

Insurance Law and Marine Insurance Law: The Unequal Twins

Hans Jacob Bull

1 Introduction	12
2 Marine Insurance in Legislation	12
2.1 The Insurance Contracts Act 1930: A Nordic Success	12
2.2 The 1930 ICA up for Revision: A Nordic Failure	14
2.3 The Norwegian 1989 ICA: Form and Content	15
2.4 The 1989 ICA and Marine Insurance	17
3 Marine Insurance in Agreed Insurance Conditions	19
3.1 The Norwegian Marine Insurance Plan 1996: A National Success	19
3.1.1 A long tradition	19
3.1.2 Background to the revised 1996 plan	19
3.1.3 An agreed document	21
3.1.4 Covers the main insurances for ocean-going vessels	21
3.1.5 Has the format of ordinary legislation	22
3.1.6 Under continuous revision	23
3.2 The 1996 Plan and the 1989 ICA: A Comparison	24
3.3 The 1995 NCC: The Compromised Solution	25
4 The 1989 ICA and Liability Insurance: The Mandatory Empire Strikes Back	28
4.1 The 1930 ICA: An Acceptable Protection of the Injured Party's Position under Liability Insurance	28
4.2 The 1989 ICA sect. 7-6: A Leap Forward	28
4.3 The 1989 ICA sect. 7-7: Correcting a Forgetful Legislator in Mandatory Liability Insurance	31
4.4 The 1989 ICA sect. 7-8: Marine Liability Insurance Revisited	31

1 Introduction

This article focuses on the relationship between general insurance law and marine insurance law, as seen from a Norwegian perspective. The aim of the article is threefold. *First*, it attempts to demonstrate that the apparent change in relationship over the past 10-15 years, following the introduction of the 1989 Insurance Contracts Act,¹ may be less dramatic than the impression left by a quick glance at the problem area. *Second*, it undertakes to show the central role agreed documents have played in marine insurance over the years, and the close resemblance they share with ordinary legislation, both in form and content. *Third*, it examines the use of mandatory legislation in different types of marine insurance contracts.

Although the presentation focuses on the developments and the solutions found in Norway, it should be mentioned by way of introduction that the legal rules on insurance contracts were for a long period (ca. 1930-1989) more or less identical in four of the five Nordic countries.² As will be explained below, this is no longer the case. As regards marine insurance conditions, the Norwegian conditions on ship hull insurance have to some extent served as a model for the solutions adopted in Finland and Sweden. Although the close common ground found in maritime law among the Nordic countries may not have its counterpart in the legislation and conditions on marine insurance matters, the differences in their marine insurance laws and conditions are insignificant, when compared to the laws and conditions of most other countries.

2 Marine Insurance in Legislation

2.1 *The Insurance Contracts Act 1930: A Nordic Success*

The Insurance Contracts Act 1930³ was the first Insurance Contracts Act in Norway. Until then, the legislators had only been concerned with marine insurance. The Maritime Code 1893 had separate provisions on marine insurance,⁴ as opposed to the Maritime Code 1860.⁵

The 1930 ICA was prepared in close cooperation with Denmark and Sweden.⁶ Later Finland⁷ and Iceland⁸ made their own regulation, based on the three Scandinavian Acts. The five Nordic Acts were quite similar both in format and in content, although differences could be spotted on some central points.

¹ Act on Insurance Contracts of June 16 1989 no. 69 (abbreviated below: 1989 ICA).

² Denmark, Finland, Norway and Sweden. Iceland did not join until 1954, *see* below.

³ Act on Insurance Contracts of June 6 1930 no. 20 (abbreviated below: 1930 ICA).

⁴ The Maritime Code of July 20 1893 no. 1, sects. 230-266 (abbreviated below: 1893 MC).

⁵ The Maritime Code of March 24 1860.

⁶ *See* Acts of April 8 1927 (Lag om försäkringsavtal, 1927:77 Sweden) and April 15 1930 (Lov om forsikringsaftaler, Denmark).

⁷ *See* Act of May 12 1933 om försäkringsavtal (132:33).

⁸ *See* Act of March 8 1954 no. 20 um váttryggingarsemninga.

A few characteristic features of the 1930 ICA should be underlined. The act was structured in four chapters. Chapter I (sects. 1-34) contained provisions that were common to all types of insurances, whereas Chapter II regulated non-person insurances, Chapter III life insurances and Chapter IV accident insurances. In Chapter II, subchapter A (sects. 35-58) contained provisions that applied to all types of non-person insurances, whereas subchapters B-E had rules on specific types of non-person insurances. Thus, subchapter B had provisions on transport insurances; this subchapter was further divided into two parts: marine insurance (sects. 59-76) and other transport insurances (sect. 77-78). Finally, subchapter E (sects. 91-96) had provisions on liability insurance.

All the provisions of the 1930 ICA were in principle non-mandatory.⁹ However, in the two chapters we are focusing on here, Chapter I and Chapter II, the legislator had found it necessary to make several of the provisions mandatory.¹⁰ As a general rule, this was done explicitly in the relevant provision. Some provisions, where no explicit regulation had been made, were interpreted by the courts as being mandatory.¹¹

As for marine insurance contracts, Chapter I and Chapter II subchapters A and B applied in principle. As for subchapter E on liability insurance, the preparatory works were formulated so as to raise doubts on this point,¹² but in the SKOGHOLM case,¹³ the Supreme Court established that the subchapter did apply.

More difficult was the question as to what extent the relevant provisions in the two chapters were to be seen as mandatory in marine insurance. All rules specifically dealing with marine insurance (Chapter II subchapter B)¹⁴ and all general provisions in Chapter I and Chapter II subchapter A that were seen as non-mandatory in non-marine insurance, would obviously be non-mandatory in marine insurance. As for the many mandatory rules left in the two chapters, three observations should be made.

First, the two chapters had four explicit openings for the parties to a marine insurance contract to contract out of provisions that were otherwise mandatory.¹⁵

⁹ 1930 ICA sect. 3.

¹⁰ It is interesting to note that it was not full congruency on this point between the different Nordic acts.

¹¹ A good example is the 1930 ICA sect. 95, which we will return to below 4.1.

¹² See Bugge, *Lov om forsikringsavtaler*, p. 24, where the Expert Committee stated that a separate edition of the 1930 ICA, particularly drafted for the need of the marine insurance industry, would only have to cover sects. 1-78, and p. 162, where the Committee explains that except for sect. 76, all other provisions relating to marine insurance may be contracted out of. In Rt. 1954.1002 SKOGHOLM, these statements were brought forward by the insurer to establish that sect. 95 third paragraph did not apply in marine insurance, *see* below.

¹³ *See* footnote 12.

¹⁴ Although the preparatory works stated that sect. 76 was to be looked upon as mandatory, *see* footnote 12, this view was challenged in Bugge, *l.c.* p. 162 footnote 1.

¹⁵ Sect. 10 first paragraph stated that the provisions in sects. 6, 8 and 9, all dealing with reactions to the insured's breach of duty of disclosure, were mandatory, except in marine insurance. Sect. 50, making the provisions on alteration of risk in sects. 45-49 mandatory, did not apply in marine insurance, *see* third paragraph. Sect. 51, which contained mandatory rules on safety regulations, proclaimed that these rules were not mandatory in marine

Second, whereas the mandatory provisions in the 1930 ICA had as their *raison d'être* the wish to protect the insured against unjust conditions found in the insurance contracts, one provision stood out as a provision with a different direction. Sect. 39 first paragraph stated that the insurer was not obliged to pay out a greater compensation than necessary to cover the incurred damage, even where an opposite solution had been agreed in the insurance contract. Sect. 39 second paragraph made a small exception to this rule: Had the parties decided that potential damage should be compensated for on the basis of the property in question having an assessed insurable value, then this value would prevail, unless this would result in the insured receiving a considerably higher compensation than he would have received had the ordinary rules been used. In principle, this provision also applied to marine insurance contracts, but sect. 39 second paragraph second sentence stated that where a marine insurance contract had a taxed value, sect. 75 third paragraph would apply. This paragraph had a slightly different wording than sect. 39 second paragraph, by stating that the assessed value was binding for the insurer, unless the insurer proved that the assessed value was so much higher than the real value so as to make the assessed value unreasonable.

Third, among the remainder of the 1930 ICA mandatory provisions relevant in marine insurance,¹⁶ only three could be viewed as really important as seen from the insurer's perspective. According to sect. 20 first sentence, the insurer could not deny the insured compensation for losses suffered, by alleging that the insured had brought about the insured event through ordinary negligence. On the other hand, sect. 24 entitled the insured to interest on his outstanding claim for compensation when a month had passed after the claim had been presented to the insurer.¹⁷ The final provision, sect. 95, will be treated later (below 4.1).

2.2 *The 1930 ICA up for Revision: A Nordic Failure*

It was Sweden who first proposed to revise the Nordic Insurance Contracts Acts. Work in Denmark, Norway and Sweden started in 1974; Finland joined a few years later.¹⁸ Whereas the Scandinavian cooperation preparing for the 1927-1930 ICA had been constructive and helpful, the work on the revision was not productive. The four Expert committees had a tendency to work on different problems at the same time, and they also had very different opinions as to how a future regulation of insurance contracts should be structured. The problems encountered are clearly visible in the end result.

insurance, *see* third paragraph second sentence. Finally, sect. 54 second paragraph, which prescribed that in case of change of ownership of property, the new owner would be protected under the insurance of the previous owner for a mandatory period of fourteen days, did not apply in marine insurance.

¹⁶ *See* the 1930 ICA sects. 20, 21-23, 24, 30, 52 and 95.

¹⁷ The 1930 ICA sect. 24 was reformulated in 1976, *see* Act of December 17 1976 no. 100. Most important was the considerable rise in the interest rate.

¹⁸ Iceland did not participate in the work, but an Expert Committee prepared a Draft Act in 2002, with great similarities to the Norwegian 1989 ICA.

The Norwegian Insurance Contracts Act was passed in 1989, whereas the Finnish Act was passed five years later, in 1994.¹⁹ There are important differences between the two acts both in structure and in content. Sweden, on the other hand, preferred to draft a separate Consumer Insurance Contracts Act first; this act was passed by Riksdagen in 1980.²⁰ A complete revision of the previous 1927 Act is still not finalized. The proposals presented by the Swedish Expert committee and later by the government have been heavily criticized by the industry, and it is at present uncertain if or when a new general Insurance Contracts Act will be passed by Riksdagen. Denmark never participated wholeheartedly in the Nordic initiative, partly due to the competing work taking place in the EU in the 1970s and 1980s to formulate a common policy and a directive on insurance contracts. When this EU attempt failed,²¹ Denmark decided to leave its Insurance Contracts Act from 1930 unchanged for the time being. A new initiative was taken in 1999, when an Expert committee was set up to revise the 1930 Act. With a few exceptions, the committee proposed to leave the 1930 Act unchanged,²² and in 2003, the Government and later Folketinget decided to adopt the solution suggested by the committee.²³

2.3 The Norwegian 1989 ICA: Form and Content

The 1989 ICA has been divided into two main parts, Part A on non-person insurances and Part B on person insurances. In addition, Part C – with only two sections – contains general rules. Several provisions in Part A and Part B are identical or semi-identical.²⁴

In contrast to the 1930 ICA, all the provisions of the 1989 ICA are in principle mandatory.²⁵ But it is indicated in several sections that the relevant provision may be contracted out of by the parties,²⁶ and it is also stated generally

¹⁹ See Act of June 28 1994/543 om försäkringsavtal.

²⁰ See Act 1980:38 Konsumentförsäkringslagen.

²¹ In 1979, the Commission presented a draft Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts. A revised draft was introduced in 1980, but it turned out to be impossible to reach the necessary agreement among member states.

²² See the Expert Committee's Report, 2002.

²³ See Act of June 10 2003 no. 434.

²⁴ An important reason for the solution chosen was the fact that the two parts were prepared separately by the Expert Committee, see NOU 1983:56 An act on contracts for person insurances, and NOU 1987:24 An act on contracts for non-person insurances. Instead of either amalgamating the two draft acts into one concise act (as was later done in Finland) or propose two separate acts, the Ministry of Justice chose one act divided into two parts, and this was later followed up by the King in Council and Stortinget.

²⁵ See the 1989 ICA sect. 1-3 first paragraph, which we will return to later.

²⁶ See as an example the 1989 ICA sect. 3-1 first paragraph regarding The period of liability: "Unless otherwise provided by law or by agreement, the liability of the insurer shall commence when the insured or the insurer have accepted the terms stipulated by the other party."

that for certain types of non-person insurances, all provisions of Part A (except one, see later) may be contracted out of.²⁷

Part A has been divided into nine chapters, which are structured in the following way:

Chapter 1: Introductory provisions, covers i.a. the area of application of part A and the mandatory nature of its provisions,

Chapter 2: The duty of the insurer to provide information, covers the information to be given by the insurer when writing or renewing the insurance,

Chapter 3: The insurance contract, etc., contains rules on the period of liability, the right of both parties to terminate the contract and the insurer's right to substitute insurance conditions during the period of cover and at renewal,

Chapter 4: General preconditions for the insurer's liability, regulates duty of disclosure, alteration of risk, safety regulations, casualties caused by the insured through an intentional or negligent act, identification,

Chapter 5: The premium, rules on payment of premium and delayed payment,

Chapter 6: General rules for the liability of the insurer, containing i.a. rules on calculation of the compensation, taxed insurances, double insurance and coverage of expenses to avert or minimize the insured losses,

Chapter 7: The right of third parties under the insurance contract, covering coinsurance and third party's rights under liability insurance,

Chapter 8: Settlement of compensation, limitation, etc., containing rules on claims settlements, set-offs, interest and limitation,

Chapter 9: Special rules concerning group insurance.

In contrast to the 1930 ICA, the 1989 ICA Part A does not contain chapters or provisions that are relevant only for a specific type of insurance, except for the rules in Chapter 7 on liability insurance. Such rules would have had to be non-mandatory, first and foremost due to the variety of possible solutions, but also to provide parties to the insurance contract opportunities to develop new solutions to the ones found in the 1989 ICA. Although non-mandatory rules might serve as guidelines to the parties and as a useful checklist when drawing up insurance conditions, it was felt that this would not be a task for the legislator.²⁸

²⁷ See the 1989 ICA sect. 1-3 second paragraph, which we will return to later.

²⁸ Many of the rules prescribed for specific insurances in the 1930 ICA were in fact never used. Marine insurance is a good example. Because the agreed insurance conditions (*see* below 3)

A distinct feature in the 1989 ICA compared with the previous 1930 ICA is the wide use of provisions with open-ended solutions, leaving a great deal of discretion to the judge to reach a just and balanced result. The rules on duty of disclosure in Chapter 3 may be used as an example. Both under the 1930 ICA and under the 1989 ICA, the insurer is free from liability towards the insured, if he has shown fraudulence in not disclosing relevant facts.²⁹ If, on the other hand, the insured has shown negligence in not providing the insurer with complete and correct information, the 1930 Act established a complicated, but precise instrument: The insurer would be free, if there was reason to believe that he would not have taken on the insurance, had he known the correct facts. If, on the other hand, there was reason to believe that the insurer would have taken on the insurance anyway, his duty to compensate the insured should be adjusted down to the estimated level the insurer would have accepted against the premium paid, had he known the correct facts.³⁰ In contrast, the 1989 ICA proclaims that where negligence has only been slight, it will not have any consequences for the insured's right to compensation. On the other hand, the insurer's duty to pay compensation may be reduced or cease to exist, where the insured has shown ordinary or gross negligence. In assessing whether or to what extent compensation should be paid, several factors should be taken into account: The impact of the negligent breach of duty on the insurer's evaluation of the risk, the degree of blame, the course of events and the general circumstances.³¹

2.4 The 1989 ICA and Marine Insurance

During its work with the revision of the 1930 ICA, the Expert Committee formed the opinion that the 1989 ICA should – as a general principle – apply also to marine insurance. An important aspect of the Act was to strengthen the protection of the consumers, thus necessitating that the Act should be based on the principle of mandatory provisions. It was appreciated by the Committee that it would be necessary to open up for the parties, especially in non-consumer insurance contracts such as marine insurance contracts, to contract out of several of the mandatory provisions. However, when the Committee's preliminary findings and proposals were circulated within the insurance world of Norway, it

were more comprehensive and detailed than the provisions found in the 1930 ICA, these provisions did not have any influence on the development of the law in the field. – It is interesting to note that in another field of law, namely maritime law, a move in another direction has been noted. The Maritime Code of June 24 1994 no. 30 (abbreviated below: 1994 MC) Chapter 14 contains relatively detailed non-mandatory provisions on voyage charterparties, quantity contracts and time charterparties, although such contractual instruments always have detailed rules on the relevant subjects. In addition, they are normally written in English and base themselves on English law, and possible conflicts under the instruments will be decided according to English law in England, due to the contracts' own jurisdiction and choice of law clauses.

²⁹ See the 1930 ICA sect. 5 and the 1989 ICA sect. 4-2 first paragraph.

³⁰ See the 1930 ICA sect. 7 first and second paragraph. In marine insurance, the third paragraph established a somewhat different system.

³¹ See the 1989 ICA sect. 4-2 second and third paragraph. The section has no separate rules on marine insurance.

led to sharp reactions from the marine insurance industry itself and from its most important customers, the shipowners.³² The unanimous feeling was that mandatory provisions for marine insurance were not really needed in the 1989 ICA. Although the Committee upheld its view that it would be perfectly possible to accommodate the marine insurances within an act based on mandatory provisions, the strong resistance to such a solution made an impression. In its final proposal,³³ which was later upheld by the Ministry of Justice and the King in Council in their proposal to Stortinget,³⁴ the Committee gave up its earlier principle.

The 1989 ICA Part A: Agreements on non-person insurances, applies in principle to marine insurance contracts.³⁵ But for all types of marine insurance contracts relating to a ship or a structure, the contractual parties are free to contract out of all but one of the provisions of the 1989 ICA.³⁶ The concept “ship” covers any ship which is under an obligation to be entered in the ship registry,³⁷ whereas the concept “structure” relates to structures as set out in different provisions of the 1994 MC.³⁸ Likewise, all but one of the provisions of the 1989 ICA may be contracted out of where the marine insurance contract relates to goods in international transport.³⁹ In these areas, it is therefore possible to draft the total sets of insurance conditions in the way the market players find most suitable. As we shall see (below 3.1 and 3.2), these players have adopted different solutions depending on whether the marine insurance relates to ships and structures on the one hand or to carriage of goods in international transit on the other.

As indicated, there is one exception to the freedom given to the parties in marine insurance to set their own rules. The 1989 ICA sect. 7-8, which regulates an injured third party’s rights under a liability insurance covered by the 1989 ICA sect. 1-3 second paragraph, will apply mandatorily in marine insurance (below 4).

In addition, it is generally recognized that some of the general protective rules in Norwegian law might also apply to marine insurance contracts. Most

³² See NOU 1987:24 pp. 36-37. In the submissions cited in the NOU, no division was made between insurances for ships on the one side and insurances for goods in transport on the other.

³³ NOU 1987:24, with the Draft Act on agreements of non-person insurances on pp. 9-18.

³⁴ Ot.prp. no. 49 (1988-89) with the Draft Act on Insurance Contracts on pp. 163-186. In its proposal, the Ministry of Justice referred to letters received from the Central Union of Marine Underwriters and the Norwegian Shipowners’ Association with appraisal of the Committee’s final proposal on the point of mandatory provisions, *see* p. 30.

³⁵ This follows from the 1989 ICA sect. 1-1, which indicates the area of application for Part A of the Act.

³⁶ *See* the 1989 ICA sect. 1-3 second paragraph litra (c).

³⁷ For practical purposes this means a ship longer than 15 m, *see* the 1994 MC sect. 11 second paragraph.

³⁸ The 1994 MC sects. 33 paragraph one, 39 and 507. The last sections cover mobile platforms and platforms firmly fastened to the seabed and other structures to be used in the offshore petroleum activities.

³⁹ *See* the 1989 ICA sect. 1-3 second paragraph litra (f).

important is the Contract Act sect. 36,⁴⁰ which opens up for setting aside or revising unfair contract terms.

3 Marine Insurance in Agreed Insurance Conditions

3.1 The Norwegian Marine Insurance Plan 1996: A National Success

3.1.1 A long tradition

On 1 January 1997, the Norwegian Marine Insurance Plan 1964 was superseded by the Norwegian Marine Insurance Plan 1996. This was a landmark event both in Norwegian and in Nordic marine insurance law. The Norwegian Marine Insurance Plans have constituted the key marine insurance conditions in Norway for more than 125 years. Over the years, they have also influenced the drafting of corresponding conditions in other Nordic countries, notably Finland and Sweden.

The first Norwegian Marine Insurance Plan was published in 1871 by Det Norske Veritas. New plans followed in 1881, 1894,⁴¹ 1907, 1930⁴² and 1964/1967. The first five plans covered both insurances of interests in ships and cargo in transport. The 1964 Plan established a turning point, as it covered interests in ships only,⁴³ but it was followed up by the 1967 Plan for cargo insurance,⁴⁴ which to a large extent mirrored the 1964 Plan.⁴⁵

3.1.2 Background to the revised 1996 plan

The necessity in revising the 1964 Plan was based on four elements. *First*, the 1989 ICA entailed significant changes to general insurance contract law. Although the marine insurances covered by the 1964 Plan could be kept outside the 1989 ICA's mandatory regulation, it would have been both surprising and unfortunate if marine insurance law were not revised in light of the 1989 ICA and other developments in Norwegian insurance contract law.

Second, after 1964, Norwegian marine insurance had seen an extensive and far-reaching internationalization. The typical situation in 1964 was insurance of Norwegian owned and Norwegian registered ships with Norwegian insurers on

⁴⁰ See Act of May 31 1918 no. 4. Sect. 36 was amended and got its present content by an Act of March 4 1983 no. 4.

⁴¹ The revision in 1894 was necessitated by the adoption of the 1893 MC, which contained a separate chapter on marine insurance.

⁴² The revision in 1930 was necessitated by the 1930 ICA.

⁴³ To indicate that the 1964 Plan mainly covered shipowners' interests in the ship, the 1964 Plan was in its Norwegian edition named Norsk Sjøforsikringsplan av 1964 (Rederplanen).

⁴⁴ Norwegian Insurance Plan for the carriage of goods of 1967 (abbreviated below: 1967 Plan).

⁴⁵ When the insurance conditions for cargo insurance were revised in 1985, 1990 and 1995, the expression "Plan" was abolished, and is today only used for the insurance conditions for ships and mobile structures.

Norwegian conditions, i.e. the 1964 Plan. There were, admittedly, important exceptions to this main rule. It had, for instance, long been customary for Norwegian owned or Norwegian registered ships to be insured, wholly or in part, on Norwegian conditions abroad. The most important development over the 30 years between 1964 and 1996 was found among the insurers: In 1996 foreign owned and/or foreign registered ships constituted an essential part of the portfolios of several of the Norwegian insurers.

A *third* important element of the revision process was seen in the dissolution tendencies in international shipping. Four factors should be mentioned:

- (1) A steadily growing number of older and outdated ships with resultant safety and maintenance problems;
- (2) The increased splitting-up of the functions of shipowners between many hands, with the effect that the person who owned the ship did not necessarily have the operational and technical responsibilities;
- (3) The apparent failure in the crew's professional competence, partly – but certainly not totally – as a result of the widespread use of crews from non-traditional shipping countries;
- (4) The control problems encountered by the classification companies and the national maritime authorities with the result that clear deficiencies and faults in the ships were often not discovered during ordinary surveys.

A *fourth* element quite simply related to the need to undertake a general review and updating of the marine insurance conditions. The solutions found in the 1964 Plan had on a number of points been supplemented, modified or set aside over the years. Thus, P&I insurance, which had been included in the Plan for the first time in 1964, had been removed from the Plan altogether some years later.⁴⁶ The section in the 1964 Plan on loss of hire insurance was superseded in 1972 by separate Conditions for loss of hire insurance⁴⁷ (revised in 1977 and 1983), with the 1964 Plan applicable, bar the chapter on loss of hire insurance.⁴⁸ The 1964 Plan still provided the cornerstone in hull insurance for ocean-going vessels, but separate Conditions for hull insurance, used in conjunction with the 1964 Plan, contained several important amendments.⁴⁹ On the other hand, there were also examples of types of insurance that were not covered by the 1964 Plan, but where new conditions referred to and based themselves on the 1964 Plan

⁴⁶ The two Norwegian P&I insurers, Assuranceforeningen Gard og Assuranceforeningen Skuld, chose to write P&I insurance and connected insurances on their own conditions instead; these conditions being heavily influenced by the conditions used by all members of the so-called International Group, consisting of 13 P&I insurers, representing about 90 % of the total P&I insurance written in the world.

⁴⁷ General conditions for loss of hire insurance 1972, drafted as an agreed document and published with Commentaries.

⁴⁸ See sect. 1 in the General conditions referred to in the preceding footnote.

⁴⁹ Such separate conditions were drafted and published on a regular basis as agreed documents, but in a less formal way than the 1964 Plan itself.

solutions. The hull insurance conditions relating to drilling vessels and mobile offshore structures provides a good example here.⁵⁰

3.1.3 An agreed document

Like its predecessors, the 1996 Plan is an agreed document. It has been drafted and adhered to by representatives from all the main groups with a professional interest in marine insurance conditions in Norway. The Revision Committee, set up under the auspices of Det Norske Veritas, included representatives from The Norwegian Shipowners' Association and the two main marine insurers' organizations,⁵¹ The Mutual Marine Insurers' Committee and the Central Union of Marine Underwriters. Other interest groups, as well as individual experts in their own right, also participated. The Editorial Committee, set up within the Revision Committee to handle the day-to-day revision work, consisted of two representatives from each of the said three organizations, in addition to one of the Norwegian average adjusters and two university professors (serving as chairman and secretary respectively). Several subcommittees were preparing the ground work for the Editorial Committee.

The Draft 1996 Plan was submitted to various interested organizations for their comments, and formally adopted by Det Norske Veritas in December 1996. Two chapters, Chapter 18 and Chapter 19, were not finalized until 1997 and 1998 respectively.

3.1.4 Covers the main insurances for ocean-going vessels

The 1996 Plan includes – with one main exception – the most important insurances for ocean-going vessels. Part II of the Plan regulates hull insurance: Scope (Chapter 10), Total loss (Chapter 11), Damage (Chapter 12) and Collision and contact liability (Chapter 13). Part III contains rules on other insurances for ocean-going vessels; the three chapters cover Separate insurances against total loss (hull and freight interest insurances) (Chapter 14), War risk insurance (Chapter 15) and Loss of hire insurance (Chapter 16).⁵²

P&I insurance, along with associated insurances such as strike insurance and insurance of extraordinary costs, is not included in the 1996 Plan. During the revision work, the two Norwegian P&I clubs (above 3.1.2) made it clear that the highly international aspect of P&I insurance and the close cooperation within the

⁵⁰ Norwegian conditions for hull insurance of drilling vessels 1974/1975, drafted as an agreed document and published with Commentaries.

⁵¹ The two organizations have later amalgamated, under the name The Central Union of Marine Underwriters.

⁵² Part IV, named Other insurances, cover Special rules for fishing vessels and small freighters, etc. (Chapter 17), Insurance of offshore structures (Chapter 18) and Builders' risks insurance (Chapter 19). The general rules in Part I will – with some slight modifications – also apply to these types of insurance.

International Group of P&I insurers made it inappropriate to regulate shipowners' liability insurance in the 1996 Plan.

The special rules in Parts II, III and IV relating to the specific types of insurance should be seen in conjunction with Part I. This Part contains rules which are common to all (or several) of the insurances found in the other three parts. A brief survey of the different chapters found in Part I gives an indication of how the 1996 Plan has been structured.

Chapter I. Introductory provisions; contains among other things rules on jurisdiction and choice of law,

Chapter II. General rules relating to the scope of the insurance; has rules on insurable interest and on (assessed) insurable value; and also the rules relating to perils insured against and causation,

Chapter III. Duties of the person effecting the insurance and of the assured; regulates first and foremost the duty of disclosure, alteration of the risk, seaworthiness and safety regulations, casualties caused intentionally or negligently by the assured, and identification,

Chapter IV. Liability of the insurer; contains amongst other things the rules on costs of measures to avert or minimize the loss, including salvage and general average,

Chapter V. Settlement of claims,

Chapter VI. Premium,

Chapter VII. Co-insurance of mortgagees; regulates the automatic cover of mortgagees' interests under an effected insurance,

Chapter VIII. Co-insurance of third parties, regulates cover of third party interests through special arrangement under an effected insurance,

Chapter IX. Relations between the claims leader and co-insurers; regulates the claims leader's right to act on behalf of the co-insurers in relation to the assured.

3.1.5 Has the format of ordinary legislation

Although the 1996 Plan differs from the 1989 ICA in terms of *content*, the 1996 Plan has great similarities to ordinary legislation in terms of *form*. This comes out clearly when we look at how the Plan is structured (above 3.1.4) and how it came into being (above 3.1.3). Here, another important similarity should be stressed.

To the text of the 1996 Plan, copious Commentaries were prepared by the Editorial Committee and adopted by the Revision Committee (above 3.1.3). The

Commentaries play the same role for the 1996 Plan as the *travaux préparatoires* do for ordinary legislation. They cover all the parts that have been reviewed by the committees, and explain in greater detail the text of the 1996 Plan, by giving examples, commenting on court cases which have been adhered to – or distinguished – in the 1996 Plan, etc. The Commentaries will be admissible evidence in court, in the same way as preparatory works for ordinary Norwegian legislation.

The Commentaries constitute an integral part of the Plan system, as spelled out in this citation from the comments to sect. 1-4. Reference to Norwegian jurisdiction and choice of law:

The Plan does not contain any explicit reference to the Commentary and its significance as a basis for resolving disputes. This is in keeping with the approach of the 1964 Plan. Nevertheless the Commentary shall still carry more interpretative weight than is normally the case with preparatory works of statutes. The Commentary as a whole has been thoroughly discussed and approved by the Revision Committee, and it must therefore be regarded as a part of the standard contract which the Plan constitutes.⁵³

3.1.6 Under continuous revision

To ensure a continuous monitoring of the 1996 Plan, a Standing Revision Committee was established. The Committee consists of ten members. The Committee shall at least once a year evaluate the need for amendments, and draft specific texts with commentary for incorporation into the 1996 Plan. This ensures a constant updating of the Plan and an institutional framework surrounding the revision work.

Since 1996, the 1996 Plan has appeared in different updated versions, illustrating the continuous revision work. For the first two revised versions from 1997 and 1999, both the Plan itself and the Commentaries were printed by Det Norske Veritas. Version 2002 (Plan and Commentaries) was printed at the Law Faculty at the University of Oslo, and Version 2003 (Plan) by Det Norske Veritas, under the auspices of the Central Union of Marine Underwriters. The printed versions appear both in Norwegian and English. All new versions with commentaries are also found on the Internet under the addresses:

“<http://exchange.dnv.com/NMIP/>” (English versions),

“<http://exchange.dnv.com/NMIP-NO/>” (Norwegian versions).

⁵³ Commentary (English version), NMIP 1996 version 1999 p. 17.

3.2 *The 1996 Plan and the 1989 ICA: A Comparison*

As we have seen (above 2.1), the 1930 ICA had several provisions that were mandatory also in marine insurance. On the other hand, the parties to a marine insurance contract had the opportunity to contract out of four provisions in the 1930 ICA that were otherwise mandatory. It is interesting to note that for three out of these four provisions, both the 1930 Plan and the 1964 Plan adopted the solutions found in the legislation.⁵⁴ The hard-fought battle for non-mandatory provisions in the 1930 ICA was not followed up in practice.

With the freedom granted to the parties in the 1989 ICA to formulate their marine insurance contracts the way they see most fit, a comparison between the solutions found in the 1989 ICA and the 1996 Plan is of interest. A few observations should be made.

First, the 1989 ICA Part A and the 1996 Plan Part One show great similarities both in over-all structure and in how some of the separate chapters have been organized. An excellent example is Chapter 4 of the 1989 ICA and Chapter 3 of the 1996 Plan, which cover the duties placed on the insured and the actions available to the insurer if these duties are breached.

Second, several of the provisions found in the 1989 ICA are formulated so as to take care of the special needs of consumers. As may be appreciated, the 1996 Plan has been hesitant in adopting such consumer-orientated protection provisions. Two examples to this effect may be given. (1) Chapter 2 of the 1989 ICA describes the duty upon the insurer to provide the insured with information about the insurance cover. Such information should be available both when the insurance contract is entered into and upon renewal. The 1996 Plan does not carry similar rules. The insured party in a marine insurance contract is normally a professional himself, who will be assisted by a broker when negotiating the insurance contract. (2) As already mentioned (above 2.3), a characteristic feature of the 1989 ICA is the open-endedness of many of the actions available to the insurer where the insured party has breached central duties in his contractual relationship with the insurer (breach of duty of disclosure, breach of duty to comply with safety regulations, etc.). The judge is left with considerable freedom to pick the solution he finds most suitable for the individual occasion. This is not a system adopted by the 1996 Plan. The 1996 Plan continues in the

⁵⁴ The 1930 Plan sects. 4-10 and the 1964 Plan sects. 24-29 had the same rules as set out in the 1930 ICA sects. 4-9, cf. 10 as regards the insured's duty of disclosure at the start of the insurance period. The 1930 Plan sects. 27-30 and the 1964 Plan sects. 31-36 adopted the solutions found in the 1930 ICA sects. 45-50 regarding increase of danger during the insurance period. Finally, the 1930 Plan sect. 31 and the 1964 Plan sects. 48-50 compared well with the provisions in the 1930 ICA sect. 51 on safety regulations. However, it should be noted that the concept "safety regulations" was wider in the 1964 Plan sect. 48 compared with the solution found in the 1930 ICA sect. 51. – The last relevant provision was the 1930 ICA sect. 54 second paragraph, providing a new owner with a mandatory cover for fourteen days under the former owner's insurance where the insured object had been sold. This provision was not adopted in the 1930 Plan sect. 65 or the 1964 Plan sect. 133, which both stated that the insurance would lapse immediately where the insured vessel was transferred to a new owner by sale or otherwise.

tradition established by the 1930 ICA and the 1964 Plan, where the effect of the insured's breach of such duties would find its answer directly in the Act itself.⁵⁵

Third, the freedom from applying mandatory rules has not resulted in the 1996 Plan turning away from earlier principles found in the 1930 and 1964 Plans and founded on mandatory provisions in the 1930 ICA. A return to the four mandatory and the four otherwise mandatory provisions in the 1930 ICA analyzed above 2.1 shows that only on one point⁵⁶ did the fathers of the 1996 Plan introduce a different solution, namely as regards the interest rule in the 1930 ICA sect. 24, as amended in 1976⁵⁷ and prolonged in the 1989 ICA sect. 8-4. The 1996 Plan did accept the principle that interest should be paid also on claims which had not yet fallen due, but replaced the rules on interest rate with new provisions, thereby lowering the rate for claims not yet due.⁵⁸

3.3 *The 1995 NCC: The Compromised Solution*

As indicated (above 3.1.1), up until 1964, marine insurance for ships and marine insurance for the carriage of goods were covered by the same Plan. With the split in 1964/1967, the 1967 Norwegian insurance plan for the carriage of goods became the central basis for coverage of cargo insurance in Norway. The 1967

⁵⁵ The exception is the 1996 Plan sect. 3-33 on gross negligence, providing that the liability of the insurer shall be determined based on the degree of fault and circumstances generally where the insured has brought about the casualty through gross negligence. However, it should be underlined that this solution was not a newcomer to the Plan system in 1996: It had already been introduced in the 1964 Plan sect. 56.

⁵⁶ The fate of the mandatory provision in the 1930 ICA sect. 39 second paragraph, cf. sect. 75 third paragraph is interesting. When preparing the 1964 Plan, it was argued that sect. 75 third paragraph was a dead letter in marine insurance, despite being mandatory, *see* the Commentaries to the 1964 Plan p. 6. Accordingly, the 1964 Plan sect. 8 was formulated so as to mirror the "law in action": "Where the insurable value by agreement between the parties has been fixed at a definite amount ... the assessment is not binding on the insurer if the person effecting the insurance has given misleading information concerning those particulars of the subject-matter insured, which were of importance for the insurer to know for the purpose of the valuation." The Commentaries p. 6 proclaimed that the insurer should not be allowed to attack a taxed value under any other circumstances. – The solution adopted in the 1964 Plan sect. 8 was replicated in the 1989 ICA sect. 6-2 and later repeated in the 1996 Plan sect. 2-3 first paragraph. The consequence was a complete turn around: Instead of the insurer having a mandatory protection when the assessed value resulted in an unreasonable result to him, the insured now became the party protected. If the information given by him was correct, the insurer could no longer attack the valuation, even if it meant that the insured obtained an unreasonable profit.

⁵⁷ *See* footnote 17.

⁵⁸ *See* the 1996 Plan sect. 5-4. The rate of interest is six months NIBOR + 2% for insurance contracts in which the sum insured is stated in Norwegian Kroner, and otherwise six month LIBOR + 2%, *see* second paragraph. After the due date, interest on overdue payments accrues according the rules contained in the Act relating to interest on overdue payments of December 17 1976 no. 100 sect. 3 first paragraph, if the interest on overdue payments is higher than the interest determined according to the rules above, *see* third paragraph. As of winter 2004, the interest rate on overdue payments is 9,25%. – According to the 1989 ICA sect. 8-4, the interest rate on overdue payments will apply for the whole period interest is to be paid.

Plan followed to a large extent the structure and solutions found in the 1964 Plan. The 1967 Plan might thus be characterized as a complete and balanced agreed document, giving the parties to the contract a solid basis for the content and interpretation of their contract. Having said that, the thoroughness of the 1967 Plan constituted at the same time its problem. Both the insurers and the insured parties found it a cumbersome piece of work for daily use. Foreigners not used to the Norwegian structure and solutions had difficulties in detecting if and to what extent the 1967 Plan corresponded with the solutions found in other international markets.

The changes seen in the early 1980s in cargo insurance conditions in the leading markets,⁵⁹ made an impression on the Norwegian insurance market. The insurers decided to present their insurance conditions in a shorter and more concise version. However, the 1985 conditions⁶⁰ expressly stated that the 1967 Plan governed the insurance, insofar as the conditions themselves did not solve a particular question differently. The conditions were prepared without the assistance of representatives from the insured parties, thereby weakening their status as an agreed document.⁶¹

The arrival of the 1989 ICA necessitated a revision of the 1985 Conditions, if for no other reason because the provisions of the 1989 ICA were in principle mandatory in national cargo transport within Norway. Again, the 1990 Conditions⁶² relied heavily on the solutions found in the 1967 Plan, to the extent that those solutions did not conflict with the mandatory provisions of the 1989 ICA. But like the 1985 Conditions, they were given a shorter and more concise format than the 1967 Plan. Again, the 1990 Conditions were prepared by representatives from the insurance companies alone, without the support of representatives from buyers of cargo insurance or from outside sources.⁶³

The 1995 NCC⁶⁴ represented a shift from the preceding 1985 and 1990 Conditions. Once again, it was important to secure that the conditions had the format of an “agreed document”, with the strength that such an agreement would have when conditions were interpreted by the courts at a later stage. In addition to active participation in the revision by representatives from both the users of transport services for carriage of goods and the insurers, the chairman, the main secretary and one of the members of the Expert committee acted as independent

⁵⁹ First and foremost the English Institute Cargo Clauses 1982.

⁶⁰ Conditions for transport insurance of cargo (Cefor form. no. 185), 1985 (abbreviated below: 1985 Conditions).

⁶¹ The 1985 Conditions were slightly modified in the following years. They were not equipped with official and publicly known commentaries, but an unofficial version circulated among the insurance companies.

⁶² Conditions for transport insurance of cargo (Cefor form. no. 222), 1990 (abbreviated below: 1990 Conditions).

⁶³ In contrast to the 1985 Conditions, the 1990 Conditions did not refer expressly to the 1967 Plan; instead, the 1990 Conditions had an explicit reference to the 1989 ICA, indicating that the provisions of the 1989 ICA part A regulated the insurance contract, unless these provisions were overruled by provisions in the insurance policy itself or in the 1990 Conditions. The 1990 Conditions were not equipped with Commentaries.

⁶⁴ Conditions for transport insurance of cargo (Cefor form. no. 252), 1995 (abbreviated below: 1995 NCC).

and impartial experts. Also, the 1995 NCC was equipped with Commentaries,⁶⁵ although these were considerably shorter than the Commentaries to the 1967 Plan. Unlike the 1985 Conditions, there were no formal ties between the 1995 NCC and the 1967 Plan. However, the preface to the Commentaries points out that both the provisions themselves and the Commentaries are – to a considerable extent – based on the provisions and Commentaries of the 1967 Plan, and the commentaries to each separate provision in the 1995 NCC make reference to the corresponding provision in the 1967 Plan.⁶⁶

The 1995 NCC have been formulated as general insurance conditions for both national and international carriage of goods. This means that they closely follow the solutions found in the 1989 ICA, without taking full advantage of the opportunity granted for allowing the agreed conditions for international transports to differ from the mandatory rules of the 1989 ICA. However, on a few points the regulation of national and international transports has been formulated differently.⁶⁷ On other points, the text of one provision in the 1995 NCC is in apparent conflict with a mandatory provision in the 1989 ICA, but the Commentaries presuppose that the provision in question should be supplemented with the relevant 1989 ICA provision when it comes to national transports.⁶⁸

⁶⁵ Published as Cefor form. no. 252A.

⁶⁶ See Preface to the Commentaries to the 1995 NCC, Cefor form. no. 252A, second page.

⁶⁷ See the 1995 NCC sect. 21 first paragraph second sentence (the concept “safety regulations” is wider under international transports than under national transports, *see* sect. 21 first paragraph first sentence, which corresponds with the 1989 ICA sect. 1-2 litra (e)); sect. 39 second sentence (in international transport, the insurer will not cover the insured’s liability for loss incurred by a third party under the rules of costs of measures to avert or minimize the loss, whereas in national transport, the 1989 ICA sect. 6-4 apply fully, *see* the 1995 NCC sect. 39 first sentence); and sect. 54 second paragraph first sentence (where the insured in international transport intentionally or by gross negligence fails to take the steps necessary to preserve a claim against a third party, for example the carrier, he will be liable for any loss suffered by the insurer through such failure, whereas in national transport, the 1989 ICA sect. 4-10 will apply, thereby softening the insurer’s reaction, *see* the 1995 NCC sect. 54 second paragraph second sentence).

⁶⁸ A good example is the 1995 NCC sect. 21 second paragraph, which sets out the actions available to the insurer where a safety regulation has been broken. The insurer will not be liable in such a case, unless the insured proves that the loss was not caused by his non-compliance with the relevant safety regulation, or that the non-compliance was not due to negligence on his part. This is a stricter solution than the one found in 1989 ICA sect. 4-8 second sentence, where no action is available to the insurer where only a slight blame can be ascribed to the insured. The section’s third sentence also provides for partial liability of the insurer in case of ordinary negligence on the part of the insured, taking into account the nature of the safety regulation in question, the degree of blame, the course of events and other relevant circumstances. The Commentaries p. 39 spell out that in national transports, the 1995 NCC sect. 21 second paragraph will need to be supplemented by the 1989 ICA sect. 4-8, thus leaving the actual provision in the 1995 NCC applicable for international transports only.

4 The 1989 ICA and Liability Insurance: The Mandatory Empire Strikes Back

4.1 *The 1930 ICA: An Acceptable Protection of the Injured Party's Position under Liability Insurance*

A new element in the 1989 ICA was the extended protection given to the injured party under liability insurance. In the 1930 ICA,⁶⁹ the injured party had been granted a solid protection against outside competitors to the insurance payment. The liability insurer was free to pay the relevant compensation directly to the injured party, if he so wished, regardless of the insured party's objections to such direct payment.⁷⁰ On the other hand, the injured party was protected against the liability insurer making a payment of the compensation to the insured party, unless the insured was able to show that he had in fact paid the established compensation to the injured party.⁷¹ The rules also safeguarded the injured party against creditors of the insured getting their hands on the payment due from the insurer.⁷²

However, the protection granted was passive. The injured party did not have an active and general right to claim directly against the liability insurer himself. Such a direct action was only available to him where the insured party was bankrupt.⁷³ The 1930 ICA did not explicitly state that the right to a direct action in bankruptcy cases was mandatory; as already mentioned (above 2.1), this was established by the Supreme Court in its SKOGHOLM judgment of 1954.⁷⁴

4.2 *The 1989 ICA sect. 7-6: A Leap Forward*

Although the 1989 ICA does not contain specific regulation of separate insurances in the field of non-person insurances, liability insurance is an exception. Rules concerning the injured party's privileges under a liability insurance according to the 1989 ICA are to be found in sects. 7-6, 7-7 and 7-8.⁷⁵ Sect. 7-6 contains the general principles, which will apply in all types of liability insurances, unless the special rules given in sects. 7-7 and 7-8 come into play.

⁶⁹ Interestingly enough, the rules protecting the injured party in liability insurance differed considerably in the common Nordic Acts, indicating the difficulties of the legislators in striking the right balance between the interests of the parties to the insurance contract on the one hand and the injured party on the other.

⁷⁰ See the 1930 ICA sect. 95 first paragraph.

⁷¹ See the 1930 ICA sect. 95 second paragraph.

⁷² See the 1930 ICA sect. 96.

⁷³ See the 1930 ICA sect. 95 third paragraph. It should be noted that under several separate acts or regulations, rules on mandatory liability insurance had been established. In such cases, the injured party often had an extended protection, with a right to pursue his claim for compensation against the liability insurer immediately after the occurrence.

⁷⁴ See footnote 12.

⁷⁵ These sections are placed in Chapter 7 of the 1989 ICA, named The right of third parties under the insurance contract. The rest of Chapter 7 contains rules regarding co-insurance, i.e.: To what extent does an insurance contract give rights to others than the person who has effected the insurance?

Sect. 7-7 applies where a mandatory liability insurance scheme is introduced in the legislation, without the relevant act spelling out the detailed rights of the injured party under the scheme (below 4.3). Not surprisingly, sect. 7-7 gives him a better protection than he would have enjoyed under voluntarily established liability insurances. On the other hand, sect. 7-8 has a less protective attitude towards the injured party in certain voluntary liability insurances, characterized by covering “large business risks” and/or risks of an international character (below 4.4).

The characteristic features of ICA 1989 sect. 7-6 may be summarized as follows:

1. The injured party has a right, but not a duty, to bring an immediate and direct action against the liability insurer as soon as the injury has occurred.⁷⁶ All types of liability claims are covered, whether based on contract or in tort, as are all types of liability insurances (with the qualifications made in sects. 7-7 and 7-8).
2. Both the insured and the liability insurer are under a duty to provide the injured party with information concerning the insurance upon request,⁷⁷ thus facilitating the injured party’s opportunities to use the right vested in him.
3. Under a direct claim, the liability insurer may invoke all the objections against the injured party’s claim which the insured would have had, had the claim been brought against him.⁷⁸
4. As a starting point, the liability insurer may also invoke all objections against the injured party’s claim which he could have invoked against the insured, had the claim been brought by him. However, if the objections relate to acts or omissions by the insured after the insurance event occurred, the liability insurer is blocked from invoking them.⁷⁹ The injured party is also protected against the insurer making a set-off in the compensation, except as regards missing premium payments under the same insurance contract during the course of the

⁷⁶ See sect. 7-6 first paragraph first sentence. Under the 1994 Finnish ICA, the protection given to the injured party is considerably weaker. He has a right of direct action only where (1) the insured has a mandatory duty to take out liability insurance, or (2) the insured is under bankruptcy or is insolvent, or (3) the insured has mentioned his liability insurance in his business sales promotion, see sect. 67 first paragraph. However, according to sect. 68, the insurer is under a duty to inform the injured party if he rejects a claim under a liability insurance policy. In such a case, the injured party will be allowed to sue the insurer.

⁷⁷ See sect. 7-6 first paragraph second sentence. The 1994 Finnish ICA does not have a corresponding provision.

⁷⁸ See sect. 7-6 fourth paragraph first sentence. Such a provision was not spelled out in the 1930 ICA sect. 95 third paragraph, but it was well established that the same rule would apply here. – The 1994 Finnish ICA does not have a corresponding provision.

⁷⁹ See sect. 7-6 fourth paragraph second sentence. It was argued that a similar rule – although not expressed in the text – would apply also under the 1930 ICA sect. 95 third paragraph, see Bull, *Tredjemansdekninger i forsikringsforhold*, Oslo 1988, pp. 189-191 and 195-199. The point made was never tested in the courts. – The 1994 Finnish ICA does not contain a corresponding provision.

last two years.⁸⁰ Finally, special limitation rules apply: The liability of the insurer will be subject to limitation under the same rules as apply to the injured party's claim against the insured tortfeasor.⁸¹

5. It was considered important that the strengthening of the injured party's position should not unjustly hurt the position of the insured. Therefore, the liability insurer will be under a duty to notify the insured party if a claim for compensation is brought by the injured party against the insurer.⁸² Such notification shall take place without undue delay. The insurer must also keep the insured informed about his further handling of the case. Any admissions made by the insurers will not be binding on the insured.⁸³

6. Similarly, representatives of the insurance industry strongly argued that the better position gained by the injured party should not jeopardize the insurer's possibility to defend himself against unjust claims. The liability insurer may therefore – where a legal action is brought against him by the injured party – request that the insured is joined in the same action.⁸⁴

7. The insurers were also afraid that a general right of direct action might lead to suits being brought in jurisdictions where claims for compensation in tort are measured out more benevolently than in Norway. For this reason, an action under sect. 7-6 against the insurer must be brought in Norway, unless Norway's obligations under international law provide for a different solution.⁸⁵

8. Sect. 7-6 is a mandatory provision.⁸⁶ Neither the parties to the insurance contract nor the potential injured party may therefore agree upon a solution that puts the injured party in a position less favorable to him. However, sect. 7-6 itself contains an exception to this rule. In non-consumer insurances, a potential injured party may - in an agreement entered into with the insured before the

⁸⁰ See sect. 8-3 second paragraph first sentence. It was uncertain whether or not the 1930 ICA sect. 95 might be interpreted so as to give room for a similar solution, *see* Bull, l.c. pp. 204-209.

⁸¹ See sect. 8-6 second paragraph. The 1930 ICA did not have a similar rule.

⁸² See sect. 7-6 second paragraph first sentence. The 1994 Finnish ICA sect. 67 second paragraph has the same solution.

⁸³ See sect. 7-6 second paragraph second sentence. The 1994 Finnish ICA sect. 67 third paragraph has the same solution.

⁸⁴ See sect. 7-6 third paragraph. The 1994 Finnish ICA does not have a corresponding provision.

⁸⁵ See sect. 7-6 fifth paragraph. Such an exception follows from the so-called Lugano convention between the EU countries and the EFTA countries, dated September 16 1988, and ratified by Norway in 1993, *see* the Lugano Act of January 8 1993 no. 8, which establishes where an action against an insurer may be brought. – The 1994 Finnish ICA does not have a corresponding rule.

⁸⁶ See sect. 1-3 first paragraph. However, to insurances of large “business risks” and/or risks of an international character, sect. 1-3 second paragraph will apply. – As for Finnish law, the provisions in the 1994 Finnish ICA are binding and cannot be contracted out of to the detriment of a third party, *see* sect. 3 first paragraph. However, it follows from sect. 3 third paragraph that this does not apply in marine and other transport insurances taken out by a non-consumer.

claim arose - waive his right to claim compensation directly from the liability insurer.⁸⁷ But such a waiver will not be legally enforceable should the insured become insolvent and not be able to foot his bills as they fall due.⁸⁸

4.3 The 1989 ICA sect. 7-7: Correcting a Forgetful Legislator in Mandatory Liability Insurance

Normally, legislation demanding that a potential tortfeasor should be obliged to take out liability insurance, will spell out the injured party's rights towards the insurer where an accident has occurred.⁸⁹ The 1989 ICA sect. 7-7 covers the situation where the insured is under an obligation to take out liability insurance cover to comply with an order issued under or pursuant to legislation, but the relevant act or regulation does not set out the position of the injured party. In such a case, sect. 7-7 establishes that sect. 7-6 shall apply accordingly.⁹⁰ However, the position of the injured party is strengthened on three vital points. *First*, the insurer is blocked from invoking any objections stemming from the insurance contract, if he knew or ought to have known that mandatory liability insurance was involved.⁹¹ *Second*, even if the mandatory liability insurance has been terminated or otherwise has ceased to apply between the two parties to the insurance contract, this will only affect the injured party where one month has passed since the relevant body of authority was notified of the matter.⁹² *Third*, the insurer will not be allowed to make any set-offs for unpaid premiums, etc. in the compensation due to the injured party.⁹³

4.4 The 1989 ICA sect. 7-8: Marine Liability Insurance Revisited

Whereas the 1989 ICA sect. 7-7 gives the injured party a better protection than the general rules found in sect. 7-6, sect. 7-8 marches in an opposite direction. The protection offered in sect. 7-8 is to a large extent modeled on the rules

⁸⁷ See sect. 7-6 sixth paragraph first sentence.

⁸⁸ See sect. 7-6 sixth paragraph second sentence.

⁸⁹ See as an example, the 1994 MC sect. 200. It follows from sect. 197 that the owner of a Norwegian ship carrying more than 2.000 tons of oil as cargo in bulk shall be obliged to maintain approved insurance or other financial security covering the owner's liability for oil pollution damage according to sect. 191 up to the limits mentioned in sect. 194. Sect. 200 stipulates that claims for compensation can be brought directly against the insurer. The insurer can invoke limitation of liability according to the rules set out in sect. 194, even though the owner is not entitled to limit his liability due to the fact that he has caused the pollution damage deliberately or through gross negligence and with knowledge that such damage would probably result. The insurer can also invoke the same grounds for exemptions from liability as the owner could have invoked. However, as against the claimants, the insurer shall not be entitled to invoke any defences which he may invoke against the owner, apart from the defence that the damage was caused by the wilful misconduct of the owner personally.

⁹⁰ See sect. 7-7 first paragraph.

⁹¹ See sect. 7-7 second paragraph first sentence.

⁹² See sect. 7-7 second paragraph second sentence.

⁹³ See sect. 8-3 third paragraph.

previously found in the 1930 ICA, with the effect that the injured party's right of direct action is limited compared to sect. 7-6. On the other hand, sect. 7-8 is the single mandatory provision in the 1989 ICA to apply to insurance of large business risks and risks with an international flavor, such as marine insurance of ships and structures as well as goods in international transport.⁹⁴

Among the different types of insurance for ships and mobile structures, only the hull insurance, the hull interest insurance and the P&I insurance may be seen as liability insurances.⁹⁵ The hull insurance will cover the shipowner's liability for collision and striking, with certain exceptions and limited to an amount equal to the sum insured.⁹⁶ Liability exceeding this limit will be covered under the hull interest insurance, but limited to a sum equal to the sum insured.⁹⁷ On the other hand, the P&I insurance will in principle cover all other types of liability on the part of the shipowner,⁹⁸ whether contractual or non-contractual, provided the liability incurred by him arose in direct connection with the operation of the insured ship.⁹⁹ Except for oil pollution liability,¹⁰⁰ liability is covered without limitation.¹⁰¹

In the 1996 Plan, the parties to the insurance contract have availed themselves of the possibility to contract out of the 1989 ICA sect. 7-6. An injured party does not have a direct claim against an insurer who is covering the insured's liability to third parties.¹⁰² In explaining the solution, the Commentaries point out that sect. 7-6 first paragraph "is not appropriate in marine insurance."¹⁰³ The same solution is found in P&I insurance, although expressed in a different way.¹⁰⁴

Accordingly, the 1989 ICA sect. 7-8 is the only possibility granted to the injured party under the marine liability insurances to secure for himself the

⁹⁴ In the 1994 Finnish ICA, no exceptions have been made to the rule set out in sect. 3 third paragraph, whereby all provisions in the act may be contracted out of in non-consumer marine insurance.

⁹⁵ As regards cargo insurance, the 1989 ICA sect. 7-8 is of little interest, since a cargo insurance will not cover liability on the part of the cargo owner, *see* the 1995 NCC sect. 6 third paragraph second subparagraph.

⁹⁶ *See* the 1996 Plan chapter 13, with sect. 13-1 stating the scope of liability of the insurer, and sect. 13-3 the maximum liability of the insurer in respect of any one casualty.

⁹⁷ *See* the 1996 Plan sect. 14-1 *litra* (b), indicating that the rules in sects. 13-1 and 13-3 on scope of liability and maximum liability will apply also in hull interest insurance.

⁹⁸ *See* Assurancesforeningen Gard's Rules on P&I and Defence cover for ships and other floating structures (2003) (abbreviated below: 2003 GR Rules) Part II P&I Cover Chapter I Risks covered.

⁹⁹ *See* the 2003 GR Rule 2 section 4 *litra* (a).

¹⁰⁰ *See* the 2003 GR Rule 53 Oil pollution limitations and Appendix III.

¹⁰¹ *See* the 2003 GR Rule 51 General limitation of liability, which only states that where the insured is entitled to limit his liability pursuant to any rule of law, the maximum recovery under the P&I cover is the amount to which the insured may limit his liability.

¹⁰² *See* the 1996 Plan sect. 4-17 first paragraph.

¹⁰³ *See* the 1996 Plan Commentary (Version 1999) p. 167.

¹⁰⁴ *See* the 2003 GR Rule 87 Payment first by Member, first paragraph: It is a condition precedent to the insured's right to recover from the insurer in respect of liability that he shall first have discharged or paid the same.

compensation payable by the insurer for the loss suffered.¹⁰⁵ The insurer is obliged to ensure that the compensation will not be paid to the insured until he provides evidence that the claim from the injured party has in fact been covered.¹⁰⁶ And the insured's claim against the insurer cannot be made the subject of a legal action to recover other claims than the injured party's claim for compensation.¹⁰⁷

An unequivocal right of direct action against the liability insurer only emerges where the insured is insolvent.¹⁰⁸ Although this means that the provision in sect. 7-8 is less favorable to the injured party than the rule in sect. 7-6 first paragraph, it still implies that the injured party will have a direct action in the circumstances where it is most needed.

It is important to point out that where the insured is insolvent and the injured party is making his claim against the insurer directly, the provisions of sects. 7-6 and 7-7, cf. 8-3 second and third paragraphs will apply accordingly.¹⁰⁹ The insurer will be blocked from raising objections to the injured party's claim based on acts or omissions from the insured after the insurance event occurred, and limited in his right to make set-offs in the compensation due to the injured party.

The provisions of sect. 7-8 cannot be contracted out of to the detriment of the injured party.¹¹⁰ The "pay to be paid" clause found in P&I insurance conditions,¹¹¹ whereby the insurer's duty to pay compensation under the insurance contract is made dependable upon the insured having paid the injured party first, will thus be invalid under Norwegian law.¹¹²

105 This is expressly recognised in the 1996 Plan Commentary (Version 1999) p. 168: "These provisions are mandatory in marine insurance as well, cf. ICA section 1-3, subsection 2."

106 See sect. 7-8 first paragraph first sentence, which compares with sect. 95 second paragraph of the 1930 ICA.

107 See sect. 7-8 first paragraph second sentence, which compares with sect. 96 of the 1930 ICA.

108 See sect. 7-8 second paragraph. This section is more helpful to the injured party than the parallel provision in the 1930 ICA sect. 95 third paragraph, which demanded bankruptcy on the part of the insured in order to give the injured party a right of direct action.

109 See sect. 7-8 second paragraph.

110 See sect. 7-8 third paragraph, which repeats the provision found in sect. 1-3 second paragraph *ab initio*.

111 See footnote 104.

112 The same solution applies under Swedish law, see Johansson, *Third party claim under marine insurance: The Swedish approach*, SIMPLY 1999 (MarLus no. 247 (1999)) pp. 157-173, with references to several court cases from the 1990s. The solution is different in English law, see the *Fanti/Padre Island* (1990) 2 Lloyd's Rep. 190, where the House of Lords stated "that the 'pay to be paid' provisions, being terms of the contracts of insurance made between the members and the clubs, did not purport, either directly or indirectly, to avoid those contracts, or to alter the rights of the parties under them, upon the members being ordered to be wound up, so as to render those provisions to that extent of no effect under s. 1(3) of the 1930 Act" (p. 197).