

THE COVER OF THIRD PARTIES UNDER P&I INSURANCE



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1 Introduction

The topic of this paper is insurance to the benefit of a third party, i.e. insurance protecting a person other than the one effecting the insurance contract under P&I (Protection and Indemnity) insurance.

Insurance is coverage by a contract binding a party to indemnify another against specified loss in return for premiums paid¹.

In specific, marine insurance covers the loss or damage of ships, cargo, terminals, and any transport or property by which cargo is transferred, acquired, or held between the points of origin and final destination². There are different types of marine insurance depending on the cover provided as follow.

Hull insurance is the oldest of the shipowner insurances is associated to the ship's asset or capital value³. It is mainly a property damage insurance that provides cover if the ship is damaged⁴.

Other insurances are linked to the ship as a source of revenue and are designated to cover loss of income⁵. Of the relevant insurances the *loss of hire insurance* is the most relevant

¹ See Dictionary Definitions in <http://dictionary.reference.com/browse/insurance>.

² See Dictionary in http://en.wikipedia.org/wiki/Marine_insurance.

³ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *Scandinavian Maritime Law – The Norwegian Perspective*, 2nd ed, 2004, p. 474.

⁴ According Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at p. 474, historically, hull insurance also contains an important element of liability insurance, because it covers liability the assured can incur through collisions with other ships or with fixed installations, with certain exceptions. The most important exceptions are liability for personal injury and death, as well as oil pollution.

since its primary purpose is to cover loss of revenue while the ship is out of service due to damage which is covered under the ship's hull insurance⁶.

Cargo insurance is associated with the carriage of goods from one place to another⁷. It will regularly be effected by a seller or a purchaser of goods, but it may also be relevant in situations where there is no formal sale, for example, where goods are transported from one department to another⁸.

P&I insurance (meaning: Protection and Indemnity insurance) is the elementary liability insurance in the shipping context since it covers the assured's (owner's) liability for personal injury and death, and damage to or loss of property⁹.

The risks typically covered by P&I Clubs are described in more detail under Insurance Contract¹⁰. As a starting point the insurance contract is a contract where the insurer, the P&I Club, will pay compensation to the person who entered into a contract, i.e. shipowner, if some events occur.

The person entering into the contract with the insurer, and who pays the premium, is called the *person effecting the insurance contract*¹¹. Under P&I conditions the person who pays the premium and has effected the insurance will be identified as *member* and the beneficiary of the sum insured as *assured*.

⁵ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at p. 474.

⁶ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at p. 474.

⁷ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at p. 475.

⁸ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at p. 475.

⁹ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at p. 474.

¹⁰ P&I Clubs cover a wide range of liabilities including personal injury to crew, passengers and others on board, cargo loss and damage, oil pollution, wreck removal and dock damage.

¹¹ Bull, Hans Jacob and Wilhelmssen, Trine-Lise. *Handbook in Hull Insurance – Preliminary Edition for the new course in Marine Insurance*, Oslo, 2007, p. 25.

Typically, the person/company effecting the insurance will also be the beneficiary under the policy (the *assured*), first and foremost involving the right to claim compensation in connection with an insured casualty¹².

However, it can happen that the person who is going to receive the compensation is another person than that one who effected the insurance due to, for instance, an unified financial interest between the assured cover and the main insured¹³.

Such persons may be called *co-insured*, but may also have other names, as we can see in the Scandinavian conditions: *co-assured*. A similar distinction is not used in English insurance law. Differently, they will use the concept of *third parties* whereas the problem inherit in the distinction are solved through the doctrine of agency, implying that the person effecting the insurance acts as an agent for the assured or through assignments of the policy¹⁴.

It is to note that the term “*co-insured*” can refer to both several assureds and several insurers. However, considering that the present paper is researching insurance for the benefit of more than one assured, when the term co-insurance is mentioned here it will mean the assured co-insurance and not co-insurance between several insurers.

Co-insurance is the insurance agreement between the person effecting the insurance and the insurer is made to the advantage of more than one assured. In this case, the cover may be

¹² Bull, Hans Jacob and Wilhelmsen, Trine-Lise *ibid* at p. 25.

¹³ See Simon Poland and Tony Rooth in cooperation with Gard and the law firm Wiersholm, Mellbye & Bech, *Gard Handbook on P&I*, Arendal, 1996, p. 146. Also, in cargo insurance it is not unusual for a freight forwarder to be denoted as person effecting the insurance, but at the same time the seller/purchaser of the relevant goods will be entitled to bring claims against the insurer if the goods are damaged during the transport.

¹⁴ Pursuant general contract law (in [http://en.wikipedia.org/wiki/Assignment_\(law\)](http://en.wikipedia.org/wiki/Assignment_(law))), assignment of rights under a contract is the complete transfer of the rights to receive the benefits accruing to one of the parties to that contract..

planned to protect parties who may be at risk due to operations or activities in which they are involved¹⁵. For example, crew agents who employ crew members for the ship.

Hence the position of the co-assured, will be examined in order to identify his rights and obligations. An important question here is to what extent the rules addressed to the member are also addressed to the co-assured, in a perspective of identification. Furthermore, to what extent the insurer may invoke a breach caused by the member against the co assured.

Therefore, it is with the objective of examine some of these situations that this paper comes up. For that, the analysis of the P&I Clubs statues and rules, in special SKULD P&I CLUB, GARD P&I CLUB and UK P&I CLUB will allow us to make a comparison between the conditions.

It is to mention that it is outside the scope of this thesis to discuss the international regulations above mentioned in depth. The purpose is therefore limited to a more superficial demonstration of the differences related to the cover of third parties under P&I insurance.

¹⁵ Simon Poland and Tony Rooth, *ibid* at, p. 145.

2 THE SOURCES OF LAW

2.1 Norwegian P&I Insurance

2.1.1 Introduction

Norwegian insurance contracts are regulated by the Insurance Contract Act of 16 June 1989. The following lines are going to discuss how far the right to depart from the ICA goes in certain directions concerning, specifically, marine insurance.

Besides, the documents such as Statutes and Rules that represent and regulate the contract of insurance between the P&I Club and the member will also be examined in this paper, considering that the P&I conditions have specific provisions related to the topic.

It is also important to observe that a significant feature of the Norwegian marine insurance market is the use of the conditions in the form of a Norwegian Marine Insurance Plan – NMIP. For this reason, the following lines are also going to examine the applicability, or not, of the plan in issues related to P&I insurance.

Finally, the commentaries to the clauses themselves and also more general presentations of issues around the topic “co-insurance” may also be used as source of law.

2.1.2 The Insurance Contract Act

Norwegian insurance contracts are regulated by the Insurance Contract Act of 1989 - ICA. According to the ICA § 1-3 first subparagraph the starting point is that the provisions in part A are mandatory for the benefit of the persons having a right against the insurance company unless otherwise provided for in the act¹⁶.

¹⁶ Bull, Hans Jacob and Wilhelmsen, Trine-Lise, *supra*, p. 3.

However, there are exceptions from this rule concerning certain professional insurance contracts, see § 1-3 second paragraph letter (a) to (e)¹⁷. Of interest here is the exception in letter (c). Except from the ICA § 7-8 concerning liability insurance rules in part A may be departed from if the “insurance is connected to ships that should be registered according to the Maritime Code § 33 first paragraph, § 39 and § 507”¹⁸.

Even though ICA is primarily non mandatory in relation to marine insurance (see § 1- 3 letter “c” and “e”) it is nonetheless important since it has been served as declaratory background legislation even if it is not mandatory¹⁹.

In regard to P&I insurance, the applicability of the ICA will be even more remote, or absent, considering that the conditions bring expressly that the Insurance Contract Act of 1989 shall not apply. See for instance SK Rule 47.3 whereas “the Rules and any arbitration proceedings shall be governed by Norwegian Law, except that the Insurance Contracts Act of 1989 shall not apply”.

The same follows in GR Rule 90 – Governing Law whereas “the legal relationship between the Association and the Member shall be governed by these Rules and Norwegian law, but the provisions of the Insurance Contract Act of 16th June 1989 shall not apply”.

The reason for this is that the ICA is very consumer protective under business market and Norwegian marine insurance have been regulated by a very broad set of conditions depending on each type of marine insurance. For instance, the Norwegian Marine Insurance Plan – NMIP and the Statues and Rules of each P&I Club.

¹⁷ Bull, Hans Jacob and Wilhelmsen, Trine-Lise, supra, p. 3.

¹⁸ See also Bull, Hans Jacob and Wilhelmsen, Trine-Lise, supra, p. 3. Also, the reason behind this exception is according to the NOU 1987:24 p. 40-41 that the shipowners as assureds traditionally are much more professional players in the insurance markets than other groups of assureds in general and in particular compared to consumers.

¹⁹ Bull, Hans Jacob and Wilhelmsen, Trine-Lise, supra, p. 3.

The study of the ICA concerning P&I insurance may be even so of interest for comparative reasons because ICA contains rules on co insurance in Chapter 7 - The right of third parties under the insurance contract whereas Section 7-1 (who stands to benefit from an insurance), Section 7-2. (change of ownership), Section 7-3 (protection of a co-insured from objections by the Insurers), Section 7-4 (the position of a co-insured in other respects), Section 7-5 (agreed position of a co-insured).

In conclusion, considering that in a business market the leading law is the one agreed in the insurance contract and that, in P&I insurance, the statutes and rules of the club are considered part of the contract, it is comprehensive that the Insurance Contract Act will not apply as expressed in SK Rule 47.3. Instead, it will only serve as a source of comparison and study in case, for instance, of a total absence of regulation.

2.1.3 The P&I Conditions

The majority (approximately 90%) of all P&I insurance for ocean-going ships is effected through thirteen mutual associations²⁰. These associations, which are found mainly in England, Bermuda and Scandinavia, have an extensive cooperation through The International Group²¹.

Even though the conditions or terms for P&I insurance are not standardized formally, in reality, there is a great similarity between the conditions for P&I insurance provided by the associations who are members of The International Group²².

²⁰ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p. 532.

²¹ See Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p. 532. Also, the International Group of P&I Clubs exists to arrange collective insurance and reinsurance for P&I Clubs, to represent the views of shipowners and charterers who belong to those Clubs on matters of concern to the shipping industry and to provide a forum for the exchange of information.

²² Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at p. 532.

Each P&I club is required to have a corporate structure, which includes documents such as Statutes and Rules that represent and regulate the contract of insurance between the club and the member²³. Thus, the conditions, as main source of this paper, will be examined in order to identify how these clauses are structured and divided related to the element *co-assured*.

Firstly, the SKULD P&I CLUB rules are divided into four parts: Part I concerning membership, cover and premiums, Part II concerning P&I cover, Part III concerning defence cover and Part IV concerning general provisions. As seen, the rules with reference to the topic further discussed are 1.2 joint members, co-assureds, affiliates and fleets entries. 1.4 definitions 28.5 pay to be paid 32. limitations 39. waiver and recovery 43. set-off 45. joint members, co-assureds, affiliates and fleet entries 47. arbitration and law APPENDIX 1 – definitions APPENDIX 2 - terms of entry for co-assureds and affiliates

Slightly different, the GARD P&I CLUB rules are divided into six parts: Part I concerning availability of cover, Part II concerning P&I cover, Part III concerning cover for mobile offshore units, Part IV concerning defence cover, Part V concerning general limitations and Part VI concerning miscellaneous provisions. The rules in relation to the topic further discussed are 1. interpretation 2. limit of insurance of owner's entries 12. set-off 30. limitation of liability and other restrictions in the right of recovery 35.b construction operations 46. protective co-insurance (co-insured) 48. joint members, co-assureds and affiliates.

2.1.4 The Norwegian Marine Insurance Plan

As mentioned, SK Rule 47.3 states that the Rules and any arbitration proceedings shall be governed by Norwegian Law, except that Insurance Contract Act of 1989 shall not apply.

²³ Simon Poland and Tony Rooth, *supra*, p. 98.

At this point, it is relevant to examine whether the Norwegian Marine Insurance Plan - NMIP can be identified as “Norwegian law” when the ICA shall not be used.

For general marine insurance, the comprehensive background law is the Norwegian Marine Insurance Plan (NMIP), which for more than a century has provided regulation for marine insurance committed to insurance attached to the ship²⁴.

The NMIP addresses questions that are not regulated in the ICA, and also issues that are provided for in the ICA. General marine insurance contracts entered into in Norway will normally refer directly to the Plan’s conditions²⁵.

However, it may be argued, in theory, whether or not the NMIP should be used as background law, concerning P&I insurances, due to the fact that the 1) Insurance Contract Act - ICA is expressly excluded in the conditions and 2) the NMIP would constitute “Norwegian law”.

The NMIP is an agreed document being constructed by a committee consisting of participants from all the interested parties²⁶. The plan is supplemented by extensive and published Commentaries that must be regarded as apart of the standard contract which the plan constitutes²⁷.

The first Norwegian Marine Insurance Plan was published in 1871, and has later been followed by the Plans of 1881, 1894, 1907, 1930 and 1964. The Plan in use today is the

²⁴ In special, hull insurance, total loss insurance, loss of hire insurance and risk builder’s insurance.

²⁵ See Bull, Hans Jacob and Wilhelmsen, Trine-Lise supra p. 8. Also, the current edition of the Plan is the NMIP 1996, Version 2002, which is published by Sjørettsfondet, and can also be found on the Internet (<http://exchange.dnv.com/NMIP/> for the English version).

²⁶ Bull, Hans Jacob and Wilhelmsen, Trine-Lise ibid at p. 5.

²⁷ See Bull, Hans Jacob and Wilhelmsen, Trine-Lise ibid at p. 5. Also, the NMIP, as standard contract, it is not binding for the assured unless it is incorporated in the actual insurance contract.

1996 Plan²⁸. The 1996 Plan comes in several versions: version 1997, version 1999, version 2000, version 2002, version 2003 and version 2007²⁹.

In the 1964 version P&I insurance was included³⁰. However, the P&I insurance was removed from the plan in the 1996 version because P&I Clubs are connected in an international network not tied to one sole national condition³¹.

In any case, point here is that the NMIP can be used as possible alternative background legislation. As P&I insurance previously was included in the Plan and taken out in order to obtain international conformity, there would be, in theory, no reason not to apply the NMIP as background law, in particular if the statutes exclude the use of the ICA.

2.1.5 Literature

The commentaries to the clauses themselves and also more general presentations of issues around the topic “co-insurance” are also be used as secondary source of law. Literature is often of interest when resolving a legal conflict³².

Arguments either for or against a particular position may already have been examined, and it is quite possible that the parties will be able to agree with the views adopted by a respected commentator without resorting litigation³³.

If the case does not go to court or to arbitration, the theoretical position will probably be cited and may play a significant role in the result³⁴. Sometimes non-Scandinavian law will

²⁸ Bull, Hans Jacob and Wilhelmsen, Trine-Lise supra p. 4.

²⁹ Bull, Hans Jacob and Wilhelmsen, Trine-Lise ibid at p. 4.

³⁰ Bull, Hans Jacob and Wilhelmsen, Trine-Lise ibid at p. 8.

³¹ Bull, Hans Jacob and Wilhelmsen, Trine-Lise ibid at p. 8.

³² Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, supra, p. 32.

³³ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, supra p. 32.

also have an impact on a Norwegian judicial decision, especially when foreign market is the leader market in maritime business³⁵.

2.2 INTERNATIONAL P&I INSURANCE

2.2.1 ENGLAND

2.2.1.1 Introduction

The statutory basis of the UK Marine Insurance Law is the Marine Insurance Act of 1906 - MIA which required the codification of the pre-existing common law of marine insurance and applies to all marine insurance, in more detail in relation to hull insurance and cargo insurance. However, the MIA will be relevant to P&I insurance as far as general principle applies.

In addition, the Statutes and Rules that represent and regulate the contract of insurance between the P&I Club and the member will also be examined in the English system, considering that each club has specific conditions related to the topic.

2.2.1.2 Marine Insurance Act

As mentioned above, the legal basis of the UK Marine Insurance Law is the Marine Insurance Act of 1906 - MIA that applies to all marine insurance, including P&I insurance.

Pursuant UK Rule 05, L - Rules subject to Marine Insurance Act: "These Rules and all contracts of insurance made by the Association shall be subject to and incorporate the provisions of the Marine Insurance Act, 1906, of the United Kingdom and any statutory

³⁴ Scandinavian Maritime Law – The Norwegian Perspective, 2nd ed, by Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, 2004, p. 32.

³⁵ Scandinavian Maritime Law – The Norwegian Perspective, 2nd ed, by Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, 2004, p. 532.

modifications thereof except insofar as such Act or modifications may have been excluded by these Rules or by any term of such contracts”.

The MIA does not contain a specific provision stating whether or not the Act is mandatory. However, some of the provisions in the UK MIA only apply “subject to any express provision in the policy” or “unless the policy otherwise provides”. If so, the parties are free to depart from them, and frequently do by express contractual terms.

The most important sections of this Act related to the topic include: s.17: imposes a duty on the insured of *uberrimae fides*, i.e. that questions must be answered honestly and the risk not misrepresented. s.18: the proposer of the insurer has a duty to disclose all material facts relevant to the acceptance and rating of the risk. Failure to do so is known as non-disclosure and renders the insurance voidable by the insurer. s.50: a policy may be assigned. Typically, a shipowner might assign the benefit of a policy to the ship-mortgagor. s.79: deals with subrogation. Schedule 1 of the Act contains a list of definitions; schedule 2 contains the model policy wording.

In conclusion, it is to remember that the Marine Insurance Act applies to all marine insurance, including P&I insurance. However, there are not relevant issues for P&I insurance, but it may, for instance, the general rules not regulated by the conditions.

2.2.1.3 P&I Conditions

The rules expressed in the UK CLUB, differently from other conditions, will not bring the concept of *co-assurance* or *co-assured* or *co-insured*. Instead, *third parties*.

They will work with the concept of *assignment* which means the act of transfer of a right or interest from one to another. In other words, it is the instrument by which this transfer is effected. Or, the concept of the doctrine of agency which means the act of represents the third party’s interests.

The rules in assignment are number 15 Assignment of Insurance and 29.b Assignment of Owner's interest in entered ship. Besides, the general rules in contract law are applying.

2.2.2 UNITED STATES

2.2.2.1 Introduction

The national law of the United States contains some rules on marine insurance through court decisions, in special *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310³⁶.

As the national law of the US is contained in court decisions, the regulation is not compulsory, but some of the states have binding regulations in their insurance codes, which, in some circumstances, may apply to policies of marine insurance.

2.2.2.2 American P&I conditions

The AMERICAN P&I CLUB rules are divided into three classes. The rules that deal with the term *co-assured* are: CLASS 1 – Protection and Indemnity Insurance RULE 1 - Introductory: Interpretation: Membership: General Provisions 1.9 Introductory Provisions 2. Interpretation 3.6 to 3.18 Members, Joints Members, Affiliates and Co-Assureds 4.10 Application for Insurance 4.11 (Assignment) RULE 3 – Risks and Losses Excluded 1. Introductory: Interpretation: Membership: General Provisions CLASS 2 - Freight, Demurrage and Defense Insurance RULE 1 - Introductory: Interpretation: Membership: General: Provisions 1.7 Introductory Provisions 3. Members, Joints Members, Affiliates and Co-Assureds RULE 3 - Risks and Losses Excluded 1.5 Non-recoverability Under Class II in Regard to Disputes Between Members, etc CLASS 3 – Insurance for Charterer's Risk

³⁶ This decision implies that issues of marine insurance are governed by the national law of the United States when there is a well-established rule of federal or national admiralty law, or, if not, the court determines that it should fashion a federal or national rule. Otherwise, marine insurance disputes are governed by the insurance law of one of the 50 states. See <http://web.uct.ac.za/depts/shiplaw/imic99.htm>.

RULE 1 – Introductory: Interpretation: Membership: General: Provisions 1.1 Introductory Provisions 3. Members, Joints Members, Affiliates and Co-Assureds

It is to mention that despite of these provisions are presented here, the American P&I conditions are not going to be examined in this paper. However, it can serve as a source of comparison since it is possible to find regulation in co-assured as well as assignment, suggesting a mix of both systems before described.

3 PROTECTION & INDEMNITY INSURANCE

3.1 Introduction

As already indicated above, P&I insurance (Protection and Indemnity insurance) is the essential liability insurance in the shipping context. It has been developed during the last 150 years in reaction to the need by shipowners for insurance cover for third party liability that were not recoverable under the typical hull and machinery policies³⁷.

The original purpose of P&I insurance was to protect shipowners against liability in respect of personal injury and death, and the one fourth collision liability not covered by hull insurance and/or mutual hull clubs and excess collision liability³⁸.

The P&I clubs were recognized as unincorporated associations with their members having the dual role of insurers and insureds. This led to some problems, especially when lawsuit was involved. In response, P&I clubs were incorporated so that they now have a separate legal structure from their members³⁹.

As a result, a P&I club is required to have a corporate structure, which includes documents such as Statutes and Rules that represent and regulate the contract of insurance between the club and the member⁴⁰.

³⁷ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p. 532.

³⁸ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at, p. 532.

³⁹ See Simon Poland and Tony Rooth *supra* p. 98. Also, most of the English clubs are established as companies limited by guarantee. However, the Norwegian clubs are established as mutual associations in accordance with Norwegian law (Insurance Activity Act, Ch.4) and have the statutes of corporations with separate legal identities.

⁴⁰ Simon Poland and Tony Rooth *ibid* at p. 98.

The club members have mutual obligations and are dependent on their members for the success of the club. As an insurer, the member is obliged to pay adequate premiums and, when asked, additional calls to permit the club to liberate all claims⁴¹.

Accordingly, each member shares in the risks of the others and, as a result, has a direct interest in who is admitted to the membership and how the other members conduct their business⁴². As an insured, the member has a right to be indemnified by the club for certain liabilities and losses that the member incurs in direct connection with the operation of an entered ship.

The ultimate legal control of a club rests with the members, who as owners of the club will be able to exercise such control by means of a vote taken at the club's General Meeting (i.e. Gard Statues, Article 4)⁴³. The responsibilities for the management of the club are vested in the Board of Directors (Committee and Executive Committee) consisting of club members elected by the General Meeting. The Board of Directors will delegate parts of its power to the administration or management of the club who work full time on the day-to-day business of the club⁴⁴.

The modern P&I policy includes coverage for a wide variety of liabilities and losses a shipowner may incur, including liabilities arising from the carriage of cargo, pollution liability, liability for loss of life and injury to crew members, passengers and others, such as stevedores, liability for damage to fixed or floating objects, and liability arising out of a collision with another ship.

The P&I regulation on these issues are common for the Norwegian, English and American conditions and, thus, they will be treated together as it follows below.

⁴¹ Simon Poland and Tony Rooth *ibid* at p. 98.

⁴² Simon Poland and Tony Rooth *ibid* at p. 98.

⁴³ Simon Poland and Tony Rooth *ibid* at p. 102.

⁴⁴ Simon Poland and Tony Rooth *ibid* at p. 102.

3.2 Liability for claims related to persons

The rules concerning cover for the assured's liability for claims related to persons are found in SK Rules 7-11. These are attached to various groups of individuals, such as crew⁴⁵, passengers⁴⁶, other individuals⁴⁷. In GR the provisions are found in Rules 27-33, such as crew⁴⁸, passengers⁴⁹, other individuals⁵⁰.

The P&I insurer's liability is limited to the amount that would have applied had the assured exercised his right under the transportation contract to limit his liability according to the relevant legislation⁵¹.

3.3 Liability connected to cargo

The rules concerning cover of cargo liability are located in SK Rule 13 and in GR Rules 34 and 35. The P&I insurer will cover the liability incurred by the assured in relation to the cargo owner where goods that have been transported by the ship, or that were intended to be transported by the ship, have been lost completely or have become damaged⁵².

The P&I clubs provide cover not only in respect of loss, shortage of or damage to cargo, but also for certain other responsibilities of the member, which may include financial loss or damage suffered by a third party⁵³.

⁴⁵ SK Rule 7.

⁴⁶ SK Rule 8.

⁴⁷ SK Rule 9-11.

⁴⁸ GR Rule 27.

⁴⁹ GR Rule 28.

⁵⁰ GR Rule 29 and 30.

⁵¹ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p. 534.

⁵² See GR Rule 34.1."a", "b" and "i". Also, GR Rule 35.

⁵³ See GR Rule 43.1.viii.

In principle, the basis of the assured's liability will not be of any consequences as far as cover of such cargo liability is concerned. It may therefore flow from either a mandatory law or by virtue of an agreement⁵⁴.

3.4 Liability for collision and striking

It follows from GR Rules 36 and 37 that the P&I insurer will regulate the assured's liability not already covered under the ship's hull insurance for collision and striking. The hull insurer answers for such liability, but only within fixed amount limits and such that certain types of liability are excluded (i.e. personal injury)⁵⁵.

The P&I insurer will cover the excess liability and the types of liability not covered by the hull insurance.

3.5 Pollution liability

Pursuant SK 14 and GR Rule 38, the liability of the assured in the case of oil or other substances escaping or threatening to escape from the ship is covered by the P&I insurance, and consequently, both liabilities for the actual losses incurred by third parties and expenses linked with measures to prevent such liability will be covered.

There are important exceptions from the cover provided for oil pollution liability where an oil spill occurs in American territorial waters. For tankers which are to load or unload oil in American waters, the insurer will not cover liability attracted according to the American Oil Pollution Act – OPA 1990, unless this is expressly agreed on terms set out, for example, in GR Appendix III⁵⁶. Under these terms, the assured is placed under a duty to

⁵⁴ See GR Rule 34.2 and Rule 34.1.ii.

⁵⁵ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p. 536.

⁵⁶ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p. 536.

provide information each quarter regarding the voyages conducted by the ship in these waters carrying oil and to pay extra premium as set in such an event by the P&I insurer⁵⁷.

3.6 Other liability

Some other types of liability are also covered. SK Rule 15 and GR Rule 39 stipulate that the insurance will cover liability of wreck removal. SK Rules 17-18-22 and GR Rule 41 and 42 establish the P&I insurer's liability in connection with general average and salvage respectively.

⁵⁷ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p. 536.

4 CO-INSURANCE

4.1 Introduction

Co-insurance means that the insurance agreement between the person effecting the insurance, i.e. the club member, and the insurer is made to the benefit of more than one assured⁵⁸.

As a result, the provisions found in the insurance contract are addressed to the person who effected the insurance (i.e. the member), implying that a co-insured who is not a member has no direct duties.

However, P&I may be needed for the potential co-insured considering that he may be liable for damages to persons, damage to cargo, pollution and expenses covered by the club in preference to and/or jointly with the member. Co-insurance presupposes that the co-insured has interests to be insured, i.e. that he will be liable unless the insurance protects him.

The rules concerning co-insurance will depend on who the parties to the insurance contract are and, as consequence, who the third party/co-assured is, as explained bellow.

4.2 The parties to the insurance contract

The Scandinavian systems distinguish between the person effecting the insurance and the assured. The person effecting the insurance is the one who enters into the contract with the insurer, whereas the assured is the person who has the right of indemnity when a casualty occurs.

⁵⁸ Bull, Hans Jacob and Wilhelmssen, Trine-Lise supra, p. 228.

Typically, the person/company effecting the insurance will also be the beneficiary under the policy (the *assured*), first and foremost involving the right to claim compensation in connection with an insured casualty⁵⁹.

Co-insurance under P&I conditions will use the same distinction but applying a different terminology. The person who effected the insurance/main assured will be identified as *member* and the beneficiary of the sum insured as *co-assured*.

The P&I Club Skuld – SK in Appendices 2 distinguishes clearly the concept of member and co assured, as followed:

Member is “any owner in partnership or owner holding separate shares in severalty, part owner, trustee or bareboat or demise charterer of any entered vessel, any manager or operator having control of the operation and employment of an entered vessel, any manager or operator having control of the operation and employment of an entered vessel (being such control as is customarily exercised by a shipowner), and any other person in possession and control of any entered vessel”⁶⁰.

Co-assured is “a party, other than the member, who is named on the Certificate of Entry, to whom the Association has agreed (subject to restrictions) to extend the cover afforded to the member⁶¹”.

In some aspect differently, the P&I Club Gard – GR distinguishes, as a starting point, both concepts, but treat member as co-assured where the context allows, as shown in the rules bellow:

⁵⁹ See NMIP 1.c and ICA.

⁶⁰ This does not mean that several persons may be “main assured” under the same contract as contrary to co-insureds. Normally, the co-insured is any beneficiary not part to the contract.

⁶¹ See SK Rule 1.2.2 and Appendices 2.1.1.

GR Rule 1 define “*member*” as an owner, operator or charterer (including a bareboat or demise charterer) of a ship entered in the Association who according to the Statues and these Rules is entitled to membership of the Association, provided that, where the context allows⁶², the term “member” shall, in these Rules, include Co-assured and an Affiliate⁶³.

Yet, GR P&I conditions states that *co-assured* is any person who is insured pursuant to Rule 78.1 (b). Rule 78 – Cover for Co-Assureds and Affiliates 1 “The Association may agree, subject to the provisions of this Rule 78 and to such other terms as may be required, to extend the cover afforded by the Association to the Member to: (b) “any other named co-assured”.

SK Rule 1.2.2 and Appendices 2.1.1 brings that *co-assured* is “a party, other than the member, who is named on the Certificate of Entry, to whom the Association has agreed (subject to restrictions) to extend the cover afforded to the member”.

As seen, the co-assured will be restricted under the terms of the member’s entry and the relevant club rules.

4.3 Non-Automatic Co-Insurance

One usually makes a distinction between automatic co-insurance, implying that the co-insured is defined in the conditions and automatically co-insured, regardless of any

⁶² Also in American P&I Club - Rule 1.3.8 to 1.3.11, the term “member” when described (member: an owner, operator or charterer of a vessel insured by the Association who is entitled to membership of the Association) provides that where the context requires or allows, the term Member shall include a joint member, co-assured and affiliate.

⁶³ As seen, according to GR P&I conditions, where the context allows, the term “member” shall, in these Rules, include Co-assured and an Affiliate which means that some of the duties addressed to the member will also be addressed to the co-assured. For further discussion, see chapter 5.

information from the assured, and non-automatic co-insurance, where co-insurance relies on special agreement between the assured and the club.

In P&I insurance, as seen in the above chapter, *co-assured* is a party, other than the member, who is named on the Certificate of Entry, to whom the Association *has agreed* (subject to restrictions) to extend the cover afforded to the member. This definition would lead to non-automatic co-insurance since it relies on a special agreement⁶⁴.

SK Rule 1.2.2 and Appendices 2, 1-3 bring clearly that: “The Association may agree to extent the insurance (...)” which means that co-insurance here must be agreed.

The same is found in GR Rule 78.1 “The Association may agree, subject to the provisions of this Rule and to such other terms as may be required, to extend the cover afforded by the Association to the Member to: a) any person who is affiliated to or associated with the Member and who shall not be specifically named in the terms of entry; and b) any other named co-assured.

Thus, the definition of co-assured leads to conclude that the co-insurance brought in the conditions is non-automatic since it relies on a special agreement between the club and the member, even in case of a mortgage⁶⁵.

⁶⁴ For example, the rules found in chapter 7 of the Norwegian Marine Insurance Plan - NMIP concerns co-insurance of mortgagees in hull insurance. § 7-1 states “if the interest covered by the insurance is mortgaged, the insurance also covers the mortgagee’s interest (...)”. As we can see, this is a case of automatic co-insurance expressly brought by the plan where the co-insured, i.e. the mortgagee, is defined and automatically co-insured, regardless of any information from the assured. However, the rules found in chapter 8 of the Norwegian Marine Insurance Plan - NMIP concerns co-insurance of third parties in hull insurance, In a different way, co-insurance here is non-automatic since it relies on a special agreement according to § 8-1 “if the insurance is explicitly effected for the benefit of a named third party, the insurance also covers his interests (...)”.

⁶⁵ The rules found in chapter 7 of the Norwegian Marine Insurance Plan - NMIP concerns co-insurance of mortgagees in hull insurance. § 7-1 states “if the interest covered by the insurance is mortgaged, the insurance

Further, the same GR Rule 78, for example, that was used in the previous chapter to explain the concept of co-assured can be analyzed in a different way. Rule 78 – Cover for Co-Assureds and Affiliates 1 “The Association may agree, subject to the provisions of this Rule 78 and to such other terms as may be required, to extend the cover afforded by the Association to the Member to: (a) “any person who is affiliated to or associated with the member (not being a Co-assured or other Affiliate), and who shall not be specifically named in the terms of entry”.

Here it is imperative to examine the concept of joint members and affiliates. Joint membership arises where the vessel is entered in the names of two or more owners or operators⁶⁶.

All joint members under an entry qualify for membership in the Association with all commensurate benefits and obligations of such membership, as set out in the club’s statutes and rules⁶⁷.

Moreover, Gard Handbook⁶⁸ explains that there are also distinctions between affiliates and co-assureds.

“The most important of these is that although neither can be club members, the co-assured is expressly named in the Certificate of Entry and the affiliate is not. As a result, a co-assured is considered to be an insured as a party to the insurance contract. This means that

also covers the mortgagee’s interest (...). This is a case of automatic co-insurance expressly brought by the plan where the co-insured, i.e. the mortgagee, is defined and automatically co-insured, regardless of any information from the main assured.

⁶⁶ Simon Poland and Tony Rooth supra p. 144. Also, time or voyage charters cannot be joint members due to the definition of “charterer’s entry” under Gard Rule 1. However, as bareboat or demise charterers are not considered to be charterers, they can be joint members.

⁶⁷ Simon Poland and Tony Rooth supra p. 144.

⁶⁸ Simon Poland and Tony Rooth supra p. 144.

the co-assured is entitled to the benefit of coverage under the terms and conditions of the insurance contract agreed to when he was named. Conversely, an affiliate is not a party to the insurance contract and is, therefore, not automatically entitled to any benefits available under such contract”.

Therefore it is to conclude that co-insurance in P&I must be non-automatic since it relies in agreement between the parties in advantage of a third party who will be called co-assured from now on.

4.4 The Third Party Co-Assured

As a starting point it the co-insured do not need co-insurance unless he may be liable for losses that are covered by the P&I insurance. If he can not be liable he simply has no insurable interest.

Thus, the Association may agree to extend the cover afforded to the member to a co-assured named in the Certificate of Entry.

According to SK Appendices 2.1.1, this co-assured can be a) a person interested in the operation, management or manning of the entered vessel, b) the holding company or the beneficial owner of the member or of any co-assured referred to in “a” or c) the mortgagee of the vessel⁶⁹ as examined hereunder.

⁶⁹ It is comprehensible that there are relevant rules, for instance, in the Norwegian Maritime Code – MC concerning liability for the operator/charterer and other co-insured parties. For instance, the existence of joint liability between the owner and an operator.

4.4.1 Operators and Crewing Agents and Mortgagee

As mentioned, the Association may agree to extend the cover afforded to the member to a co-assured named in the Certificate of Entry who is a) a person interested in the operation, management or manning of the entered vessel.

The Norwegian Maritime Code – MC §151 states “the shipowner (reder) shall be liable to compensate damage caused in the service by the fault or negligence of the master, crew, pilot, tug or others performing work in the service of the ship”

Accordingly, when damage is caused through the operation of the ship, the shipowner may be liable. He is liable for a range of assistants who may cause damage by negligence act or omission in the course of their service⁷⁰.

The error must be committed within the scope of employment. This is both a temporal limitation (the act must take place during the time of employment) and a substantive limitation (the act must be in some way connected with the employee’s duties)⁷¹.

Thus, the co-assured is covered when he is acting as owner and thus may be held directly liable according to the different rules in the Maritime Code, for instance, the provision found in MC §151 whereas the operator (i.e. a bare boat charterer, a charterer or mortgagee) is held liable due to a mistake during the operation of the ship that would normally be of the responsibility of the owner.

In this case, the co-assured must show that the member would have been held liable had the claim been brought against such member⁷².

⁷⁰ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p.169.

⁷¹ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid at*, p.162.

⁷² It is to note that the Association’s liability in respect of any claim is limited solely to its liability to either the member or the co-assured. As a result, once indemnity limits have been reached no further compensation is available to either the member, the co-assured or any other party, see GR Rule 78.8.

Furthermore, it is to note that if the co-assured is identified as mortgagee the P&I insurance cover will have some peculiarities. According to SK Appendices 2.1.1, the co-assured named in the Certificate of Entry mentioned is c) the mortgagee of a vessel.

There are cases where the mortgagee is jointly liable with the shipowner⁷³. According to American pollution legislation⁷⁴, the mortgagee may in some instances be jointly liable with the shipowner and others who contributed for the oil damage.

Firstly, the OPA defines (13) “guarantor” means any person, other than the responsible party, who provides evidence of financial responsibility for a responsible party under this Act.

In Section 1005 (a) the general rule is that “the responsible party or the responsible party’s guarantor is liable to a claimant for interest on the amount paid in satisfaction of a claim under this Act for the period described in subsection (b). (B) PAYMENT BY GUARANTOR - The payment of interest under this subsection by a guarantor is subject to section 1016(g)⁷⁵.

⁷³ Moreover, the mortgagee may have an indirect interest in the cover in case where the shipowner has to sell his ship to pay to third party compensation⁷³. In this situation, no liability claim is directed against the mortgagee and, therefore, he has no direct interest in the liability insurance. Normally it will be a condition in the loan agreement that the owner effects P&I insurance, but this does not mean that the mortgagee is co-insured.

⁷⁴ See <http://epw.senate.gov/opa90.pdf> for the whole Act.

⁷⁵ Section 1016 (f) CLAIMS AGAINST GUARANTOR (1) IN GENERAL - Subject to paragraph (2), a claim for which liability may be established under section 1002 may be asserted directly against any guarantor providing evidence of financial responsibility for a responsible party liable under that section for removal costs and damages to which the claim pertains. In defending against such a claim, the guarantor may invoke— (A) all rights and defenses which would be available to the responsible party under this Act; (B) any defense authorized under subsection (e); and (C) the defense that the incident was caused by the willful misconduct of the responsible party. The guarantor may not invoke any other defense that might be available in proceedings brought by the responsible party against the guarantor.

Following, Section 1016 (g) impose limitation on the guarantor's liability: "Nothing in this Act shall impose liability with respect to an incident on any guarantor for damages or removal costs which exceed, in the aggregate, the amount of financial responsibility which that guarantor has provided for a responsible party pursuant to this section. The total liability of the guarantor on direct action for claims brought under this Act with respect to an incident shall be limited to that amount".

Thus, the Association may agree to extend the cover afforded to the member the co-assured named in the Certificate of Entry. In this case, the co-insured, as mortgagee, will have insurable interest and, as a result, will need co-insurance due to the fact that he may be considered liable for damages imposed by the American Pollution Legislation.

4.4.2 Charterer

According to SK Appendices 2.2 the Association may agree to extend the cover afforded to the member to a co-assured who is named in the Certificate of Entry and who is a charterer of the entered vessel and also being affiliated to or associated with the member insured under the same entry.

Gard Handbook⁷⁶ explains that there is a certain degree of unified financial interest between the assured cover and the charterer, to the extend that such charterer may be considered to be affiliated or associated with the shipowner, such charterer may be entitled to co-insurance.

Under this category, the co-assured affiliated or associated charterer on the owner's entry is covered for risks, liabilities, losses, costs, payments, and expenses that he incurs as the charter of the ship, provided such risks are also covered under the owner's entry⁷⁷. A co-

⁷⁶ Simon Poland and Tony Rooth supra p. 146.

⁷⁷ Simon Poland and Tony Rooth supra p. 146.

insured charterer under an owner's entry is subject to the limit of insurance applicable to charterers⁷⁸.

4.4.3 Offshore industry

This category is only available to offshore operators who have entered into a service agreement with the assured member⁷⁹.

According to SK Appendices 2.3, the Association may also agree to extend the cover afforded to the member to a co-assured named in the Certificate of Entry who is a person ("a contractor") who has entered into a contract (a "knock for knock" contract as customarily used in the offshore activity) with the member for the provision of services to or by the vessel, (...), provided that the contract has been approved by the Association and the contract is on terms no less favourable to the insured owner than that each party shall be responsible for loss of or damage to, or injury or death of, its own property and personnel and property and personnel of its affiliates and other contractors and its and their sub-contractors, irrespective of any fault or neglect of that party or its affiliates, contractors or co-licensees or its or their sub-contractors or of any of their personnel.

This category of coverage applies only to contractual liabilities related to the entered vessel and is available only if the co-assured has contracted with the member on a "knock-for-knock" basis, meaning that the contract must provide that each party is responsible for any loss or damage to its own or its sub-contractor's personnel⁸⁰.

⁷⁸ See for instance also SK Rule 32.4.2.

⁷⁹ Simon Poland and Tony Rooth *supra* p. 144.

⁸⁰ Gard Handbook on P&I (Arendal 1996) by Simon Poland and Tony Rooth, p. 144.

5 The Rights and Duties of the Co-assured

5.1 Introduction

The provisions described in this chapter are addressed to the person who effected the insurance (i.e. the member), implying that a co-insured who is not a member has no direct duties. As previously mentioned, P&I insurance may be needed for the potential co-insured considering that these parties are often directly involved in the operation of the ship and therefore in a position to breach these rules.

In a comparative approach, the question here is to examine to what extent the provisions addressed to the member may also be addressed to the co-assured⁸¹. In other words, to what extent the issue of identification (SK Rule 45.4) will apply.

In time, it is relevant to explain that the subchapters 5.4 and 5.9 concerning claim for premium and cessation/termination of the insurance contract will also be treated in this chapter – the rights and duties of the co-assured – despite of having as base another rule (SK Rule 45.3) since it will not be a matter of identification but breach done by the *member* causing a direct consequence to the right of the co-assured, as further better explained.

5.2 Disclosure and Due Care

In regard to the topic of this paper “*cover for the benefit of a third party*”, the first aspect is to identify to what extent the rules concerning duties of disclosure and due care also apply to the third party, i.e. co-assured, and, in case of a breach of these duties, to what extent they may be invoked against the co assured.

⁸¹ Are the rules addressed to the member also addressed to the co-assured in case of a directly breach (done by the co-assured)?

Before concluding an insurance contract, the person effecting insurance have a central role to play with regard to providing information to the insurer about the risk exposure and potential changes in such exposure⁸².

According to the conditions, the *member* shall 1) make full and correct disclosure to the Association, before the contract of insurance is concluded, of every circumstance, a) which is known to the member or any agent effecting the insurance on his behalf, or which, in the ordinary course of business, ought to be known by the member or agent, and b) which would influence the Association in deciding whether and on what terms to provide cover⁸³; 2) make full, correct and prompt disclosure to the Association, of every change in circumstance which is or ought to be known to the member and which alters the risk covered by the Association⁸⁴, and 3) refrain from causing or agreeing, without the Association's prior approval, to any change in circumstance which alters the risk covered by the Association⁸⁵.

The rules regarding the duty of disclosure and the duty of care presuppose the duties the insurance relationship compels on the person effecting insurance and provide rules regarding the sanctions available to the insurer in the event these duties have been breached⁸⁶.

During the insurance period, the duties of due care can be divided into four rules⁸⁷: alteration of risk, safety regulation, casualties caused negligently by the assured and duty of notification and to avert or minimize loss⁸⁸.

⁸² Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *supra*, p.486.

⁸³ SK Rule 28.1.1.

⁸⁴ SK Rule 28.1.2.

⁸⁵ SK Rule 28.1.3.

⁸⁶ Thor Falkanger, Hans Jacob Bull, Lasse Brautaset, *ibid* at, p.487.

⁸⁷ Bull, Hans Jacob and Wilhelmsen, Trine-Lise *supra* p. 147.

The duties of disclosure provide the insurer with the required information to estimate the risk, whereas the rules concerning alteration of risks secures that the risk is not altered compared to these assumptions during the insurance period.

If either a duty of disclosure or a duty of care has been breached, the insurer has, as a main rule, the right to terminate the relationship and avoids liability for future casualties.

The sanction available to the insurer in the case of breach of the duties of disclosure and care is addressed to the member⁸⁹.

However, it may be addressed to the co-assured where the context allows, which means that, in some of the cases, the co-assured may be identified with the member.

SK Rule 45.4 brings that “any failure by the member, or any joint member, or any co-assured or any affiliate, to comply with any of the obligations under these Rules, shall be deemed to be a failure of the member and all joint members, co-assureds and affiliates”⁹⁰.

Therefore, the rules will also be addressed to the co-assured and, according to the conditions, the insurer will have the right to refuse to give payment of compensation⁹¹.

⁸⁸ According to SK Rule 34, the member shall, upon the occurrence of any event which may give or has given rise to a claim upon the Association, take and continue to take all reasonable steps (including the preservation of any right of recourse against a third party or any right to limit liability) for the purpose of averting or minimising any liability, loss, expense or costs which may be covered by the Association. If the member fails to comply with the requirements set out in Rule 34.1, the Association shall, in its absolute discretion, be entitled to refuse to cover all or part of the claim.

⁸⁹ Note that if the concept of person effecting the insurance was used in P&I Insurance only the duty of disclosure would be considered relevant.

⁹⁰ SK Rule 45.4.

⁹¹ The requirements for that are: 1) that the member must normally have been negligent in connection with their breach of the relevant duty, and 2) to determine who will be identified with the member, i.e. to what

5.3 Fraudulent, Unlawful and Deliberate Acts

The member shall not make any fraudulent claim on the Association, knowingly allow the vessel to be used for illegal purposes, or deliberately cause or attempt to cause a casualty⁹².

In the event of any failure to comply with any of the above requirements, the member shall not be entitled to any recovery from the Association in respect of any event occurring at or after the time of the failure⁹³.

Following the same logic as used above, this provision is also addressed to the co-assured due to SK Rule 45.5 whereas “any conduct or omission by the member, or any joint member, or any co-assured or any affiliate, which would have entitled the Association to reject or reduce any claims shall be deemed to have been the failure of the member and all joint members, co-assureds and affiliates”.

5.4 Premiums

As a starting rule, the duty to pay premium rests with the member⁹⁴. Thus, the co-assured shall not be identified with the member, considering that just the member is obliged to pay the premium, according to the conditions, in special SK Rule 4.1.2 “The premium determined by the Association and payable by the member may include (...)”.

extent that fault or negligence of other persons shall affect the position of the member. See SK Rule 28.1.4 whereas in the event of any failure to comply with any of the requirements, the member shall not be entitled to any recovery from the Association in respect of any event occurring after the time of the failure

⁹² SK Rule 28.2.

⁹³ SK Rule 28.2.4.

⁹⁴ In the mutual associations the status of person effecting the insurance will usually depend on who has been accepted as a member in the association and not on whose account the insurance has been taken out, cf. ND 1983.79 DH Freno. See Trine-Lise Wilhelmensen and Hans Jacob Bull, *supra*, p. 37.

In regard to the member, the conditions are clear stating that the member shall pay all premiums and other sums due to the Association as they fall due⁹⁵. In the event of any failure to comply with the above requirement, the member shall not be entitled to any recovery from the Association in respect of any event occurring during the period when any premium or other sum was outstanding and the Association shall be entitled to cease handling all or any of the cases the Association is for the time being handling for the member⁹⁶.

However, the SK conditions regulate the position of the co-assured in Rule 45. According to this rule, co-assureds named on any one Certificate of Entry shall be jointly and severally liable in respect of all premiums, calls and other sums due to the Association in respect of the entered vessel.

As result, any payment by the Association to the member, or any joint member, or any co-assured, or any affiliate, shall be deemed to be payment to the member and to all joint members, co-assureds and affiliates jointly and shall fully discharge the obligations of the Association in respect of that payment⁹⁷.

Notice that any failure by the member, or any joint member, or any co-assured or any affiliate, to comply with any of the obligations under these Rules, shall be deemed to be a failure of the member and all joint members, co-assureds and affiliates⁹⁸.

Therefore, the rules addressed to the member are also addressed to the co-assured and, consequently, the sanctions will also reach the co-assured.

⁹⁵ SK Rule 28.3.

⁹⁶ SK Rule 28.3.2.

⁹⁷ SK Rule 45.2.

⁹⁸ SK Rule 45.4.

5.5 Classification & certification

It shall be a condition precedent of the insurance cover, that the entered vessel remains fully classed with a classification society approved by the Association that the vessel's classification society is not changed without the Association's prior consent, and that the member shall maintain the validity of all statutory certificates issued by or on behalf of the state of the vessel's flag in relation to the ISM Code and ISPS Code⁹⁹.

In the event of any failure to comply with any of the above requirements, the member shall not be entitled to any recovery from the Association in respect of any event occurring during the period of non-compliance, except insofar as there has only been a failure to comply with Rule 28.4.2-3 where the member is a charterer and the failure was beyond the member's control¹⁰⁰.

It seems that this provision is involving solely the member, i.e. shipowner, since it is him who will have the records and authorization for the Classification Societies. However, it may be addressed to the co-assured, i.e. an operator, named in the Certificate of Entry as co-assured and who is directly involved in the insurance contract.

5.6 Other Conditions

The member shall comply with any recommendations made by the Association following a survey, comply with any directions or safety regulations issued by the Association or any applicable public authority, comply with all rules, regulations, recommendations and requirements of the classification society, comply with all statutory requirements of the state of the vessel's flag, relating to the construction, adaptation, condition, fitment, equipment, manning, operation, security and management of the entered vessel (including applicable requirements of the ISM Code) and maintain the validity of all statutory certificates issued by or on behalf of the vessel's flag state in relation to such requirements,

⁹⁹ SK Rule 28.4.

¹⁰⁰ SK Rule 28.4.4.

provide the Association, on request, with any necessary authorisation to enable the Association to inspect and be provided with any information or documents, in the possession of the vessel's current and previous classification societies, relating to the maintenance of class, enable the Association, at any time, to carry out a survey in accordance with Rule 35, provide the Association with any information or documents requested by the Association in respect of the condition, manning, operation or management of the vessel, incorporate into all contracts and indemnities any terms required by the Association (as referred to in Appendix 6), and exclude from all contracts and indemnities any terms which are prohibited by the Association¹⁰¹.

In the event of any failure to comply with the requirements set out in Rules 29.1.1 - 29.1.9, the member shall not be entitled to any recovery from the Association, except insofar as the member can prove that liabilities, losses, expenses or costs would have been incurred in any event and would have been covered by the Association if the member had complied with those requirements¹⁰².

Once again, SK Rule 45.4 and 45.5 will apply and the co-assured identified with the owner since “any failure/conduct/omission by the member, or any joint member, or any co-assured or any affiliate, to comply with any of the obligations under these Rules, shall be deemed to be a failure of the member and all joint members, co-assureds and affiliates”.

5.7 Burden of Proof

The member shall have the burden of proving that any claim against the Association results from a risk covered under the insurance¹⁰³.

¹⁰¹ SK Rule 29.1.

¹⁰² SK Rule 29.1.10.

¹⁰³ SK Rule 31.1.

5.8 Limitations

5.8.1 Limitation of liability - general

The Association insures the member's liability as may ultimately be determined and fixed by law, including any laws relating to the limitation of liability, and the Association shall not be liable for any sum in excess of such legal liability¹⁰⁴.

Where a member or co-assured is entitled to limit any liability covered by the Association, there shall be no recovery in respect of such liability for more than the amount to which liability could have been limited¹⁰⁵.

5.8.2 Limitation of liability - joint members, co-assureds and affiliates

Where the insurance cover is extended to any joint member, co-assured or affiliate, the total liability of the Association shall in no circumstances exceed the sum that would have been recovered by the owner of the vessel had he been the sole assured¹⁰⁶.

Where the member is an owner but the member's co-assured or affiliate is a charterer, any insurance cover extended to the charterer or affiliate shall be limited to USD 350 million in the aggregate for any one vessel arising out of any one event¹⁰⁷.

5.8.3 Limitation of liability under separately agreed additional insurances

In any case, the liability of the Association for any and all liabilities, losses, costs and expenses incurred by all members, co-assureds and affiliates under any one entry and which arise out of any one event, shall be limited to the sum insured in the terms of entry, provided always that to the extent the Association has reinsured the risks insured under any

¹⁰⁴ SK Rule 32.1.1.

¹⁰⁵ SK Rule 32.1.2.

¹⁰⁶ SK Rule 32.4.1.

¹⁰⁷ SK Rule 32.4.2.

one entry, the Association shall (with the exception of insurance for War Risks and for Chemical, Bio-Chemical Electromagnetical Weapons and Computer Virus Risks) only be obliged to pay any amount in excess of USD 10 million or 10% of the cover limit per event whichever is the lowest as and when such funds are received by the Association from the reinsurer(s)¹⁰⁸.

5.9 Cessation/Termination of cover

5.9.1 Cessation of cover

As mentioned, SK Rule 45.3 states that “the contents of any communication between the Association and the member, or any joint member, or any co-assured, or any affiliate, shall be deemed to be within the knowledge of the member and all joint members, co-assureds and affiliates”.

In case where there is cessation of cover, the cover will also cease for the co-assured in respect to SK Rule 45.3.

The insurance cover shall cease immediately where, there is a change of management or ownership of the entered vessel, the member, being an individual, becomes bankrupt, has a receiving order made against him, or becomes insolvent, the member, being a corporation, is dissolved, wound up, has a receiver or liquidator appointed or commences proceedings under any bankruptcy or insolvency laws to seek protection from its creditors, the entered vessel becomes a total loss, or is accepted by the hull underwriters or deemed by the Association as being a constructive, compromised or arranged total loss, except in respect of liability arising out of the casualty which gives rise to the total loss, the vessel is missing for ten days from the date she was last heard of, the vessel is posted at Lloyd's as missing,

¹⁰⁸ SK Rule 32.5.

or the vessel is requisitioned by a State or Government Authority, except that the insurance cover shall be reinstated after the period of requisition has ceased¹⁰⁹.

In this case, the breach by the member will also cease the cover of the co-assured in respect to SK Rule 45.3.

5.9.2 Termination by the member

The Association may also terminate the entry of any or all vessels entered by the member or on behalf of more than one member, a) on immediate notice, where the member is in breach of his obligations under Rule 28.1 (in respect of disclosure and alteration of risk), Rule 28.2 (in respect of fraudulent, unlawful or deliberate acts) or Rule 28.4 (in respect of the classification and certification of the vessel), b) on three days' notice, where the member is in breach of his obligations under Rule 28.3 (in respect of the payment of premiums and other sums due to the Association), c) on seven days' notice, where the vessel is unseaworthy and the member has not made her seaworthy without undue delay, or where the member has not allowed the Association to carry out a survey in accordance with Rule 35, or where the member has notified the Association of any change of circumstance which materially alters the risks covered by the Association, or d) on thirty days' notice, without giving any reason¹¹⁰.

In case where there is termination of cover, the cover will also cease for the co-assured, as the co-insurance is dependent according to SK Rule 45.3 where “the contents of any communication between the Association and the member, or any joint member, or any co-assured, or any affiliate, shall be deemed to be within the knowledge of the member and all joint members, co-assureds and affiliates”.

¹⁰⁹ SK Rule 3.1.1.

¹¹⁰ SK Rule 3.3.2.

In parallel, pursuant the Norwegian Insurance Contract Act - ICA, if the insurance has been terminated, that, does not apply as regards a co-insured. See § 7-4: “If the insurance contract has been amended, terminated or ceased to exist, that does not apply as regards a co-insured under section 7-1¹¹¹, subsection two an three, unless the insurers have notified the party concerned specifically about the fact with one month’s notice”.

Differently, the Norwegian Marine Insurance Plan – NMIP adopts a more dependent approach. In § 8-3, for instance, if the insurance contract has been amended or cancelled, this shall also apply in relation to any co-insured third party. However, it is to point out that concerning co-insurance of mortgagees the approach is different. In this case, the NMIP adopts an independent co-insurance, for example, § 7-2 whereas if the insurance contract has been amended or cancelled, the rights of the mortgagee shall not be affected.

Thus, the concept of dependent/independent co-insurance is treated differently considering which regulation applies. As a general rule, in the P&I conditions, co-insurance is dependent. In the NMIP, co-insurance is dependent whereas in the ICA co-insurance is independent.

5.9.3 Effect of Cessation and Termination

The Association shall be under no liability whatsoever in respect of any event occurring after cessation or termination¹¹².

The cover will also cease or terminate for the co-assured, as the co-insurance is dependent as previously explained.

¹¹¹ It is to note that termination may be applied against other co assureds than those described under 7-1.

¹¹² SK Rule 3.4.1.

6 CO-INSURANCE UNDER ENGLISH LAW

6.1 General View

Co-insurance under English Law is analyzed differently from the Scandinavian system.

The English system does not operate with the concept of co-insurance of a third party and does not distinguish between the person effecting the insurance and the assured. For instance, either the insurance is effected directly for the benefit of the mortgagee, i.e. the person effecting the insurance act as agent for the mortgagee, providing him with an original or direct interest in the policy, or the policy is assigned to the mortgagee, i.e. he has derivative interest¹¹³.

The concept of co-assured is not found either¹¹⁴. However, the following definitions can be examined in the UK P&I Club Rule 44:

Applicant Owner - In relation to a ship which is desired or intended to be entered for insurance in the Association, means owner, owners in partnership, owners holding separate shares in severalty, part owner, mortgagee, trustee, charterer, operator, manager or builder of such ship and any other person (not being an insurer seeking reinsurance), by or on

¹¹³ Bull, Hans Jacob and Wilhelmsen, Trine-Lise supra p. 238.

¹¹⁴ In the AMERICAN P&I CLUB the definition is found as any person who is insured in accordance with the terms of Rule 1.3.8 to 1.3.11. It is to conclude that the co-assured is considered to be an insured as a party to the insurance contract. This means that the co-assured is entitled to the benefit of coverage under the terms and conditions of the insurance contract agreed to when he was named. For instance, the term “member” when described in some of the club’s rules asserts that member is an owner, operator or charterer of a vessel insured by the Association who is entitled to membership of the Association, provided that, where the context requires or allows, the term Member shall, in these Rules, include a Joint Member, Co-assured and Affiliate.

whose behalf an application has been, is being or is to be made for the entry of the same in the Association for insurance whether he be or is to be a Member of the Association or not.

Managers: The Managers for the time being of the Association.

Member: A Member for the time being of the Association.

Owner: In relation to an entered ship means owner, owners in partnership, owners holding separate shares in severalty, part owner, mortgagee, trustee, charterer, operator, manager or builder of such ship *and any other person (not being an insurer reinsured under Rule 13) named in the certificate of entry or endorsement slip, by or on whose behalf the same has been entered in the Association whether he is a Member or not.*

Thus, considering the followed concepts, it is to notice that when dealing with another party as mortgagee or charterer the person effecting the insurance contract is considered an agent representing the third party's interest¹¹⁵.

In this case, the insurance is effected directly for the benefit of the mortgagee, i.e. the person effecting the insurance act as agent for the mortgagee, providing him with an original or direct interest in the policy¹¹⁶.

Hence the problem inherit in the distinction are solved through the doctrine of agency¹¹⁷, implying that the person effecting the insurance acts as an agent for the assured.

¹¹⁵ Bull, Hans Jacob and Wilhelmsen, Trine-Lise supra p. 238.

¹¹⁶ Bull, Hans Jacob and Wilhelmsen, Trine-Lise supra p. 238.

¹¹⁷ A power of attorney (POA) or letter of attorney in common law systems or mandate in civil law systems is an authorization to act on someone else's behalf in a legal or business matter. The person authorizing the other to act is the principal or granter (of the power), and the one authorized to act is the agent or attorney-in-fact. According to general contract law concerning agency, the agent must act on behalf of the granter of the power according to the limits agreed. The agent who exceeds the limits or proceed against them will be considered mere manager while the granter does not ratify the acts. The agent is also obliged to give information about

Moreover, it is to notice that when dealing with another party, the policy may also be assigned by the person who effected the insurance to the mortgagee, i.e. he has derivative interest¹¹⁸.

For this reason, UK Rule 15 A states that no insurance given by the Association under any contract between the Association and any Owner may be assigned without the written consent of the Managers who shall have the right in their discretion to give or refuse such consent without stating any reason or to give such consent upon any such terms or conditions as they may think fit¹¹⁹.

In this second case, the policy must be assigned to the mortgagee, for example, to provide him with any rights under the policy¹²⁰.

its management and to apply all its habitual diligence in the execution of the mandate. In the other hand, the granter is obliged to satisfy all the obligations contracted with the agent, in conformity of the conferred mandate, and to pay the importance of the necessary expenditures to the execution of it when asked. The granter is equally obliged to pay the losses suffered with the execution of the mandate, whenever they do not result of guiltiness or excess. Finally, the granter is obliged to pay to the agent the adjusted remuneration and the expenditures of the execution of the mandate, despite of the expected effect, except in case where the agent is to blame.

¹¹⁸ An assignment (latin: *cessio*) is a term used with similar meanings in the law of contracts and in the law of real estate. In both instances, it encompasses the transfer of rights held by one party—the assignor—to another party—the assignee. The legal nature of the assignment determines some additional rights and liabilities that accompany the act.

¹¹⁹ Any purported assignment made without such consent or without there being due compliance with any such terms and conditions as the Managers may impose shall, unless the Managers in their discretion otherwise decide, be void and of no effect. UK Rule 15 B - whether or not the Managers shall expressly so stipulate as a condition for giving their consent to any assignment, the Association shall be entitled in settling any claim presented by the assignee to deduct or retain such amount as the Managers may then estimate to be sufficient to discharge any liabilities of the assignor to the Association, whether existing at the time of the assignment or having accrued or being likely to accrue thereafter.

¹²⁰ According to MIA § 50 (1) a marine policy is assignable unless it contains terms expressly prohibiting assignment. The conditions do not prohibit such assignment but in order to be binding for the underwriters,

Pursuant general contract law, assignment of rights under a contract is the complete transfer of the rights to receive the benefits accruing to one of the parties to that contract¹²¹. For example, if party A contracts with Party B to sell his vehicle to him for \$20, party A can soon after assign the benefits of the contract - the right to be paid \$20 - to party C. In this picture, party A is the obligee/assignor, party B is an obligor, and party C is the assignee.

It is important to note, however, that party C is not a third party beneficiary, because the contract itself was not made for the purpose of benefiting party C¹²².

Hence, it is possible to affirm that the concept of identification in the context of marine insurance does not exist in UK marine insurance law. The English system does not operate with the concept of co-insurance of a third party and does not distinguish between the person effecting the insurance and the co-assured.

Notice that according to the conditions an owner may be any other person named in the certificate of entry on whose behalf the same has been entered in the Association whether he is a Member or not.

some formal requirements must be fulfilled, as explained in Bull, Hans Jacob and Wilhelmsen, Trine-Lise supra p. 238.

¹²¹ See references in [http://en.wikipedia.org/wiki/Assignment_\(law\)](http://en.wikipedia.org/wiki/Assignment_(law)).

¹²² See [http://en.wikipedia.org/wiki/Assignment_\(law\)](http://en.wikipedia.org/wiki/Assignment_(law)). And also: the common law favors the freedom of assignment, so an assignment will generally be permitted unless there is an express prohibition against assignment in the contract. Where assignment is thus permitted, the assignor need not consult the other party to the contract. An assignment cannot have any effect on the duties of the other party to the contract, nor can it reduce the possibility of the other party receiving full performance of the same quality. Certain kinds of performance, therefore, cannot be assigned, because they create a unique relationship between the parties to the contract. For example, if party A contracts to hire an attorney to represent her in a civil case for a fee of \$1000, she cannot then assign her contractual right to legal representation to another party. Note however, that party A can assign her right to sue under the same claim she contracted with the attorney to pursue.

Therefore, differently from the Norwegian system where the previous chapter treated the right and duties of the co-assured when identified with the owner, where the context allowed, under the English system, the issue of identification does not exist.

Thus, the rules addressed to the owner will also be addressed to the third party since the person effecting the insurance contract is considered an agent representing the third party's interest or an assignee of his rights and duties¹²³.

According to UK Introductory - Rule 1, the cover provided by the Association as set out in the Rules is solely for the benefit of the Owner¹²⁴, and any Joint Owner, Group Affiliate, other association or insurer, or permitted assign, to the extent allowed by Rules 10, 11, 13 and 15.

It is not intended that rights should be acquired by any third party, through the operation of the Contracts (Rights of Third Parties) Act 1999 of the United Kingdom or similar legislation¹²⁵.

In time, UK Rule 5 L states that all contracts of insurance made by the Association shall

¹²³ Insurance Law Handbook by Barlow Lyde & Gilbert LLP, p. 152 explain that as far as willful misconduct of the assured is concerned, the actions of one assured, A, will not bar the claim of B under the same policy, where A and B are separately interested. This will be the case when insurance is effected to the advantage of two or more assureds, for instance, for both the mortgagor and mortgagee. On the other hand, if the claimant is not an original assured, but derives his title by assignment, the insurer may invoke willful misconduct by the assignor against the assignee.

¹²⁴ UK Rule 14 – Membership A If the Association accepts an application from an Owner who is not already a Member for a ship to be entered on terms that Calls are payable to the Association (“Call Entries”), then such Owner shall, as from the date of the acceptance of such entry, be and become a Member and his name shall be entered in the register of Members.

¹²⁵ UK Introductory - Rule 1.

be subject to and incorporate the provisions of the Marine Insurance Act 1906 except insofar as such Act or modifications may have been excluded.

In such a case the following provisions may apply as background law.

MIA Section 17 imposes a duty on the insured of *uberrimae fides*, i.e. that questions must be answered honestly and the risk not misrepresented. Section 18 imposes to a duty on the insured to disclose all material facts relevant to the acceptance and rating of the risk. Failure to do so is known as non-disclosure or concealment and renders the insurance voidable by the insurer. Section 50 states that a policy may be assigned. Typically, a shipowner might assign the benefit of a policy to the ship-mortgagor or any other third party.

Yet, it is to mention that, despite of the non-existence of the concept of co-insurance under the English insurance system, there is the institute of composite insurance whereas there is more than one insured and each has a diverse interest in the insured subject matter.

Therefore, the legal material existent in order to regulate such an institute can serve as base to this paper as a source of interpretation, as it follows.

6.2 Composite Insurance

A composite policy is when the insured party takes out insurance on behalf of himself and/or for a specifically identified third party (co-assured)¹²⁶.

Where the main insured is authorised by the third party or required by a contract to take out a composite policy (i.e. a policy under which both their respective, divisible interests in the subject matter of the insurance are covered), the policy will cover the interests of both¹²⁷.

¹²⁶ See Barlow Lyde & Gilbert LLP supra p. 178.

¹²⁷ Barlow Lyde & Gilbert LLP, abid at p. 178. In *National Oilwell (UK) Ltd v Davy Offshore Ltd* 1993 2 *Lloyd's Rep* 582, for example, the main contractor was obliged by the terms of the subcontract to procure an

Where the policy is composite each insured in effect has a separate contract with the insurer¹²⁸.

Typical examples of composite insurance are policies taken out by a mortgagor and a mortgagee¹²⁹.

In regard to the topic “*cover of a third party under P&I insurance*”, it seems suitable to examine some of the issues in composite policy since the third party which the paper mentions about is a person, other than the member, who is named on the Certificate of Entry, to whom the Association has agreed (subject to restrictions) to extend the cover afforded to the member.

all risks property insurance policy for the subcontractor, covering the equipment due to be supplied under the subcontract, up to the point of delivery of the equipment. In fact, main contractor procured a policy which covered both itself and the subcontractor against liability incurred due to defects in the subcontract equipment occurring before or after delivery. Defects arose in the equipment post-delivery, with the result that construction was delayed, causing the main contractor to incur substantial losses. These were paid by the insurer, which sought in turn to recover its payment from the subcontractors by way of subrogation. The subcontractor resisted this claim by asserting that he was a party to the contract¹²⁷ of insurance and, therefore, immune from subrogation proceedings in accordance with the general rule that subrogation rights cannot be exercised against an insured party. The court held that the subcontractor was not a co-insured vis-à-vis post-delivery risks, since to be a co-insured the main contractor must have been authorised to insure on the subcontractor's behalf. This had not been the case, as the subcontract obliged the main contractor to insure for the subcontractor only in respect of pre-delivery losses. The main contractor's authorisation to insure could not be any wider than his obligation. The subcontractor was, therefore, co-insured under the policy only in respect of pre-delivery risks.

¹²⁸ See Barlow Lyde & Gilbert LLP, *abid* at p. 178 that the English system also considers a third possibility, namely, that a policy has been taken out by a single insured, under contractual arrangements with another, whereby that other is the intended beneficiary¹²⁸. In other words, where a number of interests are to be insured, an alternative to composite insurance is a policy taken out in the name of one insured but for the benefit of himself and other person who are unidentified.

¹²⁹ Barlow Lyde & Gilbert LLP *abid* at p. 174.

As mentioned, the policy will identify the insured persons by name or description. But the description must be apt to cover the purported co-insured in question¹³⁰. In *Talbot Underwriting v Nausch Hogan & Murray Inc (The Jackson 5) 2006 2 Lloyd's Rep 195*, for example, the question was whether the shipowner's repairers were a co-insured by virtue of policy phrase: "and/or Subsidiary, Affiliates, Associated and Interrelated Companies and/or Joint Ventures". The court held that they were not, since the repairer was not in the same group of companies, and something more than a repairing contract was required to give rise to a joint venture.

If the alleged co-insured (Y) is not named or otherwise described as being an insured by the policy, then the question is whether the actual proposer, i.e. main insured (X) was acting as his agent, i.e. whether Y was X's unidentified principal¹³¹.

In *Siu Yin Kwan v Eastern Insurance Co Ltd 1994 1 All ER 213*, for example, a shipping agent was requested by a shipowner to obtain a policy covering the shipowner's potential liability to his employees. A policy was issued, but with the shipping agent named as the insured. An accident occurred for which the shipowner was held to be liable, and the Privy Council ruled that the shipowner was the proper insured under the policy by reason of the doctrine of the undisclosed principal, given that the requirements of authorisation and intention had been met.

In *Insurance Law Handbook*, Barlow Lyde & Gilbert explains that "a possible problem which may occur when someone not recognized in the policy claims to be the insured on the basis that the main insured acted with his authorisation and intended to do so, is the duty on the proposer to disclose material facts to the insurer. Is the existence of the undisclosed principle a material fact¹³²?" In *Talbot Underwriting*, Cooke J stated obiter that

¹³⁰ Barlow Lyde & Gilbert LLP, *abid* at p. 178.

¹³¹ Barlow Lyde & Gilbert LLP, *abid* at p. 178.

¹³² Barlow Lyde & Gilbert LLP, *abid* at p. 178.

in his view, in the connection of the marine policy there under consideration, this would certainly be the case¹³³.

Finally, where the primary insured under an insurance contract is not authorised to obtain cover for another person, that other may in some circumstances be able to ratify¹³⁴ the unauthorized act, and thereby claim to be a party to the contract¹³⁵.

¹³³ See Barlow Lyde & Gilbert LLP, *abid* at p. 178.: if the purported co-insured is not named or otherwise described as being an insured by the policy and is unable to successfully argue that he was the actual proposer's undisclosed principal, he may still be able to enforce the policy, by virtue of the Contracts (Rights of Third Parties) Act 1999.

¹³⁴ Ratification was discussed by the court in *National Oilwell* where the following conditions for ratification by the subcontractor were laid down¹³⁴: The contractor had to be a person identified in the policy as a co-insured, either by name or by description. This is based on the common law rule that an undisclosed principal cannot ratify. The subcontractor must have intended to insure on behalf of the subcontractor. As above, this requirement was held by the court in *National Oilwell* not to have been met, as the contractor's intention to insure could not be regarded as any wider than his obligation to do so. In the result, even though the subcontractor was stated to be a co-insured, the fact that the contractor was not obliged to insure for post-delivery losses meant that he could not have intended to do so.

¹³⁵ Barlow Lyde & Gilbert LLP, *abid* at p. 178.

7 CO-INSURANCE UNDER BRAZILIAN LAW

Brazilian co-insurance practice presents fragilities that compromise this model either in respect to the relation between several insurers or in respect to the protection of the insured and/or the beneficiaries.

The absence of rules surprises any researcher who, before examining the question in Brazilian practices, approaches the co-insurance through comparative law. Jose María Muñoz Paredes¹³⁶ explains that the true dialogue of deaf people, in this field, between the limited doctrine and the prompt jurisprudence, is that, to evaluate and to judge the subject, the only thing that counts is the fact itself and therefore the term co-insurance is relatively the difficulties to characterize, disabling, as consequence, also the construction of a jurisprudential model.

Pablo Toledo Piza¹³⁷, specialized lawyer in practices in Insurance Law, informs that the insurance policies, in Brazil, very rarely make references or have clauses on co-insurance.

Thus, considering the lack of rules of law that structuralize the models supplied by the comparative jurisprudence, it is difficult to know how to proceed since it is not easy to identify accurately the type of co-insurance that experiences the Brazilian practice today.

In fact, co-insurance in Brazil is basically referring to the co-insurance between insurers and not the one referred to this paper, which is, co-insurance between several assureds.

¹³⁶ In II Forum de Direito do Seguro “Jose Sollero Filho”, São Paulo: IBDS, 2002, p. 344.

¹³⁷ In II Forum de Direito do Seguro “Jose Sollero Filho”, São Paulo: IBDS, 2002, p. 344.

Co-insurance under Brazilian perspective is basically that modality where several insurers taking out the risk jointly, sharing it through premium, being the choice of the co-insurers the proper leader¹³⁸.

To put in our legislative picture of lacks and anomalies it is now presented the new Civil Code 2003 that promotes the unification of the civil and commercial obligations¹³⁹, in special articles 760 and 761.

However, as mentioned, these provisions are referring to co-insurance between insurers and not the one referred to this paper. Therefore, it is imperial that more researches and studies take place to improve the insurance sector in Brazil, including the one related to the definition of the co-insurance.

¹³⁸ Absent the legislation, disorganized the sector and totally unprotected the insured, the jurisprudence filled the gap: in this in case that, it allows to conclude decision of the STJ, the responsibility is integrally of the company who contracted directly with and insured and it assumed the leader role. This position points, with rationality, the differences between the Brazilian model practiced and the foreign experience.

¹³⁹ When dealing with maritime insurance, the old commercial code of 1850 states in article 668 that being diverse the insurers each one must declare the amount that they were compelled. As seen, here also the issue is co-insurance between insurers and not between insureds as subject of this study.

8 CONCLUSIONS

As seen, insurance is coverage by a contract binding a party to indemnify another against specified loss in return for premiums paid. Regarding to the topic, it was necessary to limit the research to one specific kind of insurance: Protection and Indemnity Insurance.

P&I insurance is the central liability insurance in the shipping context. It basically covers the assured's liability for personal injury and death, and damage to or loss of property.

The insurance contract is a contract whereby the insurer, the P&I Club, will pay compensation to the person who entered into a contract, i.e. the club member, if the defined events occur.

However, it can happen that the person who is going to receive the compensation is another person than that one who effected the insurance. In this case, the institute of co-insurance will apply.

Co-insurance means that the insurance agreement between the person effecting the insurance and the insurer is made to the benefit of more than one assured. This assured, in his turn, is considered a third party to the insurance contract who is named on the Certificate of Entry to whom the Association has agreed (subject to restrictions) to extend the cover afforded to the member.

Consequently, it is logical to state that the provisions found in the insurance contract/conditions are addressed to the person who effected the insurance, who is part of the contract, implying, as a starting point, that the co-assured, who is a third party to the contract, has no direct duties.

However, P&I insurance may be needed for the potential co-insured considering that these parties are often directly involved in the operation of the ship and therefore in a position to breach these rules.

In a comparative approach, it was concluding to see that some of the provisions addressed to the member may also be addressed to the co-assured, due to the doctrine of identification (SK Rule 45.4) presented by the Scandinavian system.

The Scandinavian systems distinguish between the person effecting the insurance and the assured. The person effecting the insurance is the one who enters into the contract with the insurer, whereas the assured is the person who has the right of indemnity when a casualty occurs.

Differently, the English system does not operate with the concept of co-insurance of a third party and does not distinguish between the person effecting the insurance and the co-assured. In this context, the rules addressed to the owner will also be addressed to the third party since the person effecting the insurance contract is considered an agent representing the third party's interest or an assignee of his rights and duties.

Under the Brazilian system, the absence of rules surprises any researcher who, before examining the question in Brazilian practices, approaches the co-insurance through comparative law. The doctrine and jurisprudence to evaluate and to judge the subject is very limited and only count with the fact itself, disabling, as consequence, the possibility of construction of a jurisprudential model.

Therefore, the analysis of the P&I Clubs statutes and rules, in special SKULD P&I CLUB, GARD P&I CLUB and UK P&I CLUB allowed us to understand a little bit better the conditions and the differences in each system.

9 References

As this paper is researched in English the references used in this paper were quite reduced what lead to difficulties in understand deeper the institute of co-insurance.

Considering that there are few literature and in special those translated to the English language related to the topic, and even related general insurance law, it was necessary to focus basically in the conditions as they stands.

Therefore, some of the few articles written about issues in marine insurance realized during the Marine Insurance Symposium were essential to permit the development of the theme as such as the following literature bellow mentioned:

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Gard P&I Conditions, Statues and Rules 2008 – GR

UK P&I Conditions, Statues and Rules 2008 – UK

American P&I Conditions, Statues and Rules 2008 – AM

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