [1997] 2 Lloyd's Rep and needs to be explained in some detail.

The "Nukila" involved a jack-up rig that sustained severe fracturing in all three legs as a result of poorly profiled welds, which were agreed to constitute a latent defect. Insurers' primary argument in refuting the claim was that the policy only paid for consequential damage sustained by a separate part; the cracking being limited to the legs which contained the latent defect, there was no consequential damage. The concept of having to identify a separate part had long been accepted on the basis of comments made in earlier cases, although most practitioners would have regarded Insurers' suggestion that a complete leg (made up of numerous steel plates and welded sections with a total length of 200 ft.) should be regarded as a single part, as somewhat extreme.

The Court of Appeal proceeded by analysing the actual wording of ITCH 83 Clause 6.2.2 and Hobhouse LJ, rejecting the separate part concept, concluded:

"In my judgment the application of the language of the Inchmaree clause to the facts of the present case is straightforward. At the commencement of the period of cover there was a latent defect in the welds joining the underside of the top plate of each spud can to the external surface of the leg tube. By that time that latent defect had also given rise to minute fatigue cracks in the surface of the tube in the way of the weld which could also properly be described as latent defects. Those features during the period of cover caused extensive fractures in the full thickness of the tube extending in places both above and below the defective weld, extensive fractures in the metal of the top plating and bulkheads of the spud cans and other fractures at other locations. This was on any ordinary use of language damage to the subject-matter insured, the hull etc. of "Nukila". It was, as the Judge found,

caused by the condition of "Nukila" at the commencement of the period, that is to say by the latent defects I have identified."

In the "Nukila", three tests were applied in deciding whether a claim arose:

- i) Was there damage to the subject matter insured?*
- ii) Did the damage occur during the period covered by the policy?*
- iii) Was the damage caused by a latent defect?*

In answering i), the damage had to be "something different from, something over and above and incrementally greater than the latent defect itself" and "where the line is to be drawn is a matter of fact and degree". The "Nukila's" crucial departure from past practice is that damage could be "something different from" the original latent defect, even if it was within the same component, so the need to identify a separate part that suffered consequential damage was dispensed with.

*However, as the Court of Appeal went to some lengths to emphasise, Insurers were still protected from losses where a latent defect has simply become patent, as illustrated in the well-known trio of cases heard between 1906 and 1936. (*Oceanic v Faber*, 1906; *Hutchins Bros. v Royal Exchange*, 1911; *Scindia Steamship v London Assurance*, 1936.) That protection was also expressed clearly in another form of words by Hobhouse L.J. in that "the assured has to prove some change in the physical state of the vessel".*

Underwriters have taken the view that the basic hull cover should revert to the pre "Nukila" position, which had generally been accepted until that case was litigated. This is obviously a commercial underwriting decision on which we cannot comment, but we note that they have endeavoured to accommodate Assureds by making sure that the basic cover in Clause 2 of IHC 2003 and the extended cover offered by the optional Additional Perils Clause 41 (see below) are truly "back to back" in their effect.

The wording used to achieve that objective in IHC 2002 was felt by ourselves, and many others, to be unsatisfactory and likely to give rise to disputes. The wording adopted for IHC 2003 achieves greater clarity and also, in Clause 2.3 and 2.4, ensures uniformity of practice when dealing with the "common charges" that are often encountered - for example the access costs of stripping down an engine both to replace a latently defective part and parts that form the consequential damage.

As always with any new clause, the test will come with its application to real cases. The following examples show the likely treatment of costs in different circumstances:

Example 1.

A latently defective bearing fails, causing severe consequential damage to a main engine crankshaft.

<i>Costs:</i>	<i>Crankshaft etc</i>	<i>US\$500,000</i>
	<i>Bearing</i>	<i>5,000</i>
	<i>Opening up (common)</i>	<i>10,000</i>

	<i>Opening up (extra for access to crankshaft etc)</i>	<u>150,000</u>
		<u>US\$665,000</u>
<i>Claim:</i>	<i>Crankshaft</i>	<i>US\$500,000</i>
	<i>Bearing</i>	<i>NIL</i>
	<i>Opening up (common) 50%</i>	<i>5,000</i>
	<i>Opening up (extra)</i>	<u>150,000</u>
		<u>US\$655,000</u>

Example 2.

A rudder has an area of defective welding which causes cracks in the plating and eventually the bottom section of the rudder falls off.

<i>Costs:</i>	<i>Replacement section of rudder</i>	<i>US\$100,000</i>
	<i>(Estimated cost of rectifying defective welding US\$10,000)</i>	
	<i>Removal/replacement of rudder (common)</i>	<i>50,000</i>
	<i>20 days dry-docking in total</i>	<i>100,000</i>
	<i>(Estimated 10 days dry-docking to rectify defective welding US\$50,000)</i>	
		<u>US\$250,000</u>

<i>Claim:</i>	<i>Replacement section of rudder</i>	<i>US\$100,000</i>
	<i>Less: estimated cost of re-welding defective area</i>	<u>10,000</u>
		<i>US\$90,000</i>
	<i>Removal/replacement of rudder – 50%</i>	<i>25,000</i>
	<i>10 days dry-docking (US\$50,000) – 50%</i>	<i>25,000</i>
	<i>10 days dry-docking (extra)</i>	<u>50,000</u>
		<u>US\$190,000</u>

Example 3a.

A rudder stock is examined at a routine dry-docking and is found to have a severe crack through most of its diameter, and it is condemned by Class.

A metallurgist examines the stock and determines that the crack originated from a small casting defect which, if known about, could have been ground out and repaired satisfactorily by welding.

Claim: as for example 2 the claim would be dealt with by deducting the estimated cost of rectifying the defect and 50% of any common access costs and dry-docking time.

Example 3b.

Same facts as 3a, but this time the metallurgist says that the originating defect was sufficiently large that, if known about, the stock would have been condemned immediately by Class.

Claim: None – the cost of correcting the defect is as great as the cost of repairing the crack, since both require renewal of the stock. Because no claim arises under 2.2.2, no claim for common charges can be made under 2.4.

The amounts excluded under Clauses 2.2.1 and 2.2.2, and 2.3 and 2.4, can of course be recovered under the Additional Perils Clause (41) if this is adopted at inception of the policy. It should be emphasized that even with the Additional Perils Clause there still has to be damage that is something different from or incrementally greater than the original defect.

3 LEASED EQUIPMENT

- 3.1 This insurance covers loss of or damage to equipment and apparatus not owned by the Assured but installed for use on the vessel and for which the Assured has assumed contractual liability, where such loss or damage is caused by a peril insured under this insurance.
- 3.2 The liability of the Underwriters shall not exceed the lesser of the contractual liability of the Assured for loss of or damage to such equipment or apparatus or the reasonable cost of their repair or their replacement value. All such equipment and apparatus are included in the insured value of the vessel.

New, but similar wording has been found in most Assureds' cover notes for many years.

4 PARTS TAKEN OFF

- 4.1 This insurance covers loss of or damage to parts taken off the vessel, where such loss or damage is caused by a peril insured under this insurance.
- 4.2 Where the parts taken off the vessel are not owned by the Assured but where the Assured has assumed contractual liability for such parts, the liability of the Underwriters for such parts taken off shall not exceed the lesser of the contractual liability of the Assured for loss of or damage to such parts or the reasonable cost of their repair or their replacement value.
- 4.3 If at the time of loss of or damage to the parts taken off the vessel, such parts are covered by any other insurance or would be so covered but for this Clause 4, then this insurance shall only be excess of such other insurance.
- 4.4 Cover in respect of parts taken off the vessel shall be limited to 60 days whilst not on board the vessel. Periods in excess of 60 days shall be held covered provided notice is given to the Underwriters prior to the expiry of the 60 day period and any amended terms of cover and any additional premium required are agreed.
- 4.5 In no case shall the total liability of the Underwriters under this Clause 4 exceed 5% of the insured value of the vessel.

Again this is useful additional cover that has been inserted in some Owners' Clauses and Cover Notes incorporating ITCH.

When parts are away from the vessel they may be exposed to land risks, which are not covered by the policy in its basic form, and supplementary cover may be advisable for high value items such as crankshafts. If optional Clause 41 Additional Perils is incorporated this will provide the necessary "any accident" cover. The 60 day limit under 4.4 and the 5% limit under 4.5 should also be noted.

5 POLLUTION HAZARD

This insurance covers loss of or damage to the vessel caused by any governmental authority acting under the powers vested in it to prevent or mitigate a pollution hazard or damage to the environment or threat thereof, resulting directly from damage to the vessel for which the Underwriters are liable under this insurance, provided that such act of governmental authority has not resulted from want of due diligence by the Assured, Owners or Managers to prevent or mitigate such hazard or damage or threat thereof. Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of this Clause 5 should they hold shares in the vessel.

Originally conceived following the "Torrey Canyon" disaster when the Royal Air Force were ordered to bomb a grounded tanker to set it alight and reduce oil pollution (with an embarrassing lack of success). Additional wording has now been added to cover governmental response to broader threats to the environment than oil pollution - for example damage to sensitive coral reefs.

6 3/4THS COLLISION LIABILITY

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

6.1.1 loss of or damage to any other vessel or property thereon

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

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

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

6.2 The indemnity provided by this Clause 6 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions

6.2.1 where the insured vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 6 shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision

6.2.2 in no case shall the total liability of the Underwriters under Clauses 6.1 and 6.2 exceed their proportionate part of three fourths of the insured value of the insured vessel in respect of any one collision.

6.3 The Underwriters shall also pay three fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, provided always that their prior written consent to the incurring of such costs shall have been obtained and that the total liability of the Underwriters under this Clause 6.3 shall not (unless the Underwriters' specific written agreement shall have been obtained) exceed 25% of the insured value of the insured vessel.

The Clause is unchanged except that in Clause 6.3 a cap of 25% of the Insured Value has been imposed on the recovery of legal costs (unless otherwise agreed). Previously, under ITCH 83 Clause 8.3 legal costs could theoretically be recovered up to the full insured value. It is important to note that the 25% limit relates only to what are normally termed "costs of defense", which will generally include a proportion of general costs of testing liability. Costs of recovery are governed by Clause 49 in Part 3, which imposes only the requirement that costs are reasonably incurred.

EXCLUSIONS

6.4 In no case shall the Underwriters indemnify the Assured under this Clause 6 for any sum, which the Assured shall pay for or in respect of

- 6.4.1 removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever
- 6.4.2 any real or personal property or thing whatsoever except other vessels or property on other vessels
- 6.4.3 the cargo or other property on, or the engagements of, the insured vessel
- 6.4.4 loss of life, personal injury or illness
- 6.4.5 pollution or contamination, or threats thereof, of any real or personal property or thing whatsoever (except other vessels with which the insured vessel is in collision or property on such other vessels) or damage to the environment, or threat thereof, save that this exclusion shall not exclude any sum which the Assured shall pay for or in respect of salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment as referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

Under Clause 6.4.5, "damage to the environment or threat thereof" is a logical addition to the pollution or contamination exclusion.

7 SISTERSHIP

Should the insured vessel come into collision with or receive salvage services from another vessel belonging wholly or in part to the same Owners or under the same management, the Assured shall have the same rights under this insurance as they would have were the other vessel entirely the property of Owners not interested in the insured vessel; but in such cases the liability

for the collision or the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

No change to ITCH 83 Clause 9.

8 GENERAL AVERAGE AND SALVAGE

- 8.1 This insurance covers the vessel's proportion of salvage, salvage charges and/or general average, without reduction in respect of any under-insurance, but in case of general average sacrifice of the vessel the Assured may recover in respect of the whole loss without first enforcing their right of contribution from other parties.
- 8.2 General average shall be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; but where the contract of affreightment so provides the adjustment shall be according to the York-Antwerp Rules.
- 8.3 When the vessel sails in ballast, not under charter, the provisions of the York-Antwerp Rules, 1994 (excluding Rules XX and XXI) shall be applicable, and the voyage for this purpose shall be deemed to continue from the port or place of departure until the arrival of the vessel at the first port or place thereafter other than a port or place of refuge or a port or place of call for bunkering only. If at any such intermediate port or place there is an abandonment of the adventure originally contemplated, the voyage shall thereupon be deemed to be terminated.
- 8.4 The Underwriters shall not be liable under this Clause 8 where the loss was not incurred to avoid or in connection with the avoidance of a peril insured under this insurance.
- 8.5 The Underwriters shall not be liable under this Clause 8 for or in respect of
- 8.5.1 special compensation payable to a salvor under Article 14 of the International Convention on Salvage, 1989 or under any other provision in any statute, rule, law or contract which is similar in substance
 - 8.5.2 expenses or liabilities incurred in respect of damage to the environment, or the threat of such damage, or as a consequence of the escape or release of pollutant substances from the vessel, or the threat of such escape or release.
- 8.6 Clause 8.5 shall not however exclude any sum, which the Assured shall pay
- 8.6.1 to salvors for or in respect of salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment as referred to in Article 13 paragraph l(b) of the International Convention on Salvage, 1989 have been taken into account
 - 8.6.2 as general average expenditure allowable under Rule XI(d) of the York-Antwerp Rules 1994, but only where the contract of affreightment provides for adjustment according to the York-Antwerp Rules 1994.

Clauses 8.1, 8.2, 8.3 and 8.4 are largely as per ITCH 83 with an alteration in 8.3 from the 1974 to the 1994 York-Antwerp Rules. There is one significant change namely that salvage, salvage charges and/or general average claims are no longer subject to a pro rata reduction in respect of under-insurance. This over-rides section 73 of the Marine Insurance Act.

Examples of vessels being grossly under-insured are rare and many cover notes have included wording to the effect that the "vessel shall be deemed to be fully insured", for some years.

Clauses 8.5 and 8.6 are new and require some detailed explanation.

Clause 8.5.1 refers to special compensation payable to Salvors under Article 14 of the International Convention on Salvage 1989. Article 14 provides for special compensation to be paid by the Shipowner to the Salvor for preventing or minimising damage to the environment by the ship and/or her cargo in circumstances where the Salvor has failed to earn a sufficient customary salvage reward under Article 13 (which deals with the criteria for fixing the reward and includes efforts by the salvor to prevent or minimise damage to the environment).

It was agreed (the so-called Montreal compromise) that Article 13 awards would be payable by property Underwriters but that Article 14 "special compensation" would be paid by the vessel's P.& I. Club. Clauses 8.5.1 and 8.6.1. therefore make explicit the terms of the Montreal compromise and represent no change in the cover provided by ITCH 83.

Clause 8.5.2 is new and has a potential influence on coverage. In order to understand the nature of the change, it is necessary to explain the circumstances under which expenses or liabilities of this type can be claimed under a policy which does not contain this exclusion. Under York-Antwerp Rules 1974 there is no explicit reference to liabilities and expenditure of this type, but it is well established in practice, and supported by authority, that such liabilities and expenditures can fall within General Average.

Take, for example, the case of a loaded tanker aground in the path of an approaching typhoon and with no salvage assistance in the vicinity. The Master decides to jettison part of the cargo of oil rather than risk the Total Loss of ship and cargo and the much larger spillage of oil that would occur if the vessel remains aground and the typhoon strikes. Under York-Antwerp Rules 1974 not only will the jettison be allowed in General Average, but also the direct consequences of the jettison, e.g. liabilities to nearby fish-farm owners and other environmental damage.

When the 1974 York-Antwerp Rules were under revision, many adjusters expressed concern at the practical problems that were involved in allowing environmental liabilities in General Average. As cases such as the "Exxon Valdez" had shown, such liabilities could exceed the likely values of ship and cargo by a huge margin; litigation also meant that the extent of these liabilities often could not be determined for many years, delaying the adjustment process. Following discussions at the 1994 Sydney CMI Conference, it was decided to exclude such liabilities and the York-Antwerp Rules 1994, (which of course only apply if included in the contract of affreightment), now contain special provisions regarding this sort of liability.

Rule C provides:

"In no case shall there be any allowance in General Average for losses, damages or expenses incurred in respect of damage to the environment or in consequence of the escape or release of pollutant substances from the property involved in the common maritime adventure."

However, it was realised that in many cases expenses relating to pollution avoidance (as opposed to liability) had to be incurred for the common safety, and it was felt that these should not be excluded. An example illustrating this is the vessel that is badly damaged in

way of her fuel oil tanks and needs to be towed into a port of refuge. Numerous precautions need to be taken to satisfy the requirements of the Port Authorities who are concerned about pollution risks. Protective booms, for example, may be deployed around the vessel and special craft may escort her in. Under York-Antwerp Rules 1974, the costs referred to in the example can be claimed in General Average in terms of Rule X(a), (which deals with the costs of entering a port of refuge). The 1994 Rules also specifically allow such items to be claimed, (numbered Rules over-ride the general lettered Rules).

Rule XI(d) of the York-Antwerp Rules 1994 provides:

"(d) The cost of measures undertaken to prevent or minimise damage to the environment shall be allowed in General Average when incurred in any or all of the following circumstances:

(i) as part of an operation performed for the common safety which, had it been undertaken by a party outside the common maritime adventure, would have entitled such party to a salvage reward;

(ii) as a condition of entry into or departure from any port or place in the circumstances prescribed in Rule X(a);

(iii) as a condition of remaining at any port or place in the circumstances prescribed in Rule XI(b) provided that when there is an actual escape or release of pollutant substances the cost of any additional measures required on that account to prevent or minimise pollution or environmental damage shall not be allowed as General Average;

(iv) necessarily in connection with the discharging, storing or reloading of cargo whenever the cost of those operations is admissible as general average."

Both the liability costs in the first example and the port of refuge costs would be excluded by 8.5.2, however the port of refuge costs are allowed back in by 8.6.2, but only if the contract of affreightment provides for the York-Antwerp Rules 1994. Ship's proportion of such allowances when properly made under York-Antwerp Rules 1974 will not be recoverable under IHC 2003.

A recent informal survey conducted around RHL Group offices indicated that at least 50% of General Average cases currently in hand still involve contracts of affreightment providing for York Antwerp Rules 1974.

Owners who retain York-Antwerp Rules 1974 in their Contracts of Affreightment should therefore discuss this with their Insurers at renewal, or consider changing to York-Antwerp Rules 1994. Difficulties may sometimes occur since Owners are not always aware of the detailed contents of Charterers' Bills of Lading, which are most often the ones likely to include the older Rules.

9 DUTY OF THE ASSURED (SUE AND LABOUR)

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

- 9.2 Subject to the provisions below and to Clause 15, the Underwriters shall contribute to charges properly and reasonably incurred by the Assured their servants or agents for such measures. General average, salvage charges (except as provided for in Clause 9.4), special compensation and expenses as referred to in Clause 8.5 and collision defence or attack costs are not recoverable under this Clause 9.
- 9.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject-matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.
- 9.4 When the Underwriters have admitted a claim for total loss of the vessel under this insurance and expenses have been reasonably incurred in saving or attempting to save the vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this insurance shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the vessel, excluding all special compensation and expenses as referred to in Clause 8.5.
- 9.5 The sum recoverable under this Clause 9 shall be in addition to the loss otherwise recoverable under this insurance but shall in no circumstances exceed the insured value of the vessel.

A significant change to ITC 83 Clause 13 is that the provisions applying under-insurance to Sue and Labour claims have been deleted, thus keeping Sue and Labour in line with General Average and Salvage claims, as discussed under Clause 8. The Marine Insurance Act 1906 does not refer to under-insurance with regard to Sue and Labour. For the avoidance of doubt, it is made clear that Article 14 Special Compensation is not allowable as Sue and Labour.

10 NAVIGATION PROVISIONS

Unless and to the extent otherwise agreed by the Underwriters in accordance with Clause 11

- 10.1 the vessel shall not breach any provisions of this insurance as to cargo, trade or locality (including, but not limited to, Clause 32)
- 10.2 the vessel may navigate with or without pilots, go on trial trips and assist and tow vessels or craft in distress, but shall not be towed, except as is customary (including customary towage in connection with loading or discharging) or to the first safe port or place when in need of assistance, or undertake towage or salvage services under a contract previously arranged by the Assured and/or Owners and/or Managers and/or Charterers
- 10.3 the Assured shall not enter into any contract with pilots or for customary towage which limits or exempts the liability of the pilots and/or tugs and/or towboats and/or their owners except where the Assured or their agents accept or are compelled to accept such contracts in accordance with established local law or practice
- 10.4 the vessel shall not be employed in trading operations which entail cargo loading or discharging at sea from or into another vessel (not being a harbour or inshore craft).

See comments under Clause 11.

11 BREACH OF NAVIGATION PROVISIONS

In the event of any breach of any of the provisions of Clause 10, the Underwriters shall not be liable for any loss, damage, liability or expense arising out of or resulting from an accident or occurrence during the period of breach, unless notice is given to the Underwriters immediately after receipt of advices of such breach and any amended terms of cover and any additional premium required by them are agreed.

Under ITCH 83, where the vessel could go and what she could do were largely controlled by ITCH 83 Clause 1 (Navigation) and the separate Institute Warranties. The previous warranties regarding trade and navigation were mitigated by held covered provisions in ITCH 83 Clause 3, but wherever possible, a new approach has been tried in IHC 2003.

Clause 10.1 indicates the extent of the Clause as a whole and 10.2 essentially reproduces ITCH 83 Clause 1.1. Clause 10.3 is new; generally Owners have little option but to accept pilotage or towage services on the terms (usually highly unfavourable to the customer) that are offered, but some care may be needed with Owner-operated terminals or port facilities.

Clause 10.4 reflects ITCH 83 Clause 1.2.

Under Clause 11 if navigation restrictions are breached, there is no threat of the policy becoming void, but cover is suspended for the period of the breach. As before, the position can be rectified by notice being given to Underwriters and any amended terms etc. being agreed.

Clause 11 illustrates the new approach to policy warranties that was introduced with IHC 2002 and is maintained here - Clauses 13 and 14 also refer.

Since the earliest days of insurance, policies have contained warranties that control the nature of the risk by placing restrictions on, for example, where the vessel can trade or what cargo it can carry. (The word warranty is also used in the different sense of restricting cover, as in "warranted free of Particular Average", but this need not concern us here).

Under Section 33 of the Marine Insurance Act 1906, a warranty "is a condition which must be exactly complied with whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date." For example, if a vessel breaches a warranty regarding cargo to be carried and the vessel later grounds for wholly unrelated reasons, the breach is still fatal to that claim, even if the breach has been remedied by the prior discharge of that cargo.

Although most policies have "held covered" provisions in the case of breach of warranty, it has long been felt in many quarters that the Marine Insurance Act 1906 imposes too severe a penalty in many cases, particularly when the breach is unrelated to the loss.

IHC 2003 therefore adopts a graduated approach that gives a more proportionate remedy for each kind of breach, while enabling underwriters to maintain control over key areas of the risk.

The failure to comply with a particular requirement in the policy can have one of three outcomes.

i) Automatic Termination

- Clause 13 - failure to comply with Class/ISM requirements and Class recommendations etc. relating to seaworthiness.
- Clause 14.1 - change of ownership etc.
- Clause 14.2 - vessel sails with intention of being broken up or being sold for breaking up.

In some cases termination is deferred if the vessel is at sea and it remains open to Insurers to waive the termination.

ii) Suspension of cover

- Clauses 10/11 - navigating outside permitted areas, towage except as customary, entering contracts with limitation clauses (except as customary) and double-banking operations not involving harbour craft.

Underwriters are not liable for any loss during the period of the breach, unless immediate notice is given to Underwriters and amended terms of cover and any additional premium are agreed. Once the breach is remedied, cover continues as before.

iii) Restriction of Cover

- Clause 14.4.1 - failure to comply with statutory flag state requirements.
- Clause 14.4.2 - failure to comply with Class requirements regarding reporting of accidents to and defects in the vessel.

If there is such a failure to comply, then Underwriters have no liability for any loss attributable to that failure.

12 CONTINUATION

Should the vessel at the expiration of this insurance be at sea and in distress or missing, she shall be held covered until arrival at the next port in good safety, or if in port and in distress until the vessel is made safe, at a pro rata monthly premium, provided that notice be given to the Underwriters as soon as possible.

The Continuation Clause in its ITCH 83 text had remained unchanged since 1901. The clause dates back to the days when Owners were out of communication with their ships until they arrived in port. Insurers were reluctant to take on a new risk on the expiration of the old policy until they were satisfied that the vessel had arrived safely at the home port. The earlier pre-1901 versions of the clause referred to the vessel being "at sea" but made no

reference to "distress". However it was apparent that if a vessel was in distress or at a port of refuge Insurers would be similarly reluctant to take on a new policy.

With the benefit of modern communications, the new Clause is more restrictive than the old version since the vessel must now be in distress or missing at the expiry of the policy. The clause is no longer applicable when the vessel is simply "at sea".

Underwriters agree to hold the vessel covered only until arrival "at the next port in good safety" if the vessel is at sea or until the vessel is made safe if the vessel is in port. The old clause provided that the vessel would be held covered to her port of destination.

The ITCH 83 clause simply referred to "previous" notice, and it was unclear to what it related, although it would be logical to assume that it too referred to the expiration of the insurance. The new Clause requires notice to be given as soon as possible.

These Clauses 13 and 14 shall prevail notwithstanding any provision whether written typed or printed in this insurance inconsistent therewith.

13 CLASSIFICATION AND ISM

- 13.1 At the inception of and throughout the period of this insurance and any extension thereof
 - 13.1.1 the vessel shall be classed with a Classification Society agreed by the Underwriters
 - 13.1.2 there shall be no change, suspension, discontinuance, withdrawal or expiry of the vessel's class with the Classification Society
 - 13.1.3 any recommendations, requirements or restrictions imposed by the vessel's Classification Society which relate to the vessel's seaworthiness or to her maintenance in a seaworthy condition shall be complied with by the dates required by that Society
 - 13.1.4 the Owners or the party assuming responsibility for operation of the vessel from the Owners shall hold a valid Document of Compliance in respect of the vessel as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof
 - 13.1.5 the vessel shall have in force a valid Safety Management Certificate as required by chapter IX of the International Convention for the Safety of Life at Sea (SOLAS) 1974 as amended and any modification thereof.
- 13.2 Unless the Underwriters agree to the contrary in writing, in the event of any breach of any of the provisions of Clause 13.1, this insurance shall terminate automatically at the time of such breach, provided
 - 13.2.1 that if the vessel is at sea at such date, such automatic termination shall be deferred until arrival at her next port

- 13.2.2 where such change, suspension, discontinuance or withdrawal of her class under Clause 13.1.2 has resulted from loss or damage covered by Clause 2 or by Clause 5 or by Clause 41.1.3 (if applicable) or which would be covered by an insurance of the vessel subject to current Institute War and Strikes Clauses Hulls-Time, such automatic termination shall only operate should the vessel sail from her next port without the prior approval of the Classification Society.

A pro rata daily net return of premium shall be made provided that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.

Clause 13.1.2 follows ITCH 83 Clause 4.1, with the same consequence of a breach of automatic termination, unless at sea, (Clause 13.2.1 and ITCH 83 4.1) subject to written agreement to the contrary by Underwriters.

Clause 13.1.3 is new and is taken from JH131 wording that is often incorporated into cover notes, and has the same automatic termination sanction as Clause 13.1.2. It should be noted that the clause relates only to items affecting the seaworthiness of a vessel.

Clauses 13.1.4 and 13.1.5 incorporate specific provisions regarding ISM compliance for the first time. As of July 2002, all vessels over 500 gross tonnes are required to have ISM Code accreditation, excepting only government operated ships used for non-commercial purposes.

Clause 13.2.2 makes the obvious exception in the case of damage recoverable under the Hull or War Risks clauses, but it is important to note that automatic termination will still operate if the vessel sails from her next port without prior approval (but not necessarily survey) by the Classification Society.

14 MANAGEMENT

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

- 14.1.1 any change, voluntary or otherwise, in the ownership or flag of the vessel
- 14.1.2 transfer of the vessel to new management
- 14.1.3 charter of the vessel on a bareboat basis
- 14.1.4 requisition of the vessel for title or use

provided that, if the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, such automatic termination shall if required be deferred, whilst the vessel continues her planned voyage, until arrival at final port of discharge if with cargo or at port of destination if in ballast. However, in the event of requisition for title or use without the prior execution of a written agreement by the Assured, such automatic termination shall occur fifteen days after such requisition whether the vessel is at sea or in port.

- 14.2 Unless the Underwriters agree to the contrary in writing, this insurance shall terminate automatically at the time of the vessel sailing (with or without cargo) with an intention of being broken up, or being sold for breaking up.
- 14.3 In the event of termination under Clause 14.1 or Clause 14.2, a pro rata daily net return of premium shall be made provided that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.
- 14.4 It is the duty of the Assured, Owners and Managers at the inception of and throughout the period of this insurance and any extension thereof to
- 14.4.1 comply with all statutory requirements of the vessel's flag state relating to construction, adaptation, condition, fitment, equipment, operation and manning of the vessel
- 14.4.2 comply with all requirements of the vessel's Classification Society regarding the reporting to the Classification Society of accidents to and defects in the vessel.

In the event of any breach of any of the duties in this Clause 14.4, the Underwriters shall not be liable for any loss, damage, liability or expense attributable to such breach.

Clause 14.1 follows ITCH 83.

Clause 14.2 differs from ITCH 83 Clause 1.3 in that, rather than the insured value being reduced to the scrap value, the insurance terminates automatically - subject to Underwriters' agreement to the contrary. Difficulties may sometimes arise as each side tries to prove or disapprove an intention to scrap a vessel.

In Clause 14.4 the formula used in ITCH 95 regarding matters about which Class "might" make recommendations has quite rightly been discarded in view of the uncertainty involved. The duties are therefore to comply with regulatory and Class requirements, both of which can be more objectively assessed.

Clause 14.4 is not a true warranty in that a breach does not automatically void the policy. Any breach only relieves Underwriters of liability if the breach was causative of the loss being claimed for.

15 DEDUCTIBLE(S)

- 15.1 Subject to Clause 15.2, no claim arising from a peril insured under this insurance shall be payable under this insurance unless the aggregate of all such claims arising out of each separate accident or occurrence (including claims under Clauses 2, 3, 4, 5, 6 (including, if applicable, Clause 6 as amended by Clauses 37 or 38), Clauses 8 and 9 and, if applicable, Clause 41 exceeds the deductible amount agreed in which case this sum shall be deducted. Nevertheless the expense of sighting the bottom after stranding, if reasonably incurred specially for that purpose, shall be paid even if no damage is found.
- 15.2 No claim for loss of or damage to any machinery, shaft, electrical equipment or wiring, boiler, condenser, heating coil or associated pipework, arising under Clauses 2.2.1 to 2.2.5 and Clause 41 (if applicable) or from fire or explosion when either has originated in a machinery

space, shall be payable under this insurance unless the aggregate of all such claims arising out of each separate accident or occurrence exceeds the additional machinery damage deductible amount agreed (if any) in which case that amount shall be deducted. Any balance remaining, after application of this deductible, with any other claim arising from the same accident or occurrence, shall then be subject to the deductible referred to in Clause 15.1.

- 15.3 Clauses 15.1 and 15.2 shall not apply to a claim for total or constructive total loss of the vessel or, in the event of such a claim, to any associated claim under Clause 9 arising from the same accident or occurrence.
- 15.4 Claims for damage by heavy weather occurring during a single sea passage between two successive ports shall be treated as being due to one accident. In the case of such heavy weather extending over a period not wholly covered by this insurance the deductible to be applied to the claim recoverable under this insurance shall be the proportion of the deductible in Clause 15.1 that the number of days of such heavy weather falling within the period of this insurance and any extension thereof bears to the number of days of heavy weather during the single sea passage. The expression "heavy weather" in this Clause 15.4 shall be deemed to include contact with floating ice.
- 15.5 Claims for damage occurring during each separate lightening operation and/or each separate cargo loading or discharging operation from or into another vessel at sea, where recoverable under this insurance, shall be treated as being due to one accident.

Clause 15.1 is amended only to take account of new areas of cover, such as Leased Equipment and Parts Taken Off, and the optional Clause 41.

Clause 15.2, which uses the wording of the formerly separate Institute Machinery Damage Additional Deductible Clause, is an optional Clause, although the wording of the Clause does not make that clear except by the bracketed "(if any)". We understand that the intention is that if the Clause is not to apply, a NIL value is simply entered on the Cover Note.

Clause 15.5 is a helpful addition based on an established London Market Clause, however such operations must of course be agreed with Underwriters under Clause 10.4.

It should be noted that, while no deductible applies to claims under the optional General Average Absorption Clause (40), any other claims brought under Clause 8 will attract a deductible.

16 NEW FOR OLD

Claims recoverable under this insurance shall be payable without deduction on the basis of new for old.

No change to ITCH 83 Clause 14.

17 BOTTOM TREATMENT

The Underwriters shall not be liable in respect of scraping, gritblasting and/or other surface preparation or painting of the vessel's bottom except that

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

- 17.2 gritblasting and/or other surface preparation of
- 17.2.1 the butts or area of plating immediately adjacent to any renewed or refitted plating damaged during the course of welding and/or repairs
 - 17.2.2 areas of plating damaged during the course of fairing, either in place or ashore
- 17.3 supplying and applying the first coat of primer/anti-corrosive to those particular areas mentioned in Clauses 17.1 and 17.2
- 17.4 supplying and applying anti-fouling coatings to those particular areas mentioned in Clauses 17.1 and 17.2,

shall be included as part of the reasonable cost of repairs in respect of damage to bottom plating caused by a peril insured under this insurance.

No change to ITCH 83 Clause 15, except in 17.4 which now allows the cost of anti-fouling for new plating in damaged or disturbed areas, an equitable change given the much longer life of coatings now in use.

18 WAGES AND MAINTENANCE

Other than in general average, the Underwriters shall not be liable for wages and maintenance of the Master, Officers and Crew or any member thereof, except when incurred solely for the necessary removal of the vessel from one port to another for the repair of damage covered by the Underwriters, or for trial trips for such repairs, and then only for such wages and maintenance as are incurred whilst the vessel is under way.

No change to ITCH 83 clause 16.

19 AGENCY COMMISSION

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

No change to ITCH 83 Clause 17.

20 UNREPAIRED DAMAGE

- 20.1 The measure of indemnity in respect of claims for unrepaired damage shall be the reasonable depreciation in the market value of the vessel at the time this insurance terminates arising from such unrepaired damage, but not exceeding the reasonable cost of repairs.
- 20.2 In no case shall the Underwriters be liable for unrepaired damage in the event of a subsequent total loss of the vessel (whether by perils insured under this insurance or otherwise) sustained during the period of this insurance or any extension thereof.

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

No change to ITCH 83 Clause 18.

21 CONSTRUCTIVE TOTAL LOSS

- 21.1 In ascertaining whether the vessel is a constructive total loss, 80% of the insured value of the vessel shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.
- 21.2 No claim for constructive total loss of the vessel based upon the cost of recovery and/or repair of the vessel shall be recoverable hereunder unless such cost would exceed 80% of the insured value of the vessel. In making this determination, only the cost relating to a single accident or sequence of damages arising from the same accident shall be taken into account.

A significant change to ITCH 83 Clause 19 and its predecessors in that it is now necessary to show costs only up to 80% rather than 100% of the Insured Value, in order to establish a Constructive Total Loss.

This change puts the IHC 2003 on a par with the Norwegian Plan, and many countries which are subject to Civil Codes that make a similar provision. AIHC requires that the expense of recovering and repairing the vessel exceeds the Agreed Value.

22 FREIGHT WAIVER

If a total or constructive total loss of the vessel has been admitted by the Underwriters, they shall make no claim for freight whether notice of abandonment has been given or not.

No change to ITCH 83 Clause 20.

23 ASSIGNMENT

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

No change to ITCH 83 Clause 5.

24 DISBURSEMENTS WARRANTY

24.1 Additional insurances as follows are permitted by the Underwriters:

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

- 24.1.2 *Freight, Chartered Freight or Anticipated Freight, insured for time.* A sum not exceeding 25% of the value as stated herein less any sum insured, however described, under Clause 24.1.1
- 24.1.3 *Freight or Hire, under contracts for voyage.* A sum not exceeding the gross freight or hire for the current cargo passage and next succeeding cargo passage (such insurance to include, if required, a preliminary and an intermediate ballast passage) plus the charges of insurance. In the case of a voyage charter where payment is made on a time basis, the sum permitted for insurance shall be calculated on the estimated duration of the voyage, subject to the limitation of two cargo passages as laid down herein. Any sum insured under Clause 24.1.2 to be taken into account and only the excess thereof may be insured, which excess shall be reduced as the freight or hire is advanced or earned by the gross amount so advanced or earned.
- 24.1.4 *Anticipated Freight if the vessel sails in ballast and not under Charter.* A sum not exceeding the anticipated gross freight on next cargo passage, such sum to be reasonably estimated on the basis of the current rate of freight at time of insurance plus the charges of insurance. Any sum insured under Clause 24.1.2 to be taken into account and only the excess thereof may be insured.
- 24.1.5 *Time Charter Hire or Charter Hire for Series of Voyages.* A sum not exceeding 50% of the gross hire which is to be earned under the charter in a period not exceeding 18 months. Any sum insured under Clause 24.1.2 to be taken into account and only the excess thereof may be insured, which excess shall be reduced as the hire is advanced or earned under the charter by 50% of the gross amount so advanced or earned but the sum insured need not be reduced while the total of the sums insured under Clause 24.1.2 and Clause 24.1.5 does not exceed 50% of the gross hire still to be earned under the charter. An insurance under this Clause may begin on the signing of the charter.
- 24.1.6 *Premiums.* A sum not exceeding the actual premiums of all interests insured for a period not exceeding 12 months (excluding premiums insured under the foregoing sections but including, if required, the premium or estimated calls on any Club or War etc. Risk insurance) reducing pro rata monthly.
- 24.1.7 *Returns of Premium.* A sum not exceeding the actual returns which are allowable under any insurance but which would not be recoverable thereunder in the event of a total loss of the vessel whether by perils insured under this insurance or otherwise.
- 24.1.8 *Insurance irrespective of amount against.* Any risks excluded by Clauses 29, 30 and 31.
- 24.2 It is warranted that no insurance on any interests enumerated in the foregoing Clauses 24.1.1 to 24.1.7 in excess of the amounts permitted therein and no other insurance which includes total loss of the vessel P.P.I., F.I.A., or subject to any other like term, is or shall be effected to operate during the period of this insurance or any extension thereof by or for account of the Assured, Owners, Managers or Mortgagees. Provided always that a breach of this warranty shall not afford the Underwriters any defence to a claim by a Mortgagee who has accepted this insurance without knowledge of such breach.

No change to the ITCH 83 Clause 21 provisions, other than the inclusion in Clause 24.1.8 of reference to the Radioactivity and chemical etc. attacks exclusions.

25 CANCELLING RETURNS

If this insurance shall be cancelled by agreement, the Underwriters shall pay a pro rata monthly net return of premium for each uncommenced month, provided always that a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof.

Changing ITCH 83 Clause 22, only cancelling returns are allowed as a matter of course. If lay-up returns are required, these have to be specially agreed in accordance with IHC 2003 Clause 39.

26 SEPARATE INSURANCES

If more than one vessel is insured under this insurance, each vessel insured is deemed to be separately insured, as if a separate policy had been issued in respect of each vessel.

A standard term in fleet cover notes for many years.

27 SEVERAL LIABILITY

The Underwriters' obligations are several and not joint and are limited solely to the extent of their individual subscriptions. The Underwriters are not responsible for the subscription of any co-subscribing Underwriter who for any reason does not satisfy all or part of its obligations.

A standard term in London Market policies.

28 AFFILIATED COMPANIES

In the event of the vessel being chartered by an associated, subsidiary or affiliated company of the Assured, and in the event of loss of or damage to the vessel by perils insured under this insurance, the Underwriters waive their rights of subrogation against such charterers, except to the extent that any such charterer has the benefit of liability cover for such loss or damage.

Similar Clauses are often incorporated in policies. It is important to note that it only involves a waiver of subrogation and does not extend the benefits of cover to the other parties. In some contractual situations (for example in the oil industry) it may be necessary for an Owner to obtain an unqualified waiver of subrogation from Underwriters, without the exception regarding Charterers with liability insurance that appears in the above Clause.

These Clauses 29, 30 and 31 shall be paramount and shall override anything contained in this insurance inconsistent therewith.

29 WAR & STRIKES EXCLUSION

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

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

- 29.2 capture, seizure, arrest, restraint or detainment (barratry and piracy excepted), and the consequences thereof or any attempt thereat
- 29.3 derelict mines, torpedoes, bombs or other derelict weapons of war.
- 29.4 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions.

The wording of the exclusions remains unchanged but the first part of the Strikes Exclusion has been brought under the same heading as the War Exclusions in a more logical arrangement, which also benefits from a more generous allocation of commas to please punctuation enthusiasts.

30 TERRORIST, POLITICAL MOTIVE AND MALICIOUS ACTS EXCLUSION

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

- 30.1 any terrorist
- 30.2 any person acting from a political motive
- 30.3 the use of any weapon or the detonation of an explosive by any person acting maliciously or from a political motive.

The Malicious Acts and Terrorism Exclusions have also been brought together. The only change in wording is in 30.3 which now refers to "any weapon" rather than "weapon of war".

31 RADIOACTIVE CONTAMINATION, CHEMICAL, BIOLOGICAL, BIO-CHEMICAL AND ELECTROMAGNETIC WEAPONS EXCLUSION

In no case shall this insurance cover loss, damage, liability or expense directly or indirectly caused by or contributed to by or arising from

- 31.1 ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel
- 31.2 the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof
- 31.3 any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter
- 31.4 the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this Clause 31.4 does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes
- 31.5 any chemical, biological, bio-chemical or electromagnetic weapon.

This is based on an existing Institute wording and refers to any "weapon or device" instead of "weapon of war", thus including devices such as "dirty" bombs if used by terrorist or similar organisations without a formal state of war being in existence.

IHC 2002 also included the full Chemical/Biological/Cyber attack exclusion wording, but only the first part now appears here. The section that is omitted from IHC 2003 related to losses "directly or indirectly" caused by computer viruses etc. This had raised concerns that if a vessel's navigation system failed while in confined waters due to a computer virus inserted by a disgruntled employee and she ran aground, the exclusion could be applied even though, absent this clause, the proximate cause of the loss was a peril of the sea. Such concerns have now been removed.

PART 2 - ADDITIONAL CLAUSES (01/11/03)

32 NAVIGATING LIMITS

Unless and to the extent otherwise agreed by the Underwriters in accordance with Clause 33, the vessel shall not enter, navigate or remain in the areas specified below at any time or, where applicable, between the dates specified below (both days inclusive):

Area 1 - Arctic

- (a) North of 70° N. Lat.
- (b) Barents Sea

except for calls at Kola Bay, Murmansk or any port or place in Norway, provided that the vessel does not enter, navigate or remain north of 72°30'N. Lat. or east of 35° E. Long.

Area 2 - Northern Seas

- (a) White Sea.
- (b) Chukchi Sea.

Area 3 - Baltic

- (a) Gulf of Bothnia north of a line between Umea (63°50'N. Lat.) and Vasa (63°06'N. Lat.) between 10th December and 25th May.
- (b) Where the vessel is equal to or less than 90,000 DWT, Gulf of Finland east of 28°45'E. Long. between 15th December and 15th May.
- (c) Vessels greater than 90,000 DWT may not enter, navigate or remain in the Gulf of Finland east of 28°45'E. Long. at any time.
- (d) Gulf of Bothnia, Gulf of Finland and adjacent waters north of 59°24'N. Lat. between 8th January and 5th May, except for calls at Stockholm, Tallinn or Helsinki.
- (e) Gulf of Riga and adjacent waters east of 22°E. Long. and south of 59°N. Lat. between 28th December and 5th May.

Area 4 - Greenland

Greenland territorial waters.

Area 5 - North America (east)

- (a) North of 52°10'N. Lat. and between 50°W. Long. and 100°W. Long.
- (b) Gulf of St. Lawrence, St. Lawrence River and its tributaries (east of Les Escoumins), Strait of Belle Isle (west of Belle Isle), Cabot Strait (west of a line between Cape Ray and Cape North) and Strait of Canso (north of the Canso Causeway), between 21st December and 30th April.
- (c) St. Lawrence River and its tributaries (west of Les Escoumins) between 1st December and 30th April.
- (d) St. Lawrence Seaway.
- (e) Great Lakes.

Area 6 - North America (west)

- (a) North of 54°30'N. Lat. and between 100°W. Long. and 170°W. Long.
- (b) Any port or place in the Queen Charlotte Islands or the Aleutian Islands.

Area 7 - Southern Ocean

South of 50°S. Lat. except within the triangular area formed by rhumb lines drawn between the following points

- (a) 50°S. Lat.; 50°W. Long.
- (b) 57°S. Lat.; 67°30'W. Long.
- (c) 50°S Lat.; 160°W. Long.

Area 8 - Kerguelen/Crozet

Territorial waters of Kerguelen Islands and Crozet Islands.

Area 9 - East Asia

- (a) Sea of Okhotsk north of 55°N. Lat. and east of 140°E. Long. between 1st November and 1st June.
- (b) Sea of Okhotsk north of 53°N. Lat. and west of 140°E. Long. between 1st November and 1st June.
- (c) East Asian waters north of 46°N. Lat. and west of the Kurile Islands and west of the Kamchatka Peninsula between 1st December and 1st May.

Area 10 - Bering Sea

Bering Sea except on through voyages and provided that

- (a) the vessel does not enter, navigate or remain north of 54°30'N. Lat.; and
- (b) the vessel enters and exits west of Buldir Island or through the Amchitka, Amukta or Unimak passes; and
- (c) the vessel is equipped and properly fitted with two independent marine radar sets, a global positioning system receiver (or Loran-C radio positioning receiver), a radio transceiver and GMDSS, a weather facsimile recorder (or alternative equipment for the receipt of weather and routing information) and a gyrocompass, in each case to be fully operational and manned by qualified personnel; and
- (d) the vessel is in possession of appropriate navigational charts corrected up to date, sailing directions and pilot books.

The Navigating Limits are new, bringing greater clarity, while largely retaining the substance of the Institute Warranties. These limits are no longer expressed as warranties - see Clauses 10 and 11 above.

33 PERMISSION FOR AREAS SPECIFIED IN NAVIGATING LIMITS

The vessel may breach Clause 32 and Clause 11 shall not apply, provided always that the Underwriters' prior permission shall have been obtained and any amended terms of cover and any additional premium required by the Underwriters are agreed.

34 RECOMMISSIONING CONDITION

As a condition precedent to the liability of the Underwriters, the vessel shall not leave her lay-up berth under her own power or navigate following a lay-up period of more than 180 consecutive days unless the Assured has arranged for the Classification Society or a surveyor agreed by the Underwriters to examine the vessel and has carried out any repairs or requirements recommended by the Classification Society or such surveyor.

A new requirement, which reflects good practice following a lengthy lay-up period.

35 PREMIUM PAYMENT

35.1 The Assured undertakes that the premium shall be paid

35.1.1 in full to the Underwriters within 45 days (or such other period as may be agreed) of inception of this insurance; or

35.1.2 where payment by instalment premiums has been agreed

(a) the first instalment premium shall be paid within 45 days (or such other period as may be agreed) of inception of this insurance, and

(b) the second and subsequent instalments shall be paid by the date they are due.

35.2 If the premium (or the first instalment premium) has not been so paid to the Underwriters by the 46th day (or the day after such period as may have been agreed) from the inception of this insurance (and, in respect of the second and subsequent instalment premiums, by the date they are due), the Underwriters shall have the right to cancel this insurance by notifying the Assured via the broker in writing.

35.3 The Underwriters shall give not less than 15 days prior notice of cancellation to the Assured via the broker. If the premium or instalment premium due is paid in full to the Underwriters before the notice period expires, notice of cancellation shall automatically be revoked. If not, this insurance shall automatically terminate at the end of the notice period.

35.4 In the event of cancellation under this Clause 35, premium is due to the Underwriters on a pro rata basis for the period that the Underwriters are on risk but the full premium shall be payable to the Underwriters in the event of loss, damage, liability or expense arising out of or resulting from an accident or occurrence prior to the date of termination which gives rise to a recoverable claim under this insurance.

- 35.5 Unless otherwise agreed, the Leading Underwriter(s) designated in the slip or policy are authorised to exercise rights under this Clause 35 on their own behalf and on behalf of all co-subscribing Underwriters. Nothing in this Clause 35.5 shall, however, prevent any co-subscribing Underwriter from exercising rights under this Clause 35 on its own behalf.
- 35.6 Where the premium is to be paid through a Market Bureau, payment to the Underwriters will be deemed to occur on the day of delivery of a premium advice note to the Bureau.

Sections 52-54 of the Marine Insurance Act deal with payment of the Premium in a relatively limited way. Reference to Premium Payment in the Clauses is new, although many Cover Notes already include the Lloyds Standard Wording 3000 on which this Clause 35 is based. The words "Assured undertakes that" have been added at the top of the Clause to make it clear where the obligation lies.

Many jurisdictions have specific statutory provisions regarding payment of premiums under insurance contracts, which may over-ride the above.

36 CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999

- 36.1 No benefit of this insurance is intended to be conferred on or enforceable by any party other than the Assured, save as may be expressly provided herein to the contrary.
- 36.2 This insurance may by agreement between the Assured and the Underwriters be rescinded or varied without the consent of any third party to whom the enforcement of any terms has been expressly provided for.

Prior to 1999 it was not possible for a person to enforce a contract unless he was a party to it. Even if the contract was made with the purpose of conferring a benefit on someone who was not a party to it, that person had no right to sue for breach of contract. This was known as the "privity of contract" rule.

The Contracts (Rights of Third Parties) Act 1999 amended the law by providing that (subject to some exceptions) a third party may enforce a term of a contract if the contract expressly provides that he may, or if a term in the contract purports to confer a benefit on him. However, the third party has no right to enforce the contract if it appears from the contract that the parties did not intend the term to be enforceable by the third party. In other words, the right of the third party can be excluded by a specific provision. In this case the right of any third party to enforce the contract has been excluded, to avoid any doubt regarding the position of parties such as salvors or repairers.

37 FIXED AND FLOATING OBJECTS

If the Underwriters have expressly agreed in writing, then Clauses 6 and 7 are amended to read as follows

- 6.1 The Underwriters agree to indemnify the Assured for three fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for
- 6.1.1 loss of or damage to any other vessel or fixed or floating object or property thereon

- 6.1.2 delay to or loss of use of any such other vessel or fixed or floating object or property thereon
- 6.1.3 general average of, salvage of, or salvage under contract of, any such other vessel or property thereon,

where such payment by the Assured is in consequence of the insured vessel coming into collision with any other vessel or striking any fixed or floating object.

- 6.2 The indemnity provided by this Clause 6 shall be in addition to the indemnity provided by the other terms and conditions of this insurance and shall be subject to the following provisions
 - 6.2.1 where the insured vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, the indemnity under this Clause 6 shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision
 - 6.2.2 in no case shall the total liability of the Underwriters under Clauses 6.1 and 6.2 exceed their proportionate part of three fourths of the insured value of the insured vessel in respect of any one collision.
- 6.3 The Underwriters shall also pay three fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, provided always that their prior written consent to the incurring of such costs shall have been obtained and that the total liability of the Underwriters under this Clause 6.3 shall not (unless the Underwriters' specific written agreement shall have been obtained) exceed 25% of the insured value of the insured vessel.

EXCLUSIONS

- 6.4 In no case shall the Underwriters indemnify the Assured under this Clause 6 for any sum which the Assured shall pay for or in respect of
 - 6.4.1 removal or disposal of obstructions, wrecks, cargoes or any other thing whatsoever
 - 6.4.2 any real or personal property or thing whatsoever except other vessels or any fixed or floating object struck by the insured vessel or property on other vessels or any such fixed or floating object
 - 6.4.3 the cargo or other property on, or the engagements of, the insured vessel
 - 6.4.4 loss of life, personal injury or illness
 - 6.4.5 pollution or contamination, or threats thereof, of any real or personal property or thing whatsoever (except other vessels with which the insured vessel is in collision or property on such other vessels) or damage to the environment, or

threat thereof, save that this exclusion shall not exclude any sum which the Assured shall pay for or in respect of salvage remuneration in which the skill and efforts of the salvors in preventing or minimising damage to the environment as referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.

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

A new Clause incorporating optional additional cover.

38 4/4THS COLLISION LIABILITY

If the Underwriters have expressly agreed in writing, then Clause 6 is amended such that the words "three fourths of" are deleted on each occasion in which they appear in Clause 6.

A new Clause incorporating optional additional cover.

39 RETURNS FOR LAY-UP

- 39.1 If the Underwriters have expressly agreed in writing, such percentage of the net premium as agreed by the Underwriters shall be returned for each period of 30 consecutive days the vessel may be laid up, not under repair, in a port or in a lay-up area provided such port or lay-up area is approved by the Underwriters.
- 39.2 The vessel shall not be considered to be under repair when work is undertaken in respect of ordinary wear and tear of the vessel and/or following recommendations in the vessel's Classification Society survey, but in the case of any repairs following loss of or damage to the vessel or involving structural alterations, whether covered by this insurance or otherwise, shall be considered as under repair.
- 39.3 PROVIDED ALWAYS THAT
- 39.3.1 a total loss of the vessel, whether by perils insured under this insurance or otherwise, has not occurred during the period of this insurance or any extension thereof
- 39.3.2 a return of premium shall not be allowed when the vessel is lying in exposed or unprotected waters, or in a port or lay-up area not approved by the Underwriters
- 39.3.3 loading or discharging operations or the presence of cargo on board shall not debar a return of premium but no return shall be allowed for any period during which the vessel is being used for the storage of cargo or for lightering purposes
- 39.3.4 in the event of any return of premium recoverable under this Clause 39 being based on 30 consecutive days which fall on successive insurances effected for the same

Assured, this insurance shall only be liable for an amount calculated at pro rata of the agreed percentage net for the number of days which come within the period of this insurance or any extension thereof and to which a return is actually applicable. Such overlapping period shall run, at the option of the Assured, either from the first day on which the vessel is laid up or the first day of a period of 30 consecutive days as provided under Clause 39.1 above.

Whereas ITCH 83 Clause 22 provided for different rates "under repair" and "not under repair", this Clause allows only for "not under repair" returns and the amount returnable must be agreed at the time of placing the insurance. However, carrying out routine maintenance or Class work other than structural alterations does not cause the vessel to lose its status of being "not under repair" (Clause 39.2).

40 GENERAL AVERAGE ABSORPTION

- 40.1 If the Underwriters have expressly agreed in writing and subject to the provisions of Clause 8, the following shall apply in the event of an accident or occurrence giving rise to a general average act under the York-Antwerp Rules 1994 or under the provisions of the general average clause in the contract of affreightment.
- 40.2 The Assured shall have the option of claiming the total general average, salvage and special charges up to the amount expressly agreed by the Underwriters, without claiming general average, salvage or special charges from cargo, freight, bunkers, containers or any property not owned by the Assured on board the vessel (hereinafter the "Property Interests").
- 40.3 The Underwriters shall also pay the reasonable fees and expenses of the average adjuster for calculating claims under this Clause 40, in addition to any payment made under Clause 40.2.
- 40.4 If the Assured claims under this Clause 40, the Assured shall not claim general average, salvage or special charges against the Property Interests.
- 40.5 Claims under this Clause 40 shall be adjusted in accordance with the York-Antwerp Rules 1994, excluding the first paragraph of Rule XX and Rule XXI, relating to commission and interest.
- 40.6 Claims under this Clause 40 shall be payable without the application of the deductible(s) in Clause 15.
- 40.7 Without prejudice to any other defences that the Underwriters may have under this insurance or at law, the Underwriters waive any defences to payment under this Clause 40 which would have been available to the Property Interests, if the Assured had claimed general average, salvage or special charges from the Property Interests.
- 40.8 In respect of payments made under this Clause 40, the Underwriters waive their rights of subrogation against the Property Interests, save where the accident or occurrence giving rise to such payment is attributable to fault on the part of the Property Interests or any of them.
- 40.9 Claims under this Clause 40 shall be payable without reduction in respect of any under-insurance.

40.10 For the purposes of this Clause 40, special charges shall mean charges incurred by the Assured on behalf of or for the benefit of a particular interest to the adventure, for which charges the Assured is not responsible under the contract of affreightment.

A quick survey amongst RHL offices suggested that around 70% of all policies on ocean-going vessels now contain a General Average Absorption Clause of some kind. Such Clauses play a vital part in reducing the number of small, uneconomic collections from cargo interests, by allowing the Assured to recover General Average in full under the Hull Policy, up to a specified limit.

Until recently there has been no standard wording, but in September 2002 BIMCO circulated their recommended Standard General Average Absorption Clause. IHC 2002 contained the first Standard Absorption Clause to be found in Institute Clauses, which was to be welcomed due to the inadequacies of some of the wordings in circulation.

The extended version now found in IHC 2003 moves much closer to the BIMCO wording in two respects. Most significantly, claims under this Clause will not be subject to the deductible.

The rationale for this is simple. The purpose of such Clauses is to remove the need to collect General Average contributions from cargo in cases where it is uneconomic to do so, thus avoiding unnecessary expense and commercial friction between vessel operators, charterers and cargo interests. If the Absorption Clause is subject to the policy deductible and that deductible happens to be set at a significant level (as is often the case today), the Shipowner may feel under financial pressure to declare General Average so that he can at least recover Cargo's proportion, even if he can recover nothing under the Hull Policy because of that deductible.

For example, assume a claim where:

<i>General Average</i>	<i>US\$ 100,000</i>
<i>Particular Average</i>	<i>150,000</i>
	<i><u>US\$ 250,000</u></i>
<i>Deductible</i>	<i><u>US\$ 250,000</u></i>

Under Absorption Clauses in use in the past or under IHC 2002, there would be no claim on the Hull Policy and the Assured might be tempted to collect security from cargo to recover their proportion of US\$100,000. Under the IHC 2003 Absorption Clause there would be a claim on the Hull Policy of US\$100,000 and the Assured would be precluded (40.4) from seeking contributions from cargo etc.

Whilst this does increase the burden on Hull Insurers for lower level claims, there will be a saving in costs for property Insurers as a whole, leaving full General Average cases involving cargo to the larger casualties to which the system is best suited.

The Clause also now refers to "Special Charges", which are defined in Clause 40.10. When General Average Guarantees and Bonds are obtained from cargo interests following a

casualty, the wording will almost invariably refer to Special Charges as well as General Average and Salvage.

If cargo is discharged ashore following a fire in order to be inspected and/or reconditioned, the reconditioning costs relating to extinguishing damage will be General Average (payable by all parties) and the costs relating to fire damage will be a Special Charge falling on the individual cargo interests. For practical reasons it is often difficult to distinguish between likely General Average expenses and Special Charges at the time decisions are being made whether or not to collect security from cargo. By bringing both within the terms of the Absorption Clause this uncertainty is removed and a further incentive to avoid uneconomic security collections is provided.

It should be noted that the Clause is triggered (40.1) by a General Average according to the York-Antwerp Rules 1994 or according to the General Average Clause in the Contract of Affreightment which may be an earlier version, usually YAR 1974, or (rarely) YAR 1950. However once the Clause is triggered, the adjustment of the claim on the Hull Policy is carried out according to York-Antwerp Rules 1994.

The importance of Absorption Clauses is already well known amongst Container Vessel Operators, but as a general observation we rarely find that the limits are set at a high enough level, in circumstances in which modest feeder services may employ vessels with over 1000 teu capacity. Our guide to "Container Vessels and General Average" deals with these questions in more detail, but one solution that is recommended is the use of separate "top up" insurances that provide an additional layer of cover above the Hull Absorption Clause.

41 ADDITIONAL PERILS

41.1 If the Underwriters have expressly agreed in writing, this insurance covers

41.1.1 the costs of repairing or replacing any boiler which bursts or shaft which breaks, where such bursting or breakage has caused loss of or damage to the subject matter insured covered by Clause 2.2.1, and that half of the costs common to the repair of the burst boiler or the broken shaft and to the repair of the loss or damage caused thereby which is not covered by Clause 2.3

41.1.2 the costs of correcting a latent defect where such latent defect has caused loss of or damage to the subject matter insured covered by Clause 2.2.2, and that half of the costs common to the correction of the latent defect and to the repair of the loss or damage caused thereby which is not covered by Clause 2.4

41.1.3 loss of or damage to the vessel caused by any accident or by negligence, incompetence or error of judgment of any person whatsoever

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

41.2 Master, Officers, Crew or Pilots shall not be considered Owners within the meaning of Clause 41.1 should they hold shares in the vessel.

The IHC 2003 continue the existing practice of having a basic cover intended for general use, which can be supplemented by additional clauses that give cover on an "any accident" basis rather than being limited to specified named perils. Previously, such additional cover was provided by separate wordings that were attached to the policy and the basic clauses. In the IHC 2003 the Additional Perils cover forms part of the body of the clauses and is activated by agreement when the insurance is placed.

The Institute Additional Perils Clause (IAPC) was drafted to complement ITCH 83 and replaced the "Liner Negligence Clause", which although not an official Institute Clause, had been in general use from its inception in the 1930's. The IAPC followed its predecessor in that bursting of boilers and breakage of shafts were covered without qualification, and the requirement in Clause 41.1.1 for such an event to cause loss or damage to the vessel is new, although it is consistent with the approach taken in Clause 2.2. It is very unusual for there not to be some consequential damage from such an incident, and, in any event Clause 41.1.3 provides an alternative avenue for recovery.

Clause 41.1.2 brings back into the cover the cost of correcting the latent defect, which was excluded in Clause 2.2.2, subject to the proviso that the defect has caused loss or damage to the vessel.

The equivalent cover that existed under ITCH 83 with IAPC incorporated relied upon the distinction between the defective part and the consequential damage that was (mistakenly as shown by the "Nukila") the common approach. The IAPC therefore excluded the cost of "repairing or replacing any part found to be defective as a result of fault or error in design or construction and which has not caused loss of or damage to the vessel".

The wording of the basic cover (Clause 2.2.2) and the Additional Perils cover in Clause 41 are truly "back to back". There remains a requirement for the latent defect to have caused damage (in line with one of the three "Nukila" tests referred to on page 9 above) but it no longer has to be damage to a separate part; damage within the same component is sufficient, provided it is something "incrementally greater" than the defect itself.

Clause 41.1.3 is unchanged from IAPC and its predecessor, the Liner Negligence Clause.

PART 3 - CLAIMS PROVISIONS (01/11/03)

42 LEADING UNDERWRITER(S)

42.1 Where there is co-insurance in respect of this insurance, all subscribing Underwriters agree that the Leading Underwriter(s) designated in the slip or policy may act on their behalfs so as to bind them for their respective several proportions in respect of the following matters (in addition to Clause 35.5)

42.1.1 the appointment of surveyors, experts, average adjusters and lawyers, in relation to matters which may give rise to a claim under this insurance

42.1.2 the duties and obligations to be undertaken by the Underwriters including, but not limited to, the provision of security

42.1.3 claims procedures, the handling of any claim (including, but not limited to, agreements under Clause 43.2) and the pursuit of recoveries

42.1.4 all payments or settlements to the Assured or to third parties under this insurance other than those agreed on an 'ex-gratia' basis.

Notwithstanding the above, the Leading Underwriter(s), or any of them, may require any such matters to be referred to the co-subscribing Underwriters.

42.2. The co-subscribing Underwriters shall, to the extent of their respective several proportions, indemnify and hold harmless the Leading Underwriter(s) in respect of all liabilities, costs or expenses incurred by the Leading Underwriter(s) in respect of the matters in Clause 42.1.

42.3 If the Leading Underwriter(s) require expenses incurred for or on behalf of the Underwriters to be collected for a party instructed by the Leading Underwriter(s), the collecting party shall be entitled to charge 5% of the amount collected for this service or such other amount as may be agreed in advance by the Leading Underwriter(s), such fee to be paid by the Underwriters.

42.4 The agreement in this Clause 42 between the Leading Underwriter(s) and co-subscribing Underwriters is subject to the exclusive jurisdiction of the English High Court of Justice and is subject to English law and practice.

A new Clause that deals with the working relationship between the Leading and following Underwriters on a particular risk, which is designed to clarify and speed up the decision making process. Although not directly relevant to Assureds, it is useful for all parties to be able to see how the system will work.

43 NOTICE OF CLAIMS

43.1 In the event of an accident or occurrence whereby loss, damage, liability or expense may result in a claim under this insurance, notice must be given to the Leading Underwriter(s) as soon as possible after the date on which the Assured, Owners or Managers become aware of such loss, damage, liability or expense so that a surveyor may be appointed if the Leading Underwriter(s) so desire.

- 43.2 If notice is not given to the Leading Underwriter(s) within 180 days of the Assured, Owners or Managers becoming aware of such loss, damage, liability or expense, no claim shall be recoverable under this insurance in respect of such loss, damage, liability or expense, unless the Leading Underwriter(s) agree to the contrary in writing.

Clause 43.1 follows ITCH 83 Clause 10.1, with the added requirement that notice must be given as soon as possible.

The reference to the "nearest Lloyd's Agents" when the vessel is abroad (first introduced in 1893) has been dropped, presumably in deference to improved communications and to give Underwriters greater flexibility as to who shall be appointed as their Surveyor.

Commercial Underwriters are now under much greater pressure to maintain accurate loss reserves, which they feel can be undermined by late reporting of claims, and the new provisions of Clause 43.2 reflect that concern.

Under IHC 2002, the 180 day period was started by the Assured becoming aware of an accident or occurrence that might result in a claim. Along with other commentators we expressed concern that this might have unintended repercussions. For example, momentary loss of stern tube oil or a "touch and go" grounding may be followed up by a divers inspection that reports little damage, but which is contradicted by a tailshaft withdrawal or drydocking several years later. With the test of awareness being related to the "accident or occurrence" an Assured might be in difficulty if, mindful of a large deductible, the original incident was not reported to Underwriters and damage was found after the 180 day cut-off point.

The amended Clause 43.2 in IHC 2003 avoids this problem by specifying that the test is the Assureds awareness of loss or damage etc. that may result in a claim.

44 TENDER PROVISIONS

- 44.1 The Leading Underwriter(s) shall be entitled to decide the port to which the vessel shall proceed for docking or repair (the actual additional expense of the voyage arising from compliance with the Leading Underwriter(s)' requirements being refunded to the Assured) and shall have a right of veto concerning a place of repair or a repairing firm.
- 44.2 The Leading Underwriters(s) may also take tenders or may require further tenders to be taken for the repair of the vessel. Where such a tender has been taken and a tender is accepted with the approval of the Leading Underwriter(s), an allowance shall be made at the rate of 30% per annum on the insured value for the time lost between the despatch of the invitations to tender required by the Underwriters and the acceptance of a tender to the extent that such time is lost solely as the result of tenders having been taken and provided that the tender is accepted without delay after receipt of the Leading Underwriter's approval.
- 44.3 Due credit shall be given against the allowance in Clause 44.2 for any amounts recovered in respect of fuel, stores, wages and maintenance of the Master, Officers and Crew or any member thereof, including amounts allowed in general average, and for any amounts recovered from third parties in respect of damages for detention and/or loss of profit and/or running expenses, for the period covered by the tender allowance or any part thereof.

- 44.4 Where a part of the cost of the repair of damage other than a fixed deductible is not recoverable from the Underwriters the allowance shall be reduced by a similar proportion.
- 44.5 If the Assured fails to comply with this Clause 44, a deduction of 15% shall be made from the amount of the ascertained net claim.

There is no change to ITCH 83 clause 10, other than the insertion of "Leading Underwriters" rather than "Underwriter".

As a general comment, unrelated to the revision, we would recommend Owners who have particular repair requirements (perhaps for regulatory, commercial or technical reasons), that involve them in repairing in a particular place or manner, should make these known to Underwriters during placing discussions.

45 DUTIES OF THE ASSURED

- 45.1 The Assured shall, upon request and at their own expense, provide the Leading Underwriter(s) with all relevant documents and information that they might reasonably require to consider any claim.
- 45.2 Upon reasonable request, the Assured shall also assist the Leading Underwriter(s) or their authorised agents in the investigation of any claim, including, but not limited to
- 45.2.1 interview(s) of any employee, ex-employee or agent of the Assured
- 45.2.2 interview(s) of any third party whom the Leading Underwriter(s) consider may have knowledge of matters relevant to the claim
- 45.2.3 survey(s) of the subject-matter insured
- 45.2.4 inspection(s) of the classification records of the vessel.
- 45.3 It shall be a condition precedent to the liability of the Underwriters that the Assured shall not at any stage prior to the commencement of legal proceedings knowingly or recklessly
- 45.3.1 mislead or attempt to mislead the Underwriters in the proper consideration of a claim or the settlement thereof by relying on any evidence which is false
- 45.3.2 conceal any circumstance or matter from the Underwriters material to the proper consideration of a claim or a defence to such a claim.
- 45.4 Clause 45.3 does not require the Assured at any stage to disclose to the Underwriters any document or matter which under English law is protected from disclosure by legal advice privilege or by litigation privilege.

Clause 45.1 reflects the existing position regarding burden of proof, but parts of Clause 45.2 go rather further than Owners are accustomed to in the routine handling of claims. Clause 45.2 is prefaced by the phrase "upon reasonable request", which we assume reflects an intention that such requests should be appropriate for the kind of claim under investigation. Underwriters will also need to be mindful of the fact, when reaching a balanced assessment of a claim, that evidence of an employee may not always be objective, particularly if disciplinary action is

anticipated or has occurred; similar considerations also apply to evidence from engine manufacturers or service engineers in some machinery damage cases.

Survey of the damage (Clause 45.2.3) is a routine matter and inspection of Class records is a logical corollary of the Clauses that stipulate compliance with Class requirements.

In relation to Clause 45.3 the House of Lords ruled in the "STAR SEA" [2001] 1 Lloyd's Rep that the duty of good faith imposed on both parties to an insurance contract by section 17 of the Marine Insurance Act 1906 continues to apply after the conclusion of the insurance contract. However, once the parties are engaged in litigation, the conduct of the parties as to what should or should not be disclosed is governed by the procedural rules of the court rather than by section 17. The words "(whether legal proceedings be commenced or not)" are intended to reverse the effect of this decision and to create a general duty of the Assured not to mislead the Underwriters or conceal material circumstances from them, even after litigation has been commenced.

Sub Clauses 45.3.1 and 45.3.2 render in more specific terms the basic requirement set out in Section 17 of the Marine Insurance Act 1906:

"A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

It has been settled under English Law for some time that, (even in the absence of any Clause in the terms of 45.3), if part of a claim is fraudulently presented, the Assured loses all right of recovery, including those losses that were properly put forward (Orakpo v Barclays Insurance Services, LLR 1995). Clause 45.3 is therefore an important reminder of that existing legal position, which was confirmed recently in a marine insurance context in the "AEGEON" [2002] 2 Lloyd's Rep.

In dealing with the "due diligence" proviso in ITCH 83 Clause 6.2 and its predecessors, it has been accepted practice to follow the case of the "EURYSTHENES" [1976] in deciding who constitutes the "Assured". That case concerned Section 39(5) of the Marine Insurance Act 1906 and it was held that the "Assured" meant the "head people" of a company. It should also be noted that the clause only relates to situations in which the Assured has "knowingly or recklessly" sought to mislead underwriters.

There have been two changes (from what was Clause 48.3 in IHC 2002) in Clause 45.3 in IHC 2003.

The words "in the preservation or maintenance of such claim" have been deleted from Clause 48.3.1. It has been suggested that these words have been rendered unnecessary by a recent judgement, but in any event the introductory words "at any stage" would seem to make the phrase superfluous.

In Clause 45.3.2 the phrase "which might be" no longer qualifies the word "material", which helps to clarify that the test of materiality is an objective one, probably to be assessed according to the viewpoint of the same prudent insurer who is envisaged in the well known cases involving disclosure when the risk is placed. An objective test of materiality, coupled with the phrase

"proper consideration" appears to maintain an equitable balance between the rights and duties of the parties.

Clause 45.4 is new to IHC 2003 and makes it clear that the Assured cannot be required to disclose documents or matters (such as correspondence with their solicitors) which are covered by legal privilege.

46 DUTIES OF THE UNDERWRITERS IN RELATION TO CLAIMS

- 46.1 The Leading Underwriter(s) may, at their sole discretion, upon the notification of loss, damage, liability or expense arising from an accident or occurrence which may result in a claim under this insurance
- 46.1.1 instruct a surveyor who shall report to the Leading Underwriter(s) concerning the cause and extent of damage, the necessary repairs and the fair and reasonable cost thereof and any other matter which the Leading Underwriter(s) or the surveyor consider relevant
- 46.1.2 confirm the appointment of an independent average adjuster to assist the Assured in the preparation of the claim. If not already agreed, the Assured shall propose the average adjuster to be appointed who may be a Fellow of the Association of Average Adjusters of the United Kingdom or any other average adjuster mutually acceptable to the Assured and the Leading Underwriter(s).
- 46.2 Where such appointments are made, the Underwriters shall be responsible for payment of reasonable fees directly to the surveyor and the average adjuster irrespective of whether a claim ultimately arises under this insurance. However, the Underwriters' liability for the fees of the appointed average adjuster shall cease no later than at such time as the Underwriters pay, settle or communicate their intention to deny the claim under this insurance or when it becomes apparent that any claim is unlikely to exceed the relevant deductible(s) in Clause 15.
- 46.3 The making of such appointments is not an admission by the Underwriters that the accident, occurrence or resulting claim is covered under this insurance or a waiver of any rights or defences that the Underwriters may have under this insurance or at law.
- 46.4 The reports of the surveyor shall, subject to no conflict of interest being identified by the Leading Underwriter(s), be released without delay to the Assured and the appointed average adjuster.
- 46.5 The Leading Underwriter(s) shall be entitled to request the appointed average adjuster to provide status reports at any stage.
- 46.6 The Leading Underwriter(s) shall give prompt consideration to the making of a payment on account upon the recommendation of the appointed average adjuster or, if no adjuster is appointed, upon the request of the Assured supported by appropriate documentation.
- 46.7 The Leading Underwriter(s) shall make a decision in respect of any claim within 28 days of receipt by them of the appointed average adjuster's final adjustment or, if no adjuster is appointed, a fully documented claim presentation sufficient to enable the Underwriters to determine their liability in relation to coverage and quantum. If the Leading Underwriter(s) request additional documentation or information to make a decision, they shall make a decision within a reasonable time after receipt of the additional documents or information

requested, or of a satisfactory explanation as to why such documents and information are not available.

Much of this new clause could be said merely to reflect existing practice, but it is both welcome and important that such claims procedures have been set out explicitly for the first time. Although Assureds might have wished to see some sanction, perhaps in the form of interest becoming payable, if settlement is delayed, Underwriters have committed themselves to a clear "mission statement" as to how claims should be progressed.

47 PROVISION OF SECURITY

If the Assured is obliged to provide security to a third party in order to prevent the arrest of, or to obtain the release of, the vessel, due to an accident or occurrence giving rise to a claim alleged to be covered under this insurance, the Underwriters shall give due consideration to assisting the Assured by providing security on behalf of the Assured or counter-security in a form to be determined by the Leading Underwriter(s).

A new Clause based on an existing JHC Clause that appears in many cover notes. The provision of security remains discretionary, but once the decision to give security has been made by the Leader, it is binding on the following Underwriters.

Given that security is often required as a matter of some urgency, we recommend that Assureds consider their particular circumstances with regard to counter-guarantees etc. and discuss matters with any mortgagees/assignees etc. to ensure that procedures are fully understood by all parties in advance of any emergency.

48 PAYMENT OF CLAIMS

Claims payable under this insurance shall, subject to the terms of any assignment, be paid to the loss payee or, if no loss payee has been agreed, to the Assured or as they may direct in writing. Such payment, whether in account or otherwise, when made shall be a complete discharge of the Underwriters' obligations under this insurance in respect of the amount so paid.

New Clause regarding payment procedures.

49 RECOVERIES

49.1 The Assured shall, whether or not the Underwriters have paid a claim or agreed to pay a claim or potential claim under this insurance, take reasonable steps to

49.1.1 assess as soon as possible whether there are any prospects of a recovery from third parties in respect of matters giving rise to a claim or to a potential claim under this insurance

49.1.2 protect any claims against such third parties if necessary by the commencement of proceedings and the taking of appropriate steps to obtain security for the claim from third parties

- 49.1.3 keep the Leading Underwriter(s) and the appointed average adjuster (if any) advised of the recovery prospects and any action taken against third parties
- 49.1.4 co-operate with the Leading Underwriter(s) in the taking of such steps as may be reasonably required to pursue any claims against third parties.
- 49.2 Underwriters shall pay the reasonable costs incurred by the Assured pursuant to this Clause 49 in the same proportion as the insured losses bear to the total of the insured and uninsured losses (as defined in Clause 49.4.2).
- 49.3 Where the Assured have incurred reasonable costs pursuant to Clause 49.1.2 and where no claim is recoverable under this insurance, provided always that the Underwriters' written agreement to the reimbursement of such costs shall have been obtained prior to the incurring of such costs, the Underwriters shall reimburse such costs to the extent agreed, notwithstanding that no claim is recoverable under this insurance.
- 49.4 In the event of recoveries from third parties in respect of claims which have been paid in whole or in part under this insurance, such recoveries shall be distributed between the Underwriters and the Assured as follows
- 49.4.1 the reasonable costs and expenses incurred in making such recoveries from the third party shall be deducted first and returned to the paying party
- 49.4.2 the balance shall be apportioned between the Underwriters and the Assured in the same proportion that the insured losses and uninsured losses bear to the total of the insured and uninsured losses. For the purposes of Clause 49.2 and this Clause 49.4.2, uninsured losses shall mean loss of or damage to the subject-matter insured and any liability or expense which would have been recoverable under this insurance, but for the application of deductible(s) under Clause 15 and the limits of this insurance
- 49.5 In the event that under this insurance coverage is not provided in accordance with Clause 6, the following shall apply
- 49.5.1 Where the insured vessel is in collision with another vessel and both vessels are to blame then, unless the liability of one or both vessels becomes limited by law, any recovery due to the Underwriters shall be calculated on the principle of cross-liabilities as if the respective Owners had been compelled to pay to each other such proportion of each other's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of the collision.

The Institute Cargo Clauses have long contained specific provisions regarding preserving rights of recovery because of the relationship with Carriage of Goods by Sea legislation. Hull Underwriters are concerned that their rights of subrogation should be similarly safeguarded. Under Section 79 of the Marine Insurance Act, the Insurer acquires his subrogative rights on payment of the loss, at which point he is entitled to "stand in the Assured's shoes" in seeking recoveries. Clause 49 seeks to ensure that recovery rights are properly managed from day one, with Underwriters agreeing to pay their proportion of costs so incurred.

No specific sanction is mentioned if the Assured fails to meet the requirements of 49.1.1 and 49.1.2, but the position under the equivalent Institute Cargo Clause 16 has been clear since the "Vasso" (1993, 2 Lloyd's Rep). A submission by Insurers in that case, that the Clause should be construed as a contractual warranty (so that a breach was automatically fatal to

any claim) was firmly rejected. The general view from this and other cases, and from authorities such as *Arnould on Marine Insurance*, is that if subrogation rights are lost due to inaction by the Assured the Insurer has a right to counter-claim for damages to the extent of the benefit that has been lost. This may sometimes give Insurers a complete defense, but it may often be only a partial defense or one that is difficult to prove in practice.

As an encouragement to Assureds and recognising the significantly higher levels of deductible now current, Clause 49.4 represents a significant change in how a recovery, once received, is divided between Underwriters and the Assured. Under ITCH 83 recoveries were dealt with on a "top down" basis, with the Underwriter having the first call on recovery funds until he had recovered everything he had paid. Under IHC 2003 the recovery is apportioned over insured and uninsured losses (including the deductible) as the following example illustrates.

A vessel with a deductible of US\$100,000 has a claim against a third party of US\$1,500,000 of which US\$1,000,000 relates to damage repairs recoverable under the hull policy and US\$500,000 to the Owners claim for demurrage. A 50% recovery is made totalling US\$750,000. Under ITCH 83 the claim and recovery would be dealt with as follows:

Particular Average claims in respect of damage repairs	US\$1,000,000
<u>Less deductible</u>	<u>100,000</u>

Net claim paid by underwriters	<u>US\$900,000</u>
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Recovery apportioned:

Damage repairs	US\$1,000,000 receives	US\$500,000
Demurrage	<u>US\$ 500,000</u> "	<u>250,000</u>
		<u>US\$750,000</u>

In terms of ITCH 83 clause 12 the underwriter is entitled to receive the whole recovery in respect of damage of US\$500,000, which leaves the Owner with a net recovery from Underwriters of US\$400,000

Under IHC 2003 the claim on the policy is the same but the proportion of the recovery relating to damage repairs is shared between underwriters and Owners in relation to the deductible.

Recovery in respect of damage repairs.	<u>US\$500,000</u>
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Paid by Underwriters	US\$900,000 receives	US\$450,000
Deductible	<u>100,000</u> "	<u>50,000</u>
	<u>US\$1,000,000</u>	<u>US\$500,000</u>

The amount received from Hull Underwriters is therefore US\$900,000 less US\$450,000, which equals US\$450,000, as against US\$400,000 under the “top down” method in ITCH 83.

Clause 49.3 is new to IHC 2003 and usefully clarifies the difficulties that can sometimes arise when a potential claim on the policy goes away because of successful legal action undertaken by the Assured. The appropriate proportion of costs (having regard, for example, to uninsured losses that may have been recovered) will be refunded by Underwriters without application of the deductible.

Clause 49.5 is an important reminder that where collision liabilities are insured separately elsewhere (usually 4/4ths with the P&I Club), Hull Insurers are still entitled, under the doctrine of indemnity, to benefit from any recovery due to them under the cross-liabilities calculation.

50 DISPUTE RESOLUTION

Subject to the overriding provisions of Clause 1.3, disputes between the Assured and the Underwriters may, if not settled amicably by negotiation, be referred at the request of the Assured or the Underwriters to mediation or other form of alternative dispute resolution and, in default of agreement as to the procedure to be adopted, any such mediation or other form of alternative dispute resolution shall be in accordance with the current CEDR Solve model procedures.

There has been increasing concern in recent years that the claim settling process was becoming too adversarial, leading to delays, damaging commercial relationships and increasing costs. Acting as independent and impartial intermediaries, average adjusters have been mediating between Underwriters and Assureds for some two hundred years; we therefore welcome the recognition of the importance of mediation - based dispute resolution.

The best way to resolve disputes is to prevent them happening, and the Joint Hull Committee are to be congratulated in taking a further bold step towards greater clarity and transparency in the conduct of Hull insurance.

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