Comparison of rules relating to compensation for total loss and damage according to Norwegian, Swedish and Danish marine hull insurance conditions

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1 Introduction and problem identification

1.1 Aim and purpose
The aim of this dissertation is to describe and analyse the differences in rules relating to compensation for total loss of and damage to ships according to the marine hull insurance law that is applicable in Norway, Sweden and Denmark. Even though there are substantial similarities between insurance conditions, there are also significant differences which need to be addressed, both regarding the rules relating to total loss and the rules relating to damage. The purpose is to investigate and to point out the differences that exist within the topic, as well as to gain increased general knowledge within the field of Scandinavian marine insurance.

1.2 Delimitation
I have limited the dissertation to involve only Norwegian, Swedish and Danish hull insurance law. I will only discuss the rules relating to compensation for total loss and casualty damage. I will neither go into details with regards to deductions nor make comparisons with insurance conditions in other countries.
2 Legal sources

There are no common international or Scandinavian legal sources in the marine insurance law area. However, there are substantial similarities between the Norwegian, Swedish and Danish regulations. This part aims at giving a short introduction to the legal sources applicable in marine insurance law in the three countries.

2.1 Marine insurance in Norway

Until 1930 marine insurance was regulated in the Norwegian Maritime Code. At that time, the rules were instead included in the Insurance Contract Act of 1930, but this act has only had limited relevance in marine insurance. Just like in Denmark and Sweden, the most important legal marine insurance source has instead been privately drafted marine insurance regulations; the Norwegian Marine Insurance Plans.\(^1\)

On January 1\(^{st}\) 1997 the Norwegian Marine Insurance Plan of 1996 came into force, replacing the version of 1964. The Plan of 1964 was in need of an update for several reasons; the passing of a new Insurance Contract Act in 1989 as well as extensive internationalisation of Norwegian marine insurance being the two most important.\(^2\)

Pursuant to §1-3 letter (c) and (e) of the Norwegian Insurance Contract Act of 1989, the provisions of this Act are non-mandatory in relation to insurance for registered ships or insurance for international transport of goods.

The Norwegian Marine Insurance Plans have been jointly drafted by insurers, ship owners, cargo owners and other interested parties. As in Sweden and Denmark, the insurance conditions of the Plan are made applicable by direct reference in the insurance contract. The Norwegian Marine Insurance Plan is updated and amended on a more or less yearly basis; the latest changes in effect from January 1\(^{st}\) 2007.

2.2 Marine insurance in Sweden

Sweden has like Norway and Denmark had private conventions on marine insurance law for many years. The first Swedish private legislation, the General Swedish Marine Insurance Plan (GSMIP), came in 1891 and was revised only few years later. A new version of the convention came in 1957, and the latest, applicable today, came as late as January 1\(^{st}\) 2006.

\(^1\) Falkanger/Bull/Brautaset: Scandinavian Maritime Law, p 476-477
\(^2\) Bull: Marlus 240 p 123
However, for hull insurances the Marine Insurance Plan is supplemented by the General Swedish Hull Insurance Conditions (SHIC) of January 1st 2000, which replaces an older version from 1957. These conditions were developed and drafted jointly by representatives from the Swedish Association of Marine Underwriters, the Swedish Shipowners Association and the Swedish Club.

On January 1st 2006 the new Insurance Contract Act of 2005 (SICA) came into force in Sweden. This is the main source covering general insurance law in Sweden but like in Norway and Denmark, marine insurance is to a large extent excluded from this Act.\(^3\)\(^4\)

### 2.3 Marine insurance in Denmark

The *Danish Marine Insurance Convention April 2nd 1934* (DMIC), is the main source of law on marine insurance in Denmark. Like in Norway and Sweden, this insurance convention has been jointly drafted by representatives from the shipping-, commerce- and insurance industry and covers both ship owners’ and cargo owners’ insurance.\(^5\) This convention replaced the *Convention of April 2nd 1850* which previously had been the main source and the first Nordic private legislation on marine insurance. Until 1930 the *Danish Maritime Code* contained a chapter on marine insurance, which was being used as a supplement to the Convention of 1850. This chapter containing marine insurance provisions was abolished when the Danish Insurance Convention April 15\(^{th}\) 1930, DICA, came into force.\(^6\)

The DICA contains a number of provisions that are mandatory irrespective of the type of insurance and therefore when drafting the Danish Marine Insurance Act of April 2\(^{nd}\) 1934, any mandatory provisions of the DICA were incorporated in this convention. Consequently this convention is the most important legislation for marine insurances in Denmark and becomes applicable by reference in each individual insurance contract.\(^7\)

Danish hull insurance regulation has further been modernised and supplemented by the *Danish Hull Time Clauses of January 1st 1992*, DHT, drafted by Danish Marine Insurers Association.\(^8\) These clauses are also made applicable by a direct reference in the insurance contract and replace some of the provisions in the DMIC.

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\(^3\) See SICA Chapter 1 § 7 subparagraph 1
\(^4\) Bengtsson: Försäkringsavtalsrätt p. 188-189
\(^5\) Lynø Danish Insurance Law, p 105
\(^6\) Tybjerg: Om søassurandørens ansvar
\(^7\) Rosenberg Overby: Introduktion til søretten, p. 497
\(^8\) Foreningen af Danske Søassurandører
2.4 Preparatory works

Since most of the marine insurance law in Norway, Sweden and Denmark is based on the individual insurance conditions, preparatory works do not exist in the same sense as for laws produced by the governments. The NMIP, however, is supplemented by extensive Commentaries that have been of at least as much importance as ordinary preparatory works of Acts of Parliament\(^9\). These commentaries have thoroughly been discussed by the Revision Committee and should be regarded as a part of the standard contract the NMIP constitutes.\(^{10}\) Neither the Swedish nor the Danish conditions have such commentaries.

2.5 Case law

Because case law helps understanding how the insurance conditions previously have been interpreted, I have used cases collected from Nordiske Dommer (N.D.) on several occasions when comparing differences in the conditions. However, many disputes regarding compensation under the insurance are solved by negotiations between the assured and the insurer and not that many are ever put before judges or arbitrators.

2.6 Literature

This dissertation is to a large extent based on Norwegian, Swedish and Danish literature which has been an important source of information together with the insurance conditions.

In Norway, there are several books covering marine hull insurance in addition to the commentaries to the NMIP. The two most important are Brækhus/Rein: Håndbok i kaskoforsikring and Falkanger/Bull/Brautaset: Scandinavian maritime law.\(^{11}\)

In Sweden and Denmark a number of books regarding general insurance law have been published but the material covering marine hull insurance is limited. As regards Swedish hull insurance, the notes belonging to the SHIC have been the most helpful literature. In Denmark, Niels Tybjerg has published a version of the DMIC which includes several notes and references as to how the provisions shall be interpreted and understood which has been very helpful.

\(^9\) Bull: Marlus 240 p. 123
\(^{10}\) Wilhelmsen/Bull: Handbook in hull insurance, p. 21.
\(^{11}\) For details, please see the list of references
3 Introduction to hull & machinery insurance

This short introduction will focus on some of the features of marine hull & machinery insurance and some of the terms necessary to be familiar with in order to understand the ensuing discussion on the rules on compensation for total loss and damage. I will not go into detailed discussions regarding any discrepancies in the conditions, but will simply give a brief overview of marine hull & machinery insurance.

Marine hull & machinery insurance is first and foremost a property damage insurance, covering the actual ship and its machinery. The assured will be entitled to compensation in situations when the ship is a total loss as well as in situations where the ship suffers physical damage following a casualty. In situations where the vessel is an actual total loss or so severely damaged that it is not worthy of repairs the assured will receive a cash compensation for the loss he suffers.\(^\text{12}\) If, on the other hand, it is decided that the vessel shall be repaired the assured will have the costs of repairing the vessel covered by the insurer.

In addition to being a property damage insurance, the insurance also has an element of liability insurance, covering situations when the assured is held liable following a collision or striking. The hull insurance furthermore covers costs of measures taken to avert or minimise loss arising in connection with the casualty up to certain amounts. General financial loss, or loss of time, is not covered under the hull insurance. However, certain time lost during the repairing process may be partly compensated by the insurer, cf. 5.4.

3.1 Assessed insurable value

The value of the interest that is insured is called the insurable value and represents the maximum amount the insured can claim as compensation for total loss. The insurable value is also of importance when establishing whether the assured shall be entitled to compensation for constructive total loss or not, cf. 4.2.

In most types of property damage insurances, the insurable value of an insured object or interest represents the objective value immediately before a casualty. To give an example, this means that if somebody has a car accident and the car is damaged beyond repair, he or she will receive compensation corresponding to the value the car had immediately before the accident. This idea is based on the premise that the assured should

\(^{12}\) See chapter 4
not be able to obtain a windfall from the insurance company by insuring the interest at a value that is higher than the actual value of the interest. 13

However, it has been a tradition in marine insurance that the insurable value shall be the full value of the interest at the inception of the insurance rather than at the time of the casualty. The reason for this was traditionally that it could be difficult to determine the correct value of the ship at the time of the loss if the ship was far away and had been gone for a long period of time. Even though today’s technology has improved considerable, the traditional principle has been maintained.

Usually the parties agree upon a fixed value, assessed insurable value, before entering into the insurance agreement. The reason for this is that the value of the ship may vary during the insurance period due to changes in the freight market and increases or decreases in the ship’s value can occur very sudden. If the parties have not agreed on an insurable value, the insurable value will be the objective value of the vessel at the inception of the insurance period14.

A second reason for operating with assessed values is that the assured and his creditors appreciate the predictability the assessed insurable value entails as the assessed insurable value represents the compensation paid if the ship is a total loss. The insurable value – whether assessed or not – shall represent the actual value of the ship and this value is binding on the insurer.15

3.2 Sum insured

The sum insured is the amount the assured chooses to insure the ship for and this sum also represents the limit of the insurer’s liability for property damage caused by any one casualty. The insurer will additionally be liable for collision liability damages corresponding to an amount equivalent to the sum insured as well as for costs of measures to avert or minimize loss16. The insurer’s liability is therefore limited both by the insurable value and the sum insured, whichever is the lowest. The sum insured also forms the basis for the premium calculation.

The sum insured may be equivalent to the insurable value, but can also be greater or lower and the ship will then be over- or under insured. If the sum insured exceeds the

13 Jerlardtz: Taxerad polis vid fartygsförsäkring, p. 19
14 NMIP § 2-2 and 2-3, SHIC Clause 2 and DMIC § 9 and 10
15 Jerlardtz: Taxerad polis vid fartygsförsäkring, p. 21
16 Pursuant to NMIP §4-18, the insurer will be liable for costs of measures to avert or minimize loss up to an amount equivalent to the sum insured. The Swedish and Danish conditions only speak of liability for reasonable expenses incurred in order to avert or minimize loss, irrespective of the sum insured, cf. SHIC 6.1 (b) and DMIC §61 (2). I do not believe this entails any practical difference as it may be questionable whether costs to avert or minimize loss exceeding the sum insured, shall be considered to be reasonable.
insurable value (over-insurance) the insurer shall only be liable to compensate up to the
insurable value. If, on the other hand, the sum insured is lower than the insurable value
(under-insurance), the insurer shall only compensate a portion of the loss corresponding
to the proportion that the sum insured bears to the insurable value.\textsuperscript{17}

In marine insurance it is common that the assured arranges for co-insurance with many
insurers, where each insurer will be liable for an agreed sum, corresponding to a part of
the assessed insurable value. Therefore, under-insurance is common in the relationship
between the assured and any one of the insurer. However, the total sum insured, including
all insurers, usually is equivalent to the assessed insurable value of the vessel.

3.3 Scope of cover – perils and recoverable losses

In order for the insurer to be liable to compensate a loss, the lost first of all has to be
caused by a peril – or risk – covered under the hull insurance. Such perils may be
fortuitous accidents such as fire, explosion, grounding, sinking etc. and different perils
are covered under different insurances. As opposed to English hull insurance,
Scandinavian hull insurance conditions are based on the “all risks”- principle, meaning
that the insurance covers against all perils that are not explicitly excluded in the contract
or the insurance conditions, cf. NMIP § 2-8, SHIC Clause 5 (e) and DHT § 3.1. There are
however exceptions to this “all risks” coverage; the most important being the exclusion
against damage caused by war risks. “War risks” is a broad term which also includes risks
like intervention by a foreign state, riots, strikes, etc. These war risks can be covered by
separate war risks insurances\textsuperscript{18}, and if the assured seeks full coverage against all insurable
perils he must affect both marine hull insurance and war insurance.

On occasions when the loss can be traced to a combination of perils, the question of
which insurer shall be liable for which portion of the loss arises and two different
methods are commonly used. One method is to assign the loss to the peril that was the
dominant cause of the loss. This method is used in Swedish and Danish marine insurance
as well as in general property damage insurance in Norway. The second option is to
apportion the loss over the individual perils and this is the starting point used in
Norwegian marine insurance. Each loss shall be apportioned over the individual peril
according to the influence each of them had on the occurrence and the extent of the loss.
The insurer is only liable for the part of the loss that is attributable to the perils covered
by the insurance. There are however exceptions to this principle, the first dealing with

\textsuperscript{17} NMIP § 4-18 subparagraph 1 first sentence, SHIC Clause 6.1 letter (a) and DHT 5.7.1

\textsuperscript{18} The main characteristic of war insurance is that it covers many types of loss, which in the context of
marine perils are covered by different insurances and is therefore both hull insurance, total loss insurance,
loss of hire and P&I insurance etc.
losses caused by a combination of marine and war perils. In such cases the whole loss shall be deemed to have been caused by the peril which was the dominant cause. If it cannot be established which peril was the dominant cause, the liability shall be equally shared between the war-risks and the marine risks insurers. The second exception covers casualties where nuclear power energy is involved. On these occasions the entire loss shall be attributed to that peril and such perils have very limited cover, if any at all\textsuperscript{19}. Finally, a defect or damage which is unknown at the inception or on expiry of an insurance, and which later results in a casualty or an extension of the damage to other parts, shall be deemed to be a marine peril which strikes the ship at the time the casualty or damage to other parts occurs, or at such earlier time as the defect or the first damage became known.

Scandinavian marine hull insurance has a broad and similar scope of cover where, as a starting point, the insurer will be liable for losses incurred when the vessel is struck by an insured peril. The insurer will, however, have certain limitations to this wide scope of cover.

\textsuperscript{19} See for example NMIP § 2-9 subparagraph 2 letter (b) and subparagraph 3 letter (b)
4 Total loss

As a starting point, the assured will be entitled to claim compensation for total loss in three different situations, namely: when the ship is an actual total loss, when the ship is a constructive total loss and finally when the ship is a presumed total loss. As a starting point when facing a total loss, the assured is entitled to compensation for the sum insured, but not in excess of the insurable value if this is less. As in opposition to the rules relating to compensation for damage, the assured will know the amount of the compensation in advance, if the rules relating to remuneration for total loss are fulfilled.

4.1 Actual total loss

An actual total loss shall be deemed to exist both when the ship is an actual total loss and in situations where the ship is irreparable. The most obvious actual total loss situation is where a vessel has sunk in the middle of an ocean. The vessel is an absolute total loss and it is obvious the ship cannot be salvaged. Consequently, the assured will be entitled to compensation for total loss of the vessel.20

The rules for total loss shall also be deemed to be fulfilled if the vessel is more or less intact but can not be repaired where it is located and can not be moved to a place where repairs could be carried out; thus the ship is deemed irreparable. The same will apply where salvage, from a technical point of view would be possible, without being economically defensible, i.e. the ship has sunk and it may be technically possible but economically indefensible to execute salvage. There will be a gradual transition from an obvious absolute total loss to cases where an economic assessment will decide whether or not it is worth undertaking salvage and repair work of the vessel. This assessment will naturally depend on the extent to which the estimated salvage and repair costs will exceed the assessed insurable value.21

Rules regarding actual total loss and irreparability are found in NMIP §11-1, SHIC Clause 24 subparagraph 1.1, 1.3, 1.4 and DMIC §126-127. The Norwegian Plan has combined both actual total loss and irreparability in one provision, NMIP § 11-1 subparagraph 1, whereas both the Swedish and the Danish conditions have separate subparagraphs for the different occasions. Although the wording is slightly different, the contents of the provisions appear to be very similar.

20 Falkanger/Bull/Brautaset: Scandinavian maritime law, p. 512
21 Commentaries to NMIP §11-1
4.1.1 Total loss as a consequence of the vessel not being salvaged

When a vessel suffers severe damage and perhaps is lost somewhere in the ocean, it is not unusual that disputes arise between the insurer and the assured on the question of whether the vessel shall be salvaged and repaired or not. The assured and the insurer may have different views on the prospects of succeeding or the costs of the salvage operation. Usually these disputes have their origin in a conflict of interests. If the assessed insurable value is lower than the value of the ship in a repaired condition, or if the loss of time the assured suffers by having to buy a ship exceeds the time he loses by repairing, it may be the assured who is interested in salvaging and having the ship repaired. In situations where the assured has a strong wish to salvage a ship which the insurer does not believe is worth salvaging, the insurer can avoid further liability by paying compensation for the sum insured.

At other times it is the insurer who is interested in salvaging the vessel; most often because the assessed insurable is higher than the value of the repaired vessel. The insurer is therefore interested in salvaging and repairing the ship thus avoiding condemnation. In situations where it is uncertain whether a lost ship can be salvaged or not, there are certain time-limits within which the salvage operation must be carried out. The assured of course wants to know whether or not the ship will be salved and repaired or whether he will receive compensation for a total loss of the vessel. The starting point in all three conditions is that the insurer is entitled to attempt to salvage the ship at his own expense and risk. According to the NMIP § 11-2 subparagraph 2 the assured is entitled to claim compensation for a total loss if the salvage operation has not been completed within six months from the date the insurer was notified of the casualty, cf. first sentence. According to the Swedish conditions, the assured shall be entitled to compensation such compensation if the salvage has not commenced within six months or has not been completed within 12, cf. SHIC Clause 25 first sentence, whereas the DMIC operates with a time limit of 10 months for a completed salvage operation. The NMIP and the SHIC have an extension of the time limit if the salvage operation is delayed due to difficult ice conditions. According to the NMIP § 11-2 subparagraph 2 second sentence the time-limit shall be extended by the same amount of time the operation is being delayed by the difficult ice conditions, however never by more than six months. A similar time-extension regarding difficult ice conditions is found in the SHIC Clause 25 second sentence. There is, however, no maximum limit of six months.

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22 NMIP § 11-2 subparagraph 1, SHIC Clause 25 subparagraph 2 and DMIC §127 subparagraph 2
4.2 Constructive total loss

Constructive total loss shall be deemed to exist when a ship is not feasible to repair on the basis of an economic evaluation. In other words, repairing the vessel would result in a poor investment due to the extent of the damage it suffers. Provisions relating to constructive total loss are found in NMIP § 11-3, SHIC Clause 26 and DMIC §129.

4.2.1 The condemnation formula

It is an internationally acknowledged principle in marine insurance that the assured shall be entitled to claim compensation as for total loss if it is established that the ship is not worthy of repairs according to certain criteria; the condemnation formula. However, there is no international unity of these criteria. The Norwegian and Swedish conditions have a rather similar approach, whereas the Danish are different.23

The starting point in the Norwegian and Swedish conditions is that the conditions for condemnation is met when casualty damage is so extensive that the cost of repairing the ship will amount to at least 80 per cent of the insured value24. The terms casualty damage and cost of repairing will be discussed in 4.2.1.1 and 4.2.1.2 respectively and will cover all three conditions.

The Norwegian plan has a modification to this starting point that cannot be found in the Swedish conditions; if the ship’s value, after repairs, is higher than the insurable value, it is this higher value which should be used as a basis for the comparison, and not the insurable value.25 The value of the ship shall be the objective market value at the time when the assured makes his request for a condemnation26. This modification has the effect that it will not be easier for the assured to obtain a condemnation of the ship by using a very low assessed insurable value.

According to the Norwegian and Swedish conditions, the wreck value is never brought into the condemnation formula, even though this may lead to results which do not make good economic sense27. The calculation is based only on the relationship between the cost of repairs and the insured value (and/or the ship’s value after the repairs, if this is higher, according to Norwegian conditions). This method has its origin in English marine insurance law and the reason why the Norwegian – and probably Swedish – hull insurers have adopted this rule is that the value of the wreck is difficult to estimate as it changes, depending on the intended use of the wreck.28

23 Brækhus/Rein: Håndbok i kaskoforsikring, p. 432
24 NMIP § 11-3.2 and SHIC Clause 26 first sentence
25 NMIP § 11-3 subparagraph 2
26 See NMIP §11-3.3 and commentaries to the same clause
27 See Brækhus/Rein: Håndbok i kaskoforsikring p. 434 for an example
28 Commentaries NMIP § 11-3
The Danish condemnation formula on the other hand is based on cumulation of two principles, where both conditions have to be fulfilled in order for the ship to be condemnable. As opposed to the Norwegian and Swedish condemnation formula the value of the wreck will be of relevance in the Danish conditions. The condemnation formula is found in DMIC §129 first subparagraph;

If the cost of repairing all damage to the vessel, exceeds the market value of the vessel in repaired condition, less the market value of the wreck and the costs of repairing the damage, recoverable under the policy, caused during the current voyage, exceeds the vessel’s insurable value minus the value the wreck would have had if it did not have other damage, the assured shall be entitled to compensation for total loss.29

According to case law the market value of the wreck shall be understood as the objective value of the vessel, i.e. the amount which the ship could be sold for in damaged condition and not the value it may have for the assured due to charter parties or freight markets. In N.D.1912.40 Entrepenør F. Hinrichsen v. A/S Danske Lloyd a dispute on condemnation arose regarding the value of the wreck. It was established by the court that the wreck value must be the scrapping value of the ship. However, according to Tybjerg’s comments to the DMIC the correct interpretation shall be the objective sales value of the ship, irrespective of whether the buyer chooses to scrap the vessel or use it for other purposes.30 As already mentioned, the terms damage and costs of repairing are discussed below in 4.2.1.1 and 4.2.1.2 respectively.

The following example31 illustrates the difference in the condemnations formulas and how these can lead to different results:

A chemical tanker with an insurable value of 90’ runs aground and suffers severe damage to its hull, crankshaft and cargo holds. Due to special high-quality material in the cargo holds, the repair cost of the damage is estimated at 60’. Furthermore, due to a violent storm on a previous voyage, the vessel also suffers damage to items on the forecastle, such as windlasses and anchoring equipment that has not yet been repaired. Cost of repairs for this damage is estimated at 10’, leaving us with an total estimated repair cost at the amount of 70’. If the repairs are carried out the ship would regain its market value, 90’.

A broker has found a buyer who is willing to pay 25’ for the damaged vessel. The same buyer would have offered to pay 35’ if the vessel did not have damage to items on the forecastle. By using less expensive material when repairing the cargo holds, the buyer can restore the vessel to a condition that would make it fit for his intended purpose for a competitive sum of money, making the deal appear favourable to him. The cargo hold can no

29 My translation
30 Tybjerg: Dansk sôforsikrings-konvention p. 131
31 My own construction of example
longer be used for transporting the commodity that was being transported by the assured, making this cheap alternative meaningless to him.

The total costs of repairing the ship (70’) does not amount to 80% of the insured value/market value (72’). Subsequently the ship is not condemnable according the Norwegian and Swedish rules, even if this calculation does not lead to a sound economic result. Unless the insurer and the assured agree on a compromised total loss32, the damage will be repaired.

However, the cost of repairing all casualty damage (70’) on the vessel exceeds the value of the repaired vessel minus the value of the wreck (90’-25’). Additionally, the cost of repairing the damage caused at the current voyage (60’) exceeds the assessed insurable value minus the value the ship would have had if it did not have any other damage (90’-35’). Consequently, the assured would be entitled to claim compensation for total loss in accordance with the Danish rules on condemnation. The assured would be entitled to the sum insured (90’) and the insurer would sell the ship at the amount of 25’ to the prospective buyer.

4.2.1.1 Unrepaired casualty damage

As regards what casualty damage shall be included in the condemnation formula, the first question is whether the evaluation shall be based solely on the costs of repairing the damage caused by the casualty that gave rise to the claim for condemnation, or whether earlier, unrepaired, casualty damage shall also be taken into account.

The Commentary to the Norwegian Marine Insurance Plan gives a good explanation of what casualty damage shall be included when evaluating whether the assured has a right to claim compensation for total loss or not, according to Norwegian rules. Since the Swedish and the Norwegian conditions are very similar in wording there is good reason to assume that the same would apply to the Swedish conditions. It follows from the commentaries that the condemnation calculation shall be based on a discretionary assessment of expenses that will be incurred in connection with complete repairs of the ship. The basis of the assessment is the ship in the state and at the place where it is at the moment when the assured makes his request for a condemnation.

It follows both from the Norwegian and the Swedish hull conditions that casualty damage shall not only encompass damage the ship suffered due to the casualty which triggered the claim for condemnation, but also previous damage which has not yet been repaired. This is provided the damage has been reported to the insurers and surveyed by them in the course of the last three years prior to the casualty that gave rise to the request for condemnation.33

32 See 5.2.2
33 NMIP §11-3.4 first sentence and SHIC Clause 26.1 last sentence
By including all casualty damage when determining whether the vessel shall be condemned or not, the decision will be based on a realistic assessment of the possibility of restoring the vessel into a seaworthy condition on a sound economic basis, thus avoiding both the assured and the insurer from making poor investments.

This means that the cost of repairing damage, even though caused by perils not covered by the relevant insurance, or perhaps not recoverable due to the deductible, shall be included in the condemnation formula. However, costs of repairing damage, which according to its nature, falls outside the scope of the insurance cover shall not be taken into account. This may be damage caused by inadequate maintenance such as corrosion or rust. This will prevent the assured from obtaining compensation for total loss by ignoring necessary maintenance.\textsuperscript{34}

The Danish rules on what casualty damage to include in the condemnation formula are somewhat different. In calculating the first of the two conditions that have to be fulfilled, \textit{cost of repairing all damage to the vessel} shall be included in the formula. There is no modification to this wording and the rules do not presuppose that the damage has been reported to the insurer during the three years preceding the accident or anything similar. Because the first part of the Danish formula is based on a principle of profitability, my understanding is that this shall comprise literally all damage; also old damage or damage that is not recoverable under any insurance policy. The first condition of the formula establishes whether it is profitable to repair the ship from a purely economic standpoint. However, the second part of the condemnation formula stipulates that it is only the damage, recoverable under the policy and caused during the current voyage\textsuperscript{35}, that shall be included in the calculation of the second condition. Consequently, damage caused by war perils or damage to items that are not recoverable shall not be included. However, damage caused to the vessel while the vessel is being salvaged or moved from the place of casualty to a place of repairs or survey shall be included\textsuperscript{36}. The reason for this is that the ship shall not be condemnable on the basis of previous, unrepaired damage or damage caused by inadequate maintenance.\textsuperscript{37}

### 4.2.1.2 Cost of repairing

The discussion above focused on \textit{the nature of damage} that shall be included in the condemnation formula. The following will address what is to be included in the term \textit{cost of repairs}, when deciding whether the assured shall have a right to claim compensation for total loss or not.

\textsuperscript{34} Commentaries NMIP § 11-3  
\textsuperscript{35} The voyage during which the casualty that gave rise to a request for condemnation arose  
\textsuperscript{36} Cf. DMIC §129 subparagraph 4 second sentence  
\textsuperscript{37} Tybjerg: Dansk søforsikrings-konvention p. 131
Costs to be included as repair costs are defined in NMIP §11-3.4, SHIC Clause 26.1 subs 2 and DMIC §129 subs 2, respectively. My understanding is that the provisions have a rather similar approach as to which costs should be included, even though the wording differ to some extent.

As a starting point, the term encompasses all costs of removal and repairs, which the insurer would be liable for if the ship was to be repaired. Furthermore, expenses the assured must cover in connection with the repairs, i.e. deductibles and cost of repairing damage that is specifically excluded from cover, shall also be included. Costs that do not refer to the salvage or repairing of the vessel, for example costs for the vessel not producing any income, shall not be taken into account. The fact that costs for moving the vessel is included in the calculation, means that the decision of condemnation will be based on a more realistic basis than if the actual repair costs were the sole decisive factor. These costs may of course vary significantly depending on where in the world the damaged ship is located and should therefore be included in the calculation.

According to the wording of the Norwegian- and the Danish plans, expenses which have already been incurred by the time the request for condemnation is made shall be ignored. This may for example be expenses for temporary repairs, incurred at the place of the casualty. Furthermore, general operating costs that run while the ship is being repaired, or costs in connection with for example bringing passengers ashore shall not be included.

Furthermore, costs for salvage awards are an important exception of the costs that shall be included in the formula. Both the Norwegian and the Swedish provisions have an explicit exclusion of these costs. Although the wording of the Danish is silent regarding salvage awards, it follows from case law that salvage costs shall not be included, cf. N.D. 1912.40 and N.D. 1922.340. The fact that salvage awards are excluded does not mean that the insurer can ignore these expenses when he evaluates what to do – he will in any event be responsible for the salvage awards.

4.2.2 Compromised total loss

The fact that the condemnation formula does not consider the value of the wreck sometimes leads to results that do not make good economic sense. Therefore, it is not unusual for the insurer to agree to compensation corresponding to the formula for total loss even though the rules regarding constructive total loss are not satisfied. This is often referred to as compromised or arranged total loss.

The insurable value is 20 millions, cost of repairs amounts to 14 millions, the value of the vessel in repaired condition is 16 millions and in damaged condition 4 millions. Consequently the vessel is not condemnable.
according to the 80% rule. If the assured receives compensation in the amount of 13 millions, in reality he is better off than by repairing the vessel.

4.3 Presumed total loss

Presumed total loss refers to a situation where the ship has disappeared or has been abandoned by the crew and a certain amount of time has elapsed, and where there is good reason to believe the ship will not be recovered. In other words, the fate of the ship is not known but it isreasonable to presume a total loss.

The rules regulating presumed total loss are similar in the three sets of conditions and are found in NMIP §11-7, SHIC Clause 24 subs 1.2a and 2b and DMIC §130 and 131 respectively. The starting point according to the Danish rules is that if the ship has been missing for three times as long as an average voyage takes, from the ship’s last known position to the next port of call, the assured will be entitled to claim compensation for total loss. However, a minimum three months must elapse. The 3-months rule also applies if the ship has gone on a voyage with unknown destination.

According to the Norwegian starting point, the assured may claim compensation for total loss when three months have elapsed from the latest date on which the ship was expected to arrive at a port whereas according to Clause 24 subparagraph 2 letter (a) of the Swedish conditions, which also has a three months limit, the counting starts from when the vessel last made contact. Considering that today’s modern vessels rarely travel for 30 days without calling a port, the Danish wording of the provision seems rather old-fashioned, which of course can be explained by the fact that they were written during the 1930’s, where the duration of voyages were considerably longer.

In reality, there is little difference between the main principles of these conditions. What may be of some interest, is that the Norwegian conditions have extended the three months period to twelve months if there is reason to believe that the vessel was icebound and that it may subsequently be located; a modification which can be found neither in the Swedish nor the Danish conditions.

The same three months time-limit applies if the ship has been abandoned by the crew at sea. As a starting point, the time-limit runs from the day of abandonment. The reason for abandonment is of no relevance. If the vessel was seen after the abandonment, the time-limit runs from the date when the ship was last seen according to Norwegian and Swedish conditions.

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39 See 4.2.1
40 Inspiration to example from Brækhus/Rein: Håndbok i kaskoforsikring p. 447
41 DMIC §130
rules. According to the Danish conditions, the time-limit runs from the date of abandonment, even if the ship has been seen after the abandonment.\textsuperscript{42}

The Norwegian and Swedish conditions give the assured a right to claim compensation for total loss before expiry of the time-limit, if it is clear that the assured will not recover the ship.\textsuperscript{43} In these situations, the assured will have an immediate right to claim compensation for the loss of the vessel. This situation is not regulated in the Danish conditions but I have reason to believe the assured will be entitled to claim compensation for total loss pursuant to §126.1-4 of the DMIC provided there is strong enough evidence that the ship will not be recovered. If loss of the vessel is proven, the loss thereby becomes actual and is no longer presumed.

So, what happens if a valid claim for total loss has been submitted and approved, and the vessel is subsequently recovered? The answer is the same in all three sets of conditions; the insurer may not reject the claim.\textsuperscript{44}

### 4.4 Compensation for total loss – unrepaired casualty damage

It follows from the Norwegian and Swedish conditions that if the ship is a total loss no deductions shall be made in the claims adjustments for unrepaired damage sustained by the ship in connection with earlier casualties.\textsuperscript{45} The insurer shall not be entitled to deductions from this amount and will subsequently be liable for the sum insured, however not in excess of the insurable value. Upon payment of such compensation, the insurer shall be entitled to anything remaining of the vessel.

The Danish conditions on the other hand, entitle the insurer to deductions for previous unrepaired casualty damage provided that this damage made the ship unseaworthy.\textsuperscript{46} Personally I can not think of many situations when this rule will be applicable. Pursuant to DHT 4.5 the insurance “does not cover loss or damage due to that fact that vessel at departure from last port of place was not seaworthy…unless it can be assumed that the Assured neither knew nor should have known the existence of the fault”.

This means that the rule regarding deductions for previous unrepaired damage only becomes applicable if the assured is entitled to compensation for total loss, despite the fact that the ship had damage that made the ship unseaworthy. This could for example be in a situation where the assured did not know (nor ought to have known) about the

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\textsuperscript{42} DMIC §131 and explanatory notes: Tybjerg. p. 134  
\textsuperscript{43} NMIP §11-7.3 and SHIC Clause 24 subs 2  
\textsuperscript{44} NMIP §11-7.4, SHIC Clause 24 subs 2 last sentence and DMIC §130 and explanatory notes: Tybjerg p. 133  
\textsuperscript{45} NMIP §11-1.2, SHIC Clause 27.1  
\textsuperscript{46} DHT Clause 9.2
unseaworthiness or a situation without a causative link between the casualty and the unrepaired damage that made the ship unseaworthy.

Upon compensation for total loss, the assured may not in addition claim compensation for previously incurred, unrepaired damage. The same applies even if the total loss was not covered by this or any other insurance.\textsuperscript{47} It appears to be obvious that the assured shall not receive compensation for the same damage more than once and this rule is applicable in accordance with all the three conditions.

An insurer who has paid compensation for total loss is not entitled to recourse against the insurer who would have been liable for the cost of the repairs if these had been carried out. This is often expressed as “a total loss absorbs partial damage”. This may be considered being an advantage on the former insurer who was liable for the unrepaired damage, or possibly the assured if the damage was not covered. The strongest argument for sticking to this principle is that it is difficult to establish the exact extent of the damage when the ship is lost. Furthermore it is considered that this will even out among the hull insurers in the long run.

Finally, if the casualty that gave rise to a total loss was caused by a combination of perils insured against and perils not insured against the loss shall be divided in accordance with the rules regarding liability in case of a combination of perils.

\textsuperscript{47} NMIP 12-2 subparagraph 3, DHT 9.2 subparagraph 2
5 Damage

As already mentioned, rules relating to compensation for damage become applicable when the ship suffers physical damage and when either the conditions for total loss have not been satisfied or the assured chooses not to claim for total loss, independently of whether he is entitled or not. Of course the damage has to be caused by a peril that the insurance covers and the loss shall not be excluded from the insurance cover for the assured to be entitled to compensation.

5.1 Main rule – compensation upon repairs

The main rule regarding compensation for damage is that the insurer’s liability arises when the repair costs are incurred. The assured shall be compensated for the actual costs of the repairs, meaning that the assured will not receive cash compensation based on an estimate of the repair costs, but will have to wait until he chooses to have the vessel repaired. This has been a recognised principle in Scandinavian hull insurance (c.f. NMIP 1871 §50.3), although it is expressed differently in the different conditions. The NMIP has a very clear wording in §12-1 subparagraph 2; Liability arises as and when the repair costs are incurred. Even if this is not explicitly expressed neither in the Swedish nor the Danish conditions, it is implied that the same rule applies here as well. As we shall see below there are, however, exceptions to this main rule.

As a starting point, the assured is entitled to compensation for all related costs in connection with the repairs; such as for example direct cost of repairs, docking expenses, cost incurred in connection with moving of the vessel. However, costs related to the lack of operation of the vessel will not be recovered.

Another question is to what standard the assured is entitled to have the ship restored to. The starting point is that the ship should be restored to the standard it had prior to the peril causing the damage. This means that the repairs shall satisfy the classification requirements, provided that the ship did so prior to the casualty. On the other hand, the insurer will be liable to cover any extra repair costs caused by the fact that the ship had a higher standard than required by the Classification Society. 48

The assured does not have an unconditional right to claim that damaged parts are replaced with new but often has to accept that old parts are repaired or replaced with

48 Brækhus/Rein: Håndbok i kaskoforsikring, p.457-458
second hand parts. However, the assured shall be entitled to a part that is at least as good as the damaged part was prior to the casualty.\(^{49}\)

In N.D. 1996.370 the 16 year old bulk vessel *Lendoudis Evangelis II* grounded in the Saint Lawrence River and suffered damaged to its hull shell plating. The damage was repaired by cutting out the original shell plating and replacing these plates with new that were welded. A total amount of 140 tonnes of steel were replaced. The repairs were approved by the classification society and the vessel recovered its class. The assured was of the opinion that all the damaged shell plating should have been entirely replaced and claimed that the ship had not been restored to the condition it was prior to the casualty until this was done. The court ruled in favour of the insurers since the repairs were approved by the classification society and because a complete replacement of the shell plating would give the assured a ship with a higher value than it had before the casualty.

Furthermore it is a prerequisite that the new parts that are required can be obtained within a reasonable period of time and what is a reasonable time has to be decided on a case-to-case basis. The insurer shall also cover other expenses associated with the repairs. The repairs shall be regarded as completed from a technical point of view, despite the fact that the ship – after repairs – may have a lower market value than it had before the casualty.

### 5.1.1 Right to deduction

The NMIP and the SHIC have explicitly entitled the insurer to a reasonable deduction for an increase in the repair costs in certain situations; namely if the repairs result in special advantages for the assured because the ship is strengthened or its equipment is improved. The insurer is then entitled to a deduction corresponding to the extra costs caused by the improvement of the vessel. This could for example be if a part is installed with a higher performance or better quality than the old part. Replacing a worn part with a new of the same kind, which is generally to the advantage of the assured, does not automatically entitle the insurer to a deduction from the cost of reparation. It is a prerequisite that the ship has been strengthened or its equipment improved; such as for example if a damaged steel anchor is replaced by one made of bronze.

Secondly, for a deduction to be warranted, the improvement has to result in special advantages for the assured, indicating some specific benefit or gain for the assured. In a situation where an old engine is replaced by one with greater power or lower fuel consumption, the insurer will be entitled to a deduction from the compensation. However, if the improvement is inevitable, i.e. the engine of the old quality is not obtainable no deductions shall be made in the settlement. This follows both from the Commentaries to the NMIP and the notes to Clause 28.4 of the SHIC.

\(^{49}\) Commentaries NMIP § 12-1 subparagraph 1
In view of the main rule concerning the insurer’s liability for compensation for damage; that the insurer shall be liable for the costs of restoring the ship to the condition it was in prior to the peril that caused the damage, this provision may appear superfluous. In light of this main rule it seems obvious that the insurer shall not be liable for the increase of repair costs caused by improvements of the ship and I therefore assume the Danish insurer will be entitled to the same deductions although this it not explicitly expressed in the Danish conditions.

5.1.2 Complete repairs are unreasonably expensive or physically impossible

Paragraph 12-1 subparagraph 4 of the Norwegian Maritime Insurance Plan contains two exceptions regarding to the insurers duty to restore the vessel to the condition it was prior to the casualty. A precondition on both these occasions is that the ship can be made seaworthy and fit for its intended purpose by less expensive repairs. Although only one of these exceptions are explicitly expressed in the Swedish and Danish conditions, I have reason to assume the results would be the same according to these rules, see discussion below.

The first exception is found in all three conditions and covers the situation when complete repairs of the ship would result in unreasonable costs, cf. NMIP § 12-1 subparagraph 4 second sentence, SHIC Clause 28.3 first sentence and DMIC § 140 subparagraph 1. The idea behind these exceptions is that the insurer shall not be forced to pay for repairs that are unreasonable from an economic point of view. This could for example be removal of hog or sag following a collision. It is of course a precondition that the ship can be made seaworthy by the less expensive repairs. It is difficult to give a good definition to what is to be considered “unreasonable costs”. The fact that the estimated difference between the alternatives of repairs exceeds the estimated reduction in value of the vessel shall not be sufficient. It is impossible to set a fixed limit and the decision will have to be based on a discretionary assessment of each individual case; ultimately the courts will decide. It shall be taken into consideration to what extent the assured loose special advantages by not having the ship fully repaired.50

The insurer will only be liable for the less expensive repairs plus the depreciation in value of the vessel, which shall be based on the difference between the market value of the partially repaired vessel and the market value of the vessel in a fully repaired condition. It further follows from the wording of the Norwegian conditions that it is only the insurer who can invoke this rule, even if it sometimes may be the assured who would be interested in saving time and receiving cash compensation for depreciation in value by accepting less expensive repairs.

50 Brækhus: Håndbok p. 462
Both the Swedish and the Danish conditions have a subparagraph regarding repairing of steel- or other metal parts that is not found in the Norwegian conditions, cf. the SHIC Clause 28.3 last sentence and the DMIC § 140 second paragraph as well as the DHT § 5.6

According to these provisions, the cost of renewing these parts is only indemnified if the parts can not be repaired in a less expensive manner or if a renewal is required by the classification society. According to the DHT § 5.6 the assured will not be entitled to claim any compensation for depreciation in value on occasions when steel parts have been repaired instead of renewed; something which is in conflict with my understanding of both the Norwegian and Swedish conditions. The Swedish wording is:

“The cost of renewal of steel and other metal parts of the hull or of the machinery is indemnified only if these cannot be faired, welded, joined, cut or otherwise be repaired more cheaply”

My understanding is that it is the actual cost of renewal the insurer does not have an obligation to indemnify. The provision is silent with regards to depreciation in value after such repairs. The idea must be that the insurer shall be protected from the unreasonably high costs that replacing damaged steel parts to the hull or machinery on an old ship could entail, provided of course that the ship can be restored to a seaworthy condition by for example welding. If the assured can show that the repairs have resulted in depreciation in value of the vessel, my understanding is that he would be compensated for this according to the Swedish conditions. This would be in accordance with the first and second sentence of SHIC Clause 28.3, regarding unreasonable repair costs in general as well as the Norwegian rules.

The next exception in the NMIP covers situations where it turns out that complete repairs of certain damage are not possible i.e. because the material that once was used no longer can be obtained, cf. NMIP § 12-1 subparagraph 4 first sentence. As an example Brækhus/Rein mention artistic decoration on a cruise ship\(^{51}\). It follows from the same sentence that on these occasions, where the ship is only partially repaired for the above mentioned reasons, the assured will be entitled to compensation for the depreciation in value of the vessel in addition to the cost of the repairs. This rule becomes applicable only if it in fact is physically impossible to complete the repairs. The fact that the costs are very high is irrelevant. The increased compensation shall be equal to the reduction in value, calculated on the basis of the market value of the partially repaired vessel compared to the value the vessel had just before the casualty.\(^{52}\) Neither the Swedish nor the Danish conditions have an explicit exception of this kind, but as follows from my

\(^{51}\) Brækhus: Håndbok p. 461

\(^{52}\) Brækhus: Håndbok p. 461
discussion below, I have no reason to believe that the solution would be different according to these rules. The Norwegian exception therefore appears superfluous to me.

If complete repairs are physically impossible, the cost of repairing the same is by definition infinite and consequently unreasonable for the insurer. As just described, the insurer’s liability shall be limited to less expensive repairs if complete repairs result in unreasonable costs for the insurer. Having in mind the main rule concerning the insurer’s liability to restore the ship to a condition it was in prior to the occurrence of the damage, the results would be unreasonable if the insurer would not be entitled to limit his liability to the less expensive repairs if complete repairs were not physically possible, provided of course that the ship can be made seaworthy and fit for its purpose.

5.2 Compensation for unrepaired damage

It has been a tradition in Scandinavian marine insurance that the assured has a very limited right to claim cash compensation for unrepaired damage of the ship. The principle of damage only being compensated upon repairs has been strong and the main rule was that the insurer’s liability did not arise until the damaged vessel was being repaired. As an exception to this main rule, the assured was granted a limited right to compensation when the ownership of the vessel changed.

However, from January 1, 2007 the Norwegian Marine Insurance Plan opened up for a right of the assured to claim (cash) compensation for unrepaired damage upon expiry of the insurance period, cf. NMIP 12-2 first subparagraph. This new solution corresponds to the English hull insurance conditions as well as to the non-mandatory rule in NICA section 6-1, which also is the solution widely practised in Norwegian non-marine insurance.

The expiry of the insurance period shall generally be understood as the ordinary expiry of the policy, which occurs once every year. However, if the ship is sold, the insurance terminates on the date of the sale. Often multi-year policies are used in marine insurances and when this is the case, each year will constitute an individual period. The assured does not need to wait until the entire multi-year period has expired. Also, if the ship is sold, the insurance period expires at the time of sale.

It follows from the commentaries to the NMIP that it is only the assured who is entitled to claim cash compensation; the insurer cannot invoke this rule and demand to pay cash compensation if the assured or the new owner wishes to have the ship repaired.

Pursuant to NMIP § 12-2 subparagraph 2 such compensation shall be based on a discretionary assessment of the estimated depreciation of the ship’s market value at the time of termination and that such compensation must not exceed the estimated cost of the repairs. Previously, according to the former solution in the NMIP, the compensation was to be calculated on the basis on the estimated costs of repairs at the change of ownership,
limited to the reduction in the sale’s price that is attributable to the damage. (There were also special rules regarding sales for scrapping). The basis for the calculation now used, is the significance of the damage for the ship’s market value. The reduction in the market value, however, will only be relevant if it is lower than the estimated costs of repairs. Therefore, in practice this means that the estimated costs of repairs will usually be decisive in the settlement.\textsuperscript{53}

The cost of repairs shall be the cost of repairing the ship in the geographical area where it would be natural to have the ship repaired. If the ship normally sails between a low-cost area and a high-cost area, only tenders from ship yards in the low-cost area shall be considered.\textsuperscript{54} The prices shall be those at the time of the expiry of the insurance and in accordance with customary compensation for unrepaid damage. 50% of the estimated docking- and quay fees are compensated whereas other joint expenses are not.

If the ship becomes an actual- or constructive total loss during the same insurance period, the assured shall not be entitled to additional cash compensation\textsuperscript{55}. It may appear obvious that this would give the assured an unfounded profit at the cost of the insurer if he received compensation for the same damage more than once. The same applies even if the total loss of the vessel is not covered by any insurance. Unrepaired damage has no effect on a ship’s market value if the ship becomes a total loss. If the ship, however, becomes a total loss in a subsequent insurance period, no deductions shall be made for compensation related to damage sustained in an earlier period.

As mentioned above, both the Swedish and Danish hull insurance conditions have a more restrictive view regarding the assured’s right to claim compensation for unrepaired damage.

According to these conditions such compensation is not payable unless the insurer has agreed that repair is not to be effected or unless the assured has suffered loss on account of the damage upon sale of the vessel, cf. SHIC Clause 32 first sentence and DMIC § 139 subparagraph 4. According to the SHIC, it is a precondition that such repair is required by the Classification Society for the assured to be entitled to compensation. The precondition regarding the Classification Society cannot be found in the DMIC.

If the assured, upon a sale damaged ship, receives a lower price due to the damage, he will receive compensation for such loss. I have reason to assume such compensation must be based on a discretionary assessment of the average repair prices in the area where the ship is sailing at the time when the ship is sold. Under any circumstances, the insurer’s liability for unrepaired damage must be limited to the actual reduction in price caused by the damage. If the insurer can prove that the damage has no effect on the sale’s price, the

\textsuperscript{53} Commentaries NMIP § 12-2
\textsuperscript{54} Commentary NMIP § 12-2
\textsuperscript{55} See NMIP § 12-2 subparagraph 3
insurer has the right to exclude liability for the unrepaired damage. This would be in accordance with the rules previously applicable under Norwegian rules.

It further follows from the DMIC § 139 subparagraph 4 last sentence that if the vessel is sold for breaking up or for other similar purposes, such remuneration is only payable if it can be assumed that the damage has caused a reduction of the price. On most occasions when a vessel is sold for breaking up or for other similar purposes, the damage is assumed not to have reduced the price of the vessel. However, if the casualty has resulted in loss of iron or steel to the vessel this may have impact on the price even if the vessel is sold for breaking up. The assured of course has the burden of proving such a loss, if he wants compensation for the unrepaired damage. A very similar wording was previously expressed explicitly in the NMIP but was deleted in the version that became applicable January 1st 2007. However, according the commentaries to the new version of the NMIP the fact that this has been deleted will not have any practical effect.

In N.D.1993.274 the vessel Kraknesson was sold for breaking up following damage caused by a fire onboard the vessel. The insurer was exempted from liability as the Norwegian court decided that repairing the damaged vessel would be purposeless, also with regards to the sale’s value of the vessel. It had not been proved that the damage had reduced the value of the vessel when the vessel was sold for breaking up.

The wording of the last sentence of the SHIC Clause 32 is that *Indemnity for unrepaired damage is not payable if the vessel is sold for breaking up or other purpose for which the damage is of no consequence.* My understanding of this is that the assured will be entitled to compensation in accordance with the Danish rules; provided that the assured can prove that such damage actually has reduced the price of the vessel even if it is sold for breaking up.

### 5.3 Unrecoverable losses

Most provisions regarding the scope of cover of the insurance are drafted solely as peril- or loss rules, i.e. “this insurance does not cover against release of nuclear energy” or “the insurer is not liable for expenses of shifting, storing and removal of cargo”. In the first example it does not matter what the actual loss is; as long as it is caused by release of nuclear energy the insurer will not be liable. This is a typical “peril-rule” which limits the scope of cover by excluding a certain peril. In the second limitation it does not matter why expenses for shifting, storing or removing cargo are incurred; the insurer is never liable for these expenses. This is a typical “loss-rule”, limiting the scope of cover by excluding a certain type of loss. These limitations are drafted in such a way that they only are relevant either as “peril-rules” or “loss-rules”.

There are however provisions which combine peril- and loss rules; if a certain peril has caused a certain loss the insurer will not be liable and there are especially two important
rules of this kind which are found both in the Norwegian, Swedish and Danish conditions, see discussion below.

5.3.1 Inadequate maintenance and the like

The first rule excludes expenses incurred in renewing or repairing a part or parts of the hull, machinery or equipment which were in a defective condition as a result of wear and tear, corrosion, rot, inadequate maintenance and the like, cf. NMIP § 12-3 subparagraph 1, SHIC 7.1 letter (b) and DHT 5.3. Although the wording is slightly different the content appears to be identical in all three conditions.

Wear and tear and inadequate maintenance are perils that in principle are covered by the insurance, which means that if the ship becomes a total loss as a consequence of inadequate maintenance, the assured will be entitled to compensation for such loss, provided of course that the insurer cannot free himself from liability by use of other provisions, such as for example breach of safety regulations. If the ship is being repaired, the cost of repairing all parts which were in sound condition will be reimbursed and only the parts which were in a defective condition due to wear and tear or the like will have to be covered by the assured.56

The question of whether one or several parts were in defective condition or not, will have to be decided by surveyors or experts, based on the technical condition of the part in question. The minimum requirements of the classification society will often provide a good guidance, meaning that that if for example shell plating has become thinner than the minimum requirements, the insurer will not be liable for the repairs of the corroded parts. If a shell plate is corroded in a limited area the whole plate will be excluded from the cover if the classification society does not accept partial renewal of the plate. 57

It follows from the commentaries to the NMIP that neither the size nor the value of the relevant part is of any significance. If a rusty bolt in the machinery causes severe damage to the machinery it is only the costs of the replacing the rusty bolt that will be excluded from the cover, provided of course that the other parts of the machinery were in good condition.

In addition to the costs of purchasing a new part to replace the defective, expenses incurred in access work and installation, plus a reasonable proportion of the common costs will also be excluded from the insurer’s liability.

The understanding of “corrosion” shall be limited to such corrosion that occurs naturally over a certain period of time. Corrosion that has occurred solely because of a

56 Falkanger/Bull/Brautaset: Scandinavian maritime law, p.483-484
57 Commentaries NMIP § 12-3
certain casualty shall therefore be recoverable, unless the assured can be blamed for not having prevented this.

The exclusion for parts that are in defective condition due to “inadequate maintenance” of course presupposes the existence of a standard for “adequate maintenance”. There are often technical specifications determining the expected duration of certain components and user manuals will often contain information regarding what types of checks, and at which intervals these checks shall be carried out in order to prevent damage. If the assured can document that a proper maintenance programme has been followed, but the part is nevertheless worn out, this will not be a case of “inadequate maintenance”. These maintenance programmes may be based on recommendations from the classification society, ISM Code or supplier’s manuals. If on the other hand the assured discovers irregularities he has a duty to act within a reasonable period of time. On these occasions, it will not be sufficient that he follows the prescribed maintenance programme. It could be said that inadequate maintenance presupposes a certain lapse of time and shall not be a question of an isolated fault and the clearest example is therefore inadequate maintenance routines onboard the ship. An isolated error in the performance of maintenance routines does not constitute inadequate maintenance, but a fault on the part of the crew.

In N.D.1988.221 the vessel M/S Ionio was delayed on a voyage between Kuwait and Taiwan. The delay was caused by a series of problems to the main engine, mainly due to insufficient preheating of the main engine oil. The insufficient preheating of the oil was a result of faults made by the chief engineer. According to the loss of time insurance conditions, the assured would only be entitled to such compensation, if the delay was due to damage recoverable under the Norwegian hull insurance conditions. The court decided that the insufficient preheating of the main engine oil must be categorised as insufficient maintenance pursuant to § 175 of the NMIP 1964 (§ 12-3 of the NMIP 1996) and subsequently the assured was neither entitled to compensation for repairing and renewing the damaged parts nor for the loss of time he suffered. A similar decision is illustrated by N.D.1990.442 regarding the vessel Mare Pride and damage to parts of the machinery caused by insufficient maintenance.

The commentaries to the NMIP contain a very thorough guidance and explanation with regards as to how these rules shall be interpreted according to Norwegian marine insurance practice. As already mentioned, the content of the three conditions appears identical even though the wording is slightly different. Consequently, I have reason to believe the Swedish and Danish conditions shall be understood in a similar way, even though very little has been written about this. The very few notes belonging to Clause 7.1 letter (b) of the SHIC are very much in line with what is written in the commentaries to the NMIP; however much less extensive.
5.3.2 Error in design or faulty material

The next important exclusion which combines peril- and loss rules is an exclusion regarding costs of renewing or repairing damage that is a result of error in design or faulty material.

Error in design means that the design of a part of the ship proves to be unfortunate or that the strength has turned out to be weaker than expected. The design of the part may turn out to be weaker than it ought to have been, according to the knowledge available at the time of construction but it may also be situations where the structure is believed to be sufficiently sturdy, but where it later proves not to be able to carry the loads the actual part was intended to carry. Designing of a part shall be understood to comprise not only the drawing, but also specification of types of materials, dimensions and specification of the manufacturing process. Thus, if incorrect specification of the manufacturing process is given, the resulting defects shall be regarded as design errors.58

Faulty material means that the material in a part of the ship is of a quality inferior to the standard it was supposed to have. Such reduced quality is normally concealed and it not detectable in a superficial examination, but requires more complex methods to be discovered. Faulty material may be caused by a defect in casting or other fault in the structure of the material which occurred during the processing. The fact that a supplier has delivered a quality which is not in accordance with the stated specifications would also be considered as faulty material. If a defect can be attributed to latent concealed casualty damage it is on the other hand not a question of faulty material.59

The Norwegian and Swedish rules regarding compensation for costs in renewing or repairing damage that is a result of design error or use of faulty materials are very similar, whereas the Danish approach is more restrictive from an assured’s point of view, cf. NMIP § 12-4, SHIC Clause 7.1 letter (b) and DHT 5.1.

The starting point according to the Norwegian and Swedish conditions is that such costs are covered by the insurer provided that the part in question has been approved by the Classification Society. It follows from the Commentaries to the NMIP that being approved by the Classification Society shall be tied to the general supervision of the building or repair work and does not imply that a special approval must be obtained for the actual part in question. However, the part must be included in classification society’s checking procedure and no replacement or repairs of the part which result in the setting aside of the supervision regulations may later be made.

If on the other hand, the part has not been approved by the classification society, the assured must bear the costs incurred in replacing the part which was in defective condition. It should, however, be pointed out that is it only the actual part that contains an

58 Commentaries to NMIP § 12-4
59 Commentaries to NMIP § 12-4
error in the material or design, that will not be covered by the insurer. Damage to other parts as well as consequential damage will of course be replaced or repaired at the expense of the insurer.

According to the starting point of the Danish conditions, the insurance does not cover damage to the defective part if this damage is a consequence of faulty design or defective material, cf. DHT § 5.1. There is however a modification to this starting point regarding damage to parts of the machinery; if the vessel is classified in the highest class with a recognised classification society and the part in question has been approved by the classification society. In such cases, the insurance will cover any damage to the machinery that is a result of defective material. It is important to note that the Danish conditions only speak of parts of the machinery and do not to include other parts of the insured vessel.

The insurance will also cover damage that is a consequence of error in design provided that such faulty design is located to a part in a boiler, air receiver or parts of the main engine and that the faulty design result in bursting, breaking, cracking or similar damage. This solution is similar to the solution which previously was found in §175 of the NMIP 1964. It follows from the same paragraph of the DHT that main engine shall be understood as the propelling machinery and any units appertaining to or working together with the propelling machinery, propeller, propeller shaft and stern tube. Again, the Danish conditions make a clear distinction between parts belonging to the machinery and parts belonging to other parts of the ship. As in opposition the Norwegian and Swedish rules, damage to parts of the hull or other equipment that is a result of defective material or faulty design will not be reimbursed.

5.3.3 Other excluded losses

In addition to the above mentioned provisions, all the insurance conditions contain clauses with more or less straightforward enumerations of losses that are excluded from the cover. Most of these are drafted solely as loss rules; excluding certain types of losses independently of the cause of the loss. However, there are a limited number of other exclusions drafted as combinations of peril- and loss rules. These are for example rules excluding loss of- or damage to objects used for mooring, towing and the like; these objects will only be reimbursed if the loss or damage is caused by certain perils. The Norwegian and Swedish conditions also have rules regarding contamination of oil. I have tried to give a brief overview of the most significant differences regarding these exclusions in the insurance cover. However, this comparison does not give a complete enumeration of all excluded losses, but is intended to give a certain overview with a selection of the main differences.

Crew’s wages and maintenance and other ordinary expenses connected with the running of the ship, are excluded in all three conditions, cf. NMIP § 12-5 letter (a), SHIC
Clause 7.5 letter (a) and DHT § 6.2. These expenses will however be reimbursed in a
general average contribution and during removal of the vessel to a repair yard, cf. NMIP
§ 12-13, SHIC Clause 7.5 letter (a) and Clause 30 as well as DHT § 6.2 and § 6.10. Even
though ordinary expenses which would have incurred independently of the repairs are not
covered, such expenses related to the repairs shall be reimbursed. These may for example
be bunker consumption during testing of the engine and during a trial run, maintenance of
repair crew staying onboard, fire watchmen etc.\textsuperscript{60} It also follows both from the
commentaries to the NMIP and the notes to Clause 7.5 letter (a) of the SHIC that the
expenses for accommodation ashore for the crew where the damage to the ship makes it
impossible to stay onboard will be compensated.

Expenses incurred for handling, shifting or removal of cargo in connection
with the repairs of the ship as well as costs for accommodation of passengers are
explicitly excluded in the Norwegian and Swedish conditions, cf. NMIP §12-5 letter (b)
and (c) and SHIC Clause 7.7 letter (i) and Clause 7.4 letter (c). These exclusions are
based on the general idea that whether or not the ship carries cargo/passengers shall have
no bearing on the hull insurer’s liability.

In N.D.1993.429 \textit{Combi Star} the insurer was exempted from liability for costs incurred in cargo
handling that was necessitated following a grounding of the vessel. The court decided that NMIP §176
(today §12-5) letter (b) must be applicable on all occasions where cargo handling was necessary in order to
have the ship repaired.

Although these expenses do not have an explicit exclusion in the Danish conditions, I
have reason to believe they fall outside the insurance cover pursuant to the general
provisions related to the insurance’s scope of cover. These expenses will usually be
recoverable under the P&I insurance.

As mentioned above, damage to objects used for mooring, towage, tarpaulins etc. are
items that are explicitly excluded from the Norwegian and Swedish conditions. These
items are excluded provided the loss is not a consequence of the ship having sunk or the
loss being attributable to collision, fire or theft, cf. NMIP § 12-5 letter (d) and SHIC
Clause 7.7 letter (b). According to Norwegian rules these items will however be
reimbursed as long as they are new and have not been used\textsuperscript{61}. The notes to the SHIC are
silent with regards to whether this exception applies here as well, but the NMIP 1964 did
not cover these items regardless of whether they were used or not. Furthermore, objects
used for lashing, securing, covering or bedding for deck cargo are also explicitly excluded
in the Norwegian and Swedish conditions, cf. NMIP § 10-1 subparagraph 2 letter (c) and

\textsuperscript{60} Commentaries to NMIP 12-5
\textsuperscript{61} Commentaries to NMIP § 12-5
SHIC Clause 7.7 letter (c). The Danish conditions have an unnecessarily complicated approach to the regulation of these items. First of all there is a provision regulating these in the DMIC §156. This provision is further supplemented by § 5.3 of the DHT, content of which is very similar. Basically, these provisions exclude loss or damage to moveable equipment provided that the same is caused by any of the perils listed in the provision. I can see no substantial difference between the content of the provisions other than that the DMIC starts with enumerating a few items, such as sail, tarpaulins, mooring lines etc. while the provision in DHT only speaks of moveable equipment in general. The provision of the DMIC ends the enumeration by including other moveable equipment in the exclusion, cf. DMIC § 156 first sentence. The perils which the insurance covers against for these types of losses are identical in both provisions and includes fire, explosion, sinking, capsizing, stranding, grounding, collision, contact as well as malicious damage or robbery including piracy or theft from locked room assumed not to have been committed by crew or passenger. This provision does thereby include objects used for lashing or securing of deck cargo, as they would be defined as moveable equipment. My understanding is that the idea of these provisions is to protect the insurer from liability in minor casualties as for example where these items have been damaged of washed over board in heavy weather. In more severe casualties (i.e. sinking, collision or fire) these items will be reimbursed if they are lost or damaged. It would be easily done to throw a couple of worn mooring lines overboard and claim they were lost in a storm and the burden of proving or disproving the actual course of events would be very difficult. Often the insurer will be protected against these types of losses irrespective of these provisions due to the assured’s’ deductible. According to my own experience from claims handling of hull insurance damage, deductibles in the amount of USD 100,000 are often used. This sum of money would cover a lot of cargo lashing gear, mooring lines and tarpaulins.

According to the very last subparagraph of DMIC § 156, the same provision shall not apply if the ship is proven to be on its right place/location. The meaning of the ship being on its right place is unclear to me and the notes to this provision are silent with regards to this. Perhaps this originates from the old days when the insurance often was effected for one voyage at the time. As long as the ship did not deviate from the agreed sailing route the insurer would compensate damage to- or loss of these items, independently of the cause of the damage. However, this very last subparagraph is overruled by § 5.3 of the DHT and is therefore not applicable these days.

Theft onboard the vessel is further excluded in DHT § 5.4 which makes it clear that the insurance does not cover theft of parts of the machinery, spare gear, furniture or cabin equipment during laying-up or at a port call, unless there is a permanent watchman.

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62 Claims Executive Trainee, 3 months at The Swedish Club, 2006
63 Original wording (Danish): Disse bestemmelser gælder dog ikke Baade, der er paa deres rette Plads
onboard. Neither the NMIP nor the SHIC have explicit exclusion for theft of these items, and subsequently I must assume theft onboard the vessel will be covered under these conditions.

The Norwegian and Swedish conditions exclude damage to zinc and magnesium anodes that are fitted for protection against corrosion from the coverage, cf. NMIP § 12-5 letter (e) and SHIC Clause 7.7 letter (e).

Section §12-5 letter (f) contains the last exclusion in the NMIP formulated as a combination of peril- and loss rules. The provision excludes loss resulting from contamination of lubricating oil, cooling water or feed water, unless proper measures against the contamination have been taken within 3 months. If the assured, the master or the chief engineer became, or must be deemed to have become aware, of the contamination, measures must be taken as soon as possible. According to the commentaries to the NMIP, the wording “must be deemed” indicates a reduced requirement of proof as regards positive knowledge and gross negligence as regards a failure to clarify the situation. If none of the above mentioned persons cannot be “deemed to have become aware” of the contamination, but “ought to have become aware of it”, a three-month time-limit will take effect. If, on the other hand, it has been shown due care and these people are in good faith with regard to the contamination, the damage must be covered.

N.D.1993.398 M/T Nor Frontier illustrates the three months time-limit used under the Norwegian rules. The insurer was exempted from liability regarding damage caused to the turbo engine as a result of water having been sucked into the lubrication oil system. The water had penetrated into the oil system six months prior to the casualty and consequently the 3-month limit had been exceeded.

Clause 7.7 letter (g) of the SHIC contains a provision that has many similarities with §12-4 letter (f) of the NMIP regarding contamination of oil. This provision however also includes bunkers in the exception. According to the notes of the same clause, the insurer will only be liable if bunkers have been bought and delivered with valid fuel specifications for the relevant type of engine/boiler and that the bunkers has been kept separated from other consignments. It further follows from the notes that this provision is connected to Clause 11.2 of the SHIC which states that bunkers and lubrication oil must be of the minimum quality prescribed by the manufacturer and that the vessel must have onboard sufficient fuel for the intended voyage. I have not been able to find any provisions regarding contamination of oil in the Danish conditions.

Furthermore, the Swedish and the Danish conditions have exclusions for bottom painting of the hull, cf. DHT § 6.1 and SHIC Clause 7.7 letter (a). This was earlier excluded in Norwegian hull insurance, cf. 1964 Plan § 176, but shall now be treated as any other painting and is therefore covered.
5.4 Repairs

Immediately after a casualty has occurred, the assured has an obligation to notify the insurer about any damage as promptly as possible. The assured is obliged to keep the insurer informed about further developments. This follows from NMIP § 3-29 subparagraph 1, SHIC Clause 23.1 as well as from DMIC § 77. The assured is further required to undertake such measures as the circumstances call for in order to avert or minimise any damage and to protect the rights of the insurer.

When a ship suffers casualty damage it is, as a starting point, the assured who decides whether, when, where and how the ship shall be repaired. Since the assured is normally entitled to compensation for the actual cost of repairs, the insurer will naturally have a significant interest in looking after the procedure of the repairs and detailed rules regarding these procedures have therefore been developed.64

In these situations a conflict of interests may arise between the insurer and the assured. The main interest of the assured is to have the repairs carried out at a time and place as convenient as possible for him as he does not wish having to take the ship out of service for longer than necessary. The insurer on the other hand, is of course interested in repairing the ship at the lowest price possible and the assured’s sailing schedule is of less concern to him. As a starting point, the hull insurer will not be liable for the assured’s loss of time, which instead will be covered by the assured’s loss of hire insurance - provided of course that the assured has chosen such insurance. A loss of hire insurance covers loss due to the ship being wholly or partially deprived of income as a consequence of damage to the ship which is covered by the hull insurer. Such insurance operate with a deductible period; an agreed amount of days, running from the commencement of the loss of time. The assured can choose where and when the repairs shall take place and can thereby choose a fast but expensive repair yard to avoid having the vessel out of service. The insurer, however, is only responsible for the cheapest alternative.

The Norwegian and Swedish conditions, being more favourable to the assured than the Danish conditions on these issues, require the insurer to avert a loss of time in many situations where these problems may arise. The rules are worded differently in different situations, but as a general rule it could be said that the value of the loss of time suffered by the assured is set at 20 % p.a. of the assessed hull value.

5.4.1 Temporary repairs

If the damage the ship has suffered does not affect the seaworthiness of the vessel, and the vessel can maintain its class without repairs, the assured often wishes to postpone the repairs until the ship is at a repair yard for other reasons; such as maintenance work, class survey or subsequent casualty damage. Even if the vessel’s class or seaworthiness is

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64 Brækhus/Rein: Håndbok p. 485
affected by the damage, it may be possible to restore the ship into a condition which enables it to continue its operation by carrying out temporary repairs of the damage, leaving the complete and time consuming repairs until later.

Complete repairs of the damage may be postponed until a later stage for several reasons; the most obvious being that complete repairs are impossible to carry out where the ship is located, i.e. because there is no shipyard that can perform the work in a satisfactory manner or that the waiting time is unreasonably long. On these occasions all three sets of conditions have the same solution; the insurer is liable for the costs incurred in carrying out necessary temporary repairs of the vessel, cf. NMIP § 12-7 subparagraph 1, SHIC Clause 29 subparagraph 1 and DHT § 6.8 subparagraph 1. Complete repairs of the vessel shall be considered to be impossible if the ship cannot be restored to the condition it was prior to the occurrence of the damage. According to the commentaries to the NMIP, the term “temporary repairs” comprises all measures necessary to get the ship to the repair yard, but which are not intended to be permanent.

It may however be other reasons for the assured to postpone complete repairs of the ship until later, often due to the operational schedule of the vessel. The assured may be interested in saving time and freight income by postponing complete repairs until it is more convenient for him to carry out the repairs.

The Norwegian, Swedish and Danish insurance conditions have different regulations on these occasions. According to the NMIP the insurer shall be liable for costs up to the amount he saves through the postponement of the permanent repairs, or up to 20% p.a. of the hull valuation for the time the assured saves, if the latter amount is higher. According to the SHIC Clause 29 subparagraph 2, the starting point is that the insurer indemnifies half the cost of temporary repairs. However, if temporary repairs result in saved costs for the insurer, he will be liable up to the amount he has saved or with half the repair costs, whichever is the most favourable to the assured. According to Danish rules, the insurer only indemnifies costs of temporary repairs up to the amount the insurer has saved, where the assured chooses a postponement of the repairs, cf. DHT § 6.8 subparagraph 2.

5.4.2 Survey of damage

When a ship has sustained damage that is assumed to be covered by the insurance, the damage shall be surveyed as soon as possible. All three conditions contain an explicit obligation to have the damaged surveyed before it is being repaired, cf. NMIP § 12-10 subparagraph 1, SHIC Clause 23.5 and DMIC § 137. The content of these three provisions are fairly similar and very much straightforward and I will not go into a detailed comparison of the exact content.

65 Commentaries to NMIP § 12-7
My experience is that the insurer is always contacted regardless of the extent of the damage; even in situations where it is obvious the cost of repairing must be assumed to be well below the deductible. The purpose of such a survey is to determine when and how the damage arose as well as evaluating the cost of repairing.

5.4.3 Invitations to tender

Before it is decided at what shipyard the ship shall be repaired, the insurer is entitled to demand that tenders are obtained from the shipyards that he considers suitable. The reason for this is of course to reduce the repair cost for the insurer as much as possible, by increasing the competition on the market. This procedure of collecting tenders may be time consuming as each and every repair yard has to give detailed specifications of the costs of the different repairs that are going to be performed and the assured may suffer great losses as the vessel cannot be used for income-producing activities.

Both according to the NMIP and the SHIC it has therefore been provided that for a period exceeding 10 days delay, compensation for loss of time should be paid, calculated on a basis corresponding to 0.055% per day of the insurable value of the vessel, cf. NMIP § 12-11 subparagraph 2 and SHIC Clause 28.2. It is the insurer’s duty to clarify with the assured whether or not he will demand invitations to tender. If the insurer chooses not to do so, he has no right to react if the assured commences repairs without further notice.

Such compensation for time lost is not compensated according to Danish conditions, cf. DHT § 6.11.

5.4.4 Choice of repair yard

When all the tenders have been received from the repair yards a choice of which repair yard is going to perform the work has to be made. It is an acknowledged rule that, as a starting point, it is the assured himself who decides where the ship is going to be repaired. However, if the insurer has obtained a less expensive tender from another repair yard than the one chosen by the assured, he will not be liable to pay the full cost of repairing at the more expensive yard. As previously mentioned, there is a connection between quick and expensive repairs as well as slow and less expensive. The tenders received shall be adjusted by adding the costs of removal when ascertaining which tender in fact is the lowest. According to the NMIP and the SHIC the insurers liability for the costs of repairs and the removal is limited to an amount corresponding to the amount that would have been recoverable if the lowest adjusted tender had been accepted with an addition of 20% p.a. of the hull valuation for the time the assured saves by not choosing that yard, cf. NMIP § 12-12 subparagraph 2 and SHIC Clause 28.2 subparagraph 3. However, according to Danish hull insurance conditions, such compensation is not payable. The insurer will only be liable for the cost of repairing according to the cheapest tender which the assured must reasonably be obliged to accept.
If the assured, due to special circumstances, does not want to have the ship repaired at a particular repair yard he may demand that the tender from that yard is disregarded pursuant to Norwegian and Swedish rules, cf. NMIP §12-12 subparagraph 3 and SHIC Clause 28.2 subparagraph 4. According to the commentaries to the NMIP, an example that would give the assured a justifiable reason to object to the repairs is if he has a justifiable doubt as to whether the yard’s technical and economic capacity is sufficient. Not being on good terms with the repair yard will normally not be relevant. Such rules regarding setting aside certain repair yards are not to be found in the Danish conditions.

In N.D. 1992.172 the assured and the insurers collected several tenders from different ship yards to repair a casualty damage following a fire onboard M/S Berglift. All the tenders were above the limits for condemnation which was in the amount of NOK 6.4 million. However, later on in time, a tender in the amount of NOK 5.95 million was obtained by the insurer who claimed that the last tender also must be taken into account. The assured opposed to this tender and claimed that it was invalid as it was unclear as to which type of works were included in the specification. The court decided that the last tender must be disregarded and consequently the assured was entitled to compensation for constructive total loss.

5.4.5 Removal of the ship

Once it has been decided at which ship yard the repairs shall be carried out the damaged ship of course has to be moved to the place of repairs. Such removal of the ship is considered to constitute a part of the repairs and thus, the costs of such removal must therefore be covered by the insurer. This remuneration first and foremost covers costs of bunkers, towage if this is necessary, canal- and port expenses etc. Furthermore, the insurer will be liable for the necessary crew’s maintenance and wages throughout the period of time involved. The assured also has a limited cover of his loss of time during the removal, in that the “bunkers and similar direct expenses in connection with the running of the ship” are included in the cover. Also similar out-of-pocket expenses and expenses for rental of objects necessary to get the ship to the repair yard will be reimbursed.

Provisions regarding the insurer’s liability for costs incurred while removing the ship are found in NMIP § 12-13, SHIC Clause 30, DHT §6.10 as well as the DMIC § 144 – 150. According to the commentaries to the NMIP and Tybjerg’s comments to the DMIC §144 first subparagraph note nr.2 the actual removal shall cover the entire deviation both to and from the repair yard, whereas the SHIC does not cover removal costs after the repairs have been completed, cf. last sentence of the SHIC Clause 30.

It follows from the commentaries to the NMIP that removal costs that must be regarded as accessory costs of repairs are to be apportioned among recoverable and non-recoverable work in accordance with NMIP §12-14. I will not discuss the apportionment of these expenses any further, other than to mention that according to the NMIP these expenses shall be apportioned on the basis of the cost of each class of work. The notes to
the SHIC Clause 30 contain explanatory notes as to how the costs shall be divided between the assured and the insurer. The starting point is that costs connected with repairs shall be borne by those for whose account the repairs will be carried out. When repairs related to maintenance and repairs following a casualty are carried out simultaneously, the costs of removal shall be equally divided. Thus there are some differences between the Norwegian and Swedish conditions concerning the apportionment of expenses.

It further follows that money gained by the assured by the fact that the removal places the vessel in a more favourable position shall be deducted from the indemnity. This is spelled out in all three conditions, cf. NMIP §12-13 subparagraph 1 last sentence, SHIC Clause 30 as well as Tybjerg’s comments to the DMIC §144 note nr.2.

5.4.6 **Costs incurred in expediting repairs**

The repairing of a ship shall not only ensure a satisfactory result from a technical point of view. The time factor is also of great importance as the ship has to get back to income-producing activities without unnecessary delay and there is a clear connection between the speed and the costs of repairs. The speed can often be increased by extraordinary measures in the repair procedure. This elucidates the question of which measures shall be considered as extraordinary- and which measures shall be considered as ordinary measures taken to expedite repairs. Ordinary measures must be covered by the insurer, whereas extraordinary measures only will be covered to a certain extent. The fact that a certain operation could have been carried out in a cheaper but more time-consuming way, does not necessarily entitle the insurer to deduction of the compensation. If the work can be considered being normal repair yard practice, the insurer will be liable for the complete cost of the repairs. The dividing line between extraordinary and ordinary measures, however, is far from clear-cut.\(^{66}\) It follows from the commentaries to the NMIP that overtime payment to the repair yard, or sending spare parts by charter plane should normally be considered as extraordinary measures. The same applies if the assured chooses to buy a new and more expensive part in a situation where the part in question could be obtained at a more reasonable price after some waiting time.

The Norwegian, Swedish and Danish conditions have different solutions regarding how much of costs incurred by extraordinary measures shall be compensated. According to the NMIP, the insurer’s liability for the costs incurred again is limited to 20% p.a. of the hull valuation for the time saved by the assured, see NMIP § 12-8. The Danish conditions, being the most restrictive from the assured’s point of view, only covers cost of repairs executed in overtime to the extend other expenses are saved for the insurer, cf. DHT § 6.9. According to the Swedish conditions, the assured shall be liable for one half

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\(^{66}\) Brækhus/Rein: Håndbok i kaskoforsikring p.493
of such additional costs, though at the most 50% of the agreed deductible per loss cf. SHIC Clause 28.6. It follows from the notes to the same clause that one should compute the time by which the total repair time has in fact been reduced, even if several different measures are taken of which each one separately constitutes some saving of time. This seems to be in line with NMIP § 12-8 subparagraph 2.

5.4.7 Deferred repairs

According to §12-6 of the NMIP the insurer will not be liable for any increase of the repair costs that is not carried out within five years after the damage was discovered. Consequently, as long as the assured chooses to have the ship repaired within five years after the damage was discovered, the risk of an increase of the repair costs will be borne by the insurer. The liability of the insurer does not terminate after five years but the insurer shall not be liable for any increase in the costs that may occur. The deduction for the cost increase must be calculated on the basis of either an estimate of the repairs upon expiry of the five-year time limit or the ordinary index for repair costs\(^\text{67}\).

Pursuant to the Swedish and the Danish conditions on the other hand, the insurer will not be liable for any increase of the repair costs where repairs are deferred without the insurer’s consent, cf. SHIC Clause 28.5 and DMIC § 141.

Consequently, according to Swedish and Danish conditions, the insurer will not be liable for an increase of the repair costs if the assured chooses to postpone the repairs until it is more convenient for him to have them carried out, unless of course, anything else has been agreed. My understanding of this provision is that the repairs must be considered to be deferred if they are not carried out at the request of the insurer. Pursuant to the second subparagraph of §141 of the DMIC, the insurer will be liable for any increase of the repair costs caused during the time it takes for the ship to complete the ongoing voyage. This presupposes the ship is seaworthy and that the postponement is otherwise justifiable. I have reason to assume the same applies according to the Swedish conditions. Consequently, the risk of any increase in repair costs will have to be borne by the assured, if he defers repairs that the insurer requests to be carried out promptly.

\(\text{67 Commentaries to NMIP § 12-6}\)
### Abbreviations

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<td>General Swedish Marine Insurance Plan</td>
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