

P&I INSURANCE AND CARGO LIABILITY

Scandinavian Theory and Practice



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Gratitude

Huge Academic Thanks

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CHAPTER I - PREFACE

1.1 Presentation – What is The Thesis About and Why Did I Choose This Topic

The present work is dedicated to the problem of cargo liability of P&I Clubs. The main idea is to examine the rules by which P&I Clubs are guided when providing the cover for cargo damages. Thus, through such examination I will try to present P&I insurers' legal field of action.

Generally P&I insurance provides cover for cargo, more precisely, for liability related to cargo, when it is damaged, lost, delayed or delivered with shortage. On the following pages we will take a closer look at conditions under which the cover is provided, will inquire into background and rational behind them, will pick out and outline the common principles of the conditions of different P&I clubs, will emphasize the essential differences (if any) between these conditions, analyze exclusions from standard rules of cover, examine real situations and cases kindly provided by practicing actors.

The prehistory of the choice of this topic is such: in summer 2008 I, as an employee of insurance company,¹ was involved in cargo claim settlement. Shortly, the circumstances of this case are as follows: cargo (heavy equipment for factory) was shipped from China to Georgia on a chartered vessel named Juliet and was delivered damaged. The major suspicion was that the cargo had not been stowed and loaded safely in two Chinese ports, Shanghai and Zhanjiang (it was commingled). During the claim settlement I was dealing with ship's P&I insurer² – it was the first time in my 3-years practice that the P&I insurer came into play, before I had had quite 'modest' knowledge of this type of insurance. The final outcome of the case was the avoidance of prolonged court and arbitration procedures and the arrangement of the amicable agreement between the parties. It was that time when I became extremely interested in essence of P&I insurance and competence of P&I clubs. And now, when choosing the topic for my Thesis, I decided to enrich my insight and profound the knowledge of P&I clubs' activities in sphere of their liabilities for cargo.

¹ JSC Insurance Company Aldagi BCI, located in Georgia, – www.aldagibci.ge.

² Assuranceforeningen Skuld, Hong Kong Office.

1.2 Scope

For practical reasons the present Thesis is based on Scandinavian experience. So, it means that I am going to examine and compare Rules of three Scandinavian P&I Clubs: Norwegian Assuranceforeningen Gard – gjensidig,³ Assuranceforeningen Skuld (Gjensidig)⁴ and Sveriges Ångfartygs Assurans Förening (The Swedish Club) in Sweden.⁵ For the sake of consistency we will take the Gard’s Rule 34 – Cargo Liability – as a sample model and follow the wording of this Rule while referring to and making parallels with Skuld’s and The Swedish Club’s Rules whenever needed.

In addition to the core line in this Thesis I will touch upon some issues inevitably related to the carriage of goods in general and the carriage of goods by sea in particular, such as: international rules and regimes for cargo liability (e.g.: international conventions), contracts of affreightment (e.g.: charterparties), documents that regulate such carriages (e.g.: Bills of Lading), some actual and topical problems of today existing in this area etc. We will not deepen much and consider these issues too thoroughly as it may lead us far outside the core of the Thesis, but a quick consideration and discussion of the mentioned points is important in order to present the background for P&I clubs’ Rules where they actually stem from and to better understand their implication.

In the framework of this Thesis I will not interfere with such questions as are: other types of cover provided by P&I insurance, types of exclusions other than those relevant to the topic in question. For instance, this paper is not intended to deal closely with the issue of extra handling costs which also have some connection to a topic of cargo liability in a part. Though this type of cover will be

³ Established on the 9th of October, 1907; head office in Arendal; hereinafter referred to as ‘Gard’ or ‘the Association’.

⁴ Founded in January 1897; head office in Oslo; hereinafter referred to as ‘Skuld’.

⁵ Established on the 13th of December, 1872; headquartered in Göteborg; hereinafter referred to as ‘The Swedish Club’.

overviewed in the last part of the Main Part (Chapter III) just in order to give a distinction from the part regulating the cargo liability.⁶

Never in the present work will I apply to the laws of the USA. Though they form a part of international conventional framework, there is found so many specificities, that it would rather require a separate serious scientific examination.

1.3 Sources / Materials

The main wording which will be examined subsequently in the Thesis is the text of Rule 34 of the Gard Rules which deals with P&I Club's liability for cargo damage. Accordingly I have made a lot of use of several editions of different years of Gard's 'Handbooks on P&I Insurance' and also 'Gard Guidance to the Statutes and Rules' – all these are Gard's commentaries to their Rules.

One may question the sufficiency of the weight of such source: own interpretation of own rules. Whereas in Norwegian maritime reality we have an excellent example of equal, objective and extremely productive co-operation between different interests: underwriters, shipowners, cargo owners, scientists; that with joint efforts have been working out the Norwegian Marine Insurance Plan since 1871. In my opinion, the fact that the P&I Club, in our case Gard, provides its own interpretation and guidance of the Rules does not derogate or depreciate their importance and validity. Being the part of the International Group of P&I Clubs, Gard cannot just 'invent' some terms and interpret them to its own benefit and as it pleases. The commentaries have a focus on being helpful in presenting the extent of their rights and responsibilities to the Members, they give advices for different complex situations and encourage Members always to contact the Association in case of ambiguity.

Other materials used in course of working are conditions/rules of Skuld and The Swedish Club, particularly, respective paragraphs relating to those P&I clubs' liability for cargo damage.

⁶ Gard's Rule 35 – Extra Handling Costs – is enclosed hereto as an Annex I.

When considering international regimes for cargo carriage by sea, international conventions – the Hague Rules, the Hague-Visby Rules, the Hamburg Rules – will be referred to. For this reason we will take an overview of all these conventions.

And, of course, it is natural for student's work to appeal to such academic sources as are textbooks and handbooks.

In addition to theoretical literature I am going to use some materials from practice to illustrate the application of P&I clubs' rules related to liability for cargo damage in real situations. These materials are real cases or claims which have been handled by practitioners and they show circumstances which constitute basis for declining the P&I cover by the insurer due to breach of the contractual obligations, non-conformity with clubs' rules, violation of conventional terms etc.

I would have gladly used court practice as well, but due to two factors this was impossible. First of all, I was limited to English language based literature and sources (while writing about Scandinavian theory and practice) – that unfortunately has impoverished this side of my work. Another thing is that disputes which arise between P&I club and its Member(s) are usually resolved not in ordinary courts, but in a private arbitration which is more close and confidential than a court. Actually, it was the case: when I asked for cases I was advised that P&I Clubs would willingly provide me with materials where the cover was denied due to different exclusion clauses, but it would not be possible with disputes which were considered by arbitration because of commercial privacy. Also it would be fair to note that as a rule claims presented to P&I insurers rarely reach the arbitration. The clubs always strive to settle them amicably. It is in no one's interest (neither the insurer's, now the Member's) to spend time, funds and human energy on formal and protracted procedures, except as there is a question of principle / fundamental discrepancy and there is no other possibility to come to some internal agreement, but to appeal to the unbiased umpire.

1.4 Structure

The paper is composed of four Chapters: (I) Preface, (II) Characteristic Features of P&I Insurance, (III) Main Part and (IV) Conclusion.

The (I) Preface includes four Sections: (1.1) Presentation, which introduces the topic and its aim and explains how the topic was chosen, (1.2) Scope, which provides information on what actually is going to be studied and sets limits for the work in whole, (1.3) Sources / Materials which gives the idea of the type of literature and data used in brief, (1.4) Structure which clears the organization of the Thesis and makes it easier to navigate inside.

The next Chapter – (II) Characteristic Features – tells about specifics of P&I Insurance which distinguishes it from other types of insurance and for this purpose also gives some historical overview which explains how this type of insurance was born and what circumstances and conditions contributed to its origin.

The (III) Main Part covers core issues of the Thesis. It is composed of six sections. It starts with the introduction of the main object of the examination – the Rule 34; then proceeds and deals with such matters as are: who is covered and what is actually covered under this Rule, when and under what conditions the cover is provided, here we will also come across some background principles in maritime area and discuss some underlying maritime rules, consider international conventions and their application; and finally the detailed examination of the exclusion to the cover under the Rule 34 of Gard will be done – I will narrowly scrutinize the wordings of exclusion clauses and compare them to the conditions for cargo damage of other Scandinavian P&I clubs. Also we will speak a little about other either supplementary or related cover (like extra handling costs). Additionally in this Chapter will be presented some practical references (claims illustrating the rules in practice) relating to different types of exclusions. As already mentioned thought I was very much inspired to get to know some sharp conflicts between the Club and the Member as an example, it was impossible to have any, because it is rare to experience such situation; as usual

these two are in the same boat working together towards reducing potential liability and respectively the claim amount as far as this serves the interests of both of them.

And finally the (IV) Conclusion provides closing thoughts, findings and arguments, resuming the topic.

CHAPTER II – CHARACTERISTIC FEATURES OF P&I INSURANCE

It is well known that one of the huge human activities is international trade which historically carries several important functions: economical, political, social and indirectly even cultural. The sea is one of the oldest ways the international trade is conducted by. As a natural element it is associated with many perils, some of them foreseeable, others not. Securing one's venture from possible hazardous factors had always had importance for people involved in such business.

Today, the industry of insurance takes care of serving the purpose of security of maritime-relating interests. One of the insurance sectors – the marine insurance – is dedicated inter alia to cover losses and damages suffered by ships and their cargo during the voyage between the points of departure and destination. Herefrom stems the principal distinction between these lines of insurance: while hull or cargo insurance can be seen more as property insurance, **P&I insurance is distinctively liability insurance.**⁷ In broader sense it is insurance of liabilities, losses, costs and expenses of the owner, operator or charterer of a ship.

If we take a short historical excursus then we would discover one interesting fact – that the name “P&I” itself has direct relation to cargo.

There were a “protecting clubs” existing in Britain in the beginning of the 18th century, which were continually competing with Lloyd's.⁸ Several turning legal events,⁹ which steadily aggravated the burden of liabilities imposed upon shipowners, contributed to changes in services provided by these clubs. Thus, they started with insuring one fourth collision liability and liability for death and

⁷ Though, for example, the authors of the book “Law of International Business in Australasia”, Robin Burnett and Vivienne Bath, consider that “P&I is indemnity not liability insurance (liability insurance is insurance like motor vehicles third party insurance).” P. 194.

⁸ Lloyd's of London – British insurance market; functioning from 1688 – the date of the first known reference to Edward Lloyd's coffee house in Tower Street in London; first legally incorporated by Lloyd's Act in 1871.

⁹ The case ‘De Vaux v Salvador’ in 1836; the Limitation of Liability Statute of 1845; the Fatal Accident Act (Lord Campbell's Act) of 1846; the Harbours, Docks and Piers Clauses Act of 1847; the Merchant Shipping Act of 1854; the Employers' Liability Act of 1880.

personal injury and were marching further in step with those events gradually extending the scope of cover for new extra risks.

An accident in 1870 gave birth to new trend in “protecting clubs” activity. A ship “Westonhope” was lost off the Cape of Good Hope, the southern coast of South Africa. She was already loaded with cargo directed to Cape Town when proceeded to Port Elizabeth for loading some additional cargo and further sank en route to Cape Town. The court held the shipowner liable for the lost cargo arguing that was an unjustifiable deviation. The shipowner was a member of “The North of England Association” which nevertheless made a small ex gratia payment for the accident.

Shorty afterwards another vessel, Emily, was lost together with her cargo as a result of stranding and the cargo owners succeeded to recover their full losses from the shipowner on the grounds that that was not a loss by a “peril of sea”.¹⁰

Those challenging events caused a creation of new landmark in “**protecting clubs**” activity – clubs **became indemnity** bodies as well. The first P&I club, being such from 1886, is regarded to be “Shipowners Mutual Protection Society”.¹¹

Modern P&I clubs have maintained their historical image of a friendly societies keeping up the traditional concepts of brotherhood and reciprocal help. All of them are **mutual insurance companies**. For instance, Gard states in its’ Statutes, Article 3 – Purpose: *‘The purpose of the Association is to insure on a mutual basis liabilities, losses, costs and expenses incurred by the Members in direct connection with the operation of Ships entered in the Association and to be engaged in other business related thereto’*.¹²

¹⁰ The story as per “Introduction to P&I”. Christopher Hill, Bill Robertson, Steven J. Hazelwood. 2nd edition. London New York Hong Kong, 1996.

¹¹ Today The Britannia Steam Ship Insurance Association Limited (<http://www.britanniapandi.com>).

¹² The emphasis (*italics*) added hereafter whenever citing the Rules.

This implies that in case of loss or damage **a member** (by the way, **not a client!**) of club is refunded from its' fellow members' contributions, in other words, fellow members indemnify each others' claims on a mutual basis. The British Marine Insurance Act of 1906, section 85, approaches this principle as follows: *"Where two or more persons mutually agree to insure each other against marine losses there is said to be a mutual insurance"*. Thus, the members of P&I club are at the same time both assureds and insurers (though indirectly – because the individual member of course is not personally and directly liable for the club's obligations).¹³

In 1899, when there already existed 6 P&I clubs, they created a London Group of P&I Clubs (as all 6 were located in Britain) and made a Pooling Agreement in order to share cost of extraordinary claims. Today the Group is called the International Group of P&I Clubs¹⁴ and it unites 13 Clubs from UK / Bermuda, Norway, Sweden, USA and Japan, thus covering over 90% of the world's merchant fleet. This is one more characteristic feature about P&I clubs – **being competitors in the business of insurance, clubs co-operate in reinsuring each other and sharing the most outstanding risks.**

The International Group operates pursuant to **a constitution**, which determines the rights and obligations of the member clubs and draws the administrative arrangements according to which the Group conducts its affairs.

The Pooling Agreement is an agreement between the clubs to mutually reinsure each other by sharing claims between themselves. It regulates the procedure of pooling the member clubs' larger risks. The Agreement defines, for example, the general principles for claims' pooling, the types of claim which can be pooled and vice versa – the types of claim which are excluded from pooling, the calculation methods and contribution formulae, how losses are to be shared between the

¹³ There are certain categories of assured to which the principle of mutuality does not extend: for instance, charterers are insured on a non-mutual fixed premium basis.

¹⁴ <http://www.igpandi.org>.

participating clubs. The Pool provides a mechanism for sharing all claims in excess of USD 7 million and up to approximately USD 5.4 billion.¹⁵

Besides the Pooling Agreement which can be seen as an internal instrument of risk management, the Group arranges a market reinsurance contract to provide reinsurance for claims which exceed USD 50 million and up to USD 2.05 billion any one claim (USD 1 billion for oil pollution claims). Comparing to ‘all risks’ insurance, which is more usual for general liability insurance, the cover provided by P&I clubs for their members falls under ‘**named risk**’ insurance type. It means that covered are only those types of liabilities, losses, costs and expenses which are named in club’s terms and conditions – Rules.

Though the P&I insurance is a named risk insurance, there exists an element of discretion held by the higher executives – directors, managers or the Board. This right of discretion is exercised in respect of the issue of cover to be provided or not to particular claims which are otherwise excluded under the standard rules. This power of discretion is called **the Omnibus Rule**.¹⁶ In Gard’s Statutes it appears through the power of the Article 9.3.b:

‘In any particular case the Board of Directors may decide:

[...] b that the Association shall pay compensation in respect of a liability, loss, cost or expense which is not covered under the Rules where in view of the purpose of the Association this is deemed natural and desirable.’

One more ethos about P&I clubs is a **non-profit making nature**. The income of clubs is mainly designed to cover liabilities and set up reserve funds, but not to benefit some formal external shareholders.

¹⁵ As per August 2009.

¹⁶ In the Rules of The Swedish Club the respective provision is directly called ‘Omnibus Clause’ (Rule 19).

And finally, the one more distinctive moment which I would like to mention is that **each vessel** of a fleet (if there is a such) is insured or more correctly – **entered – separately**. The membership of an owner, operator or charterer continues until there is still at least one valid entry.

After this overall review having a bit illuminating nature we will procede to the Rule 34 which deals with the subject of the Thesis – P&I Club’s liability for cargo.

CHAPTER III – MAIN PART

1.1 Introduction

As already mentioned above, the P&I clubs started with insuring hull, more precisely collision liability, later continuing with health or personal injury liability. Nowadays the P&I clubs, traditionally marching in line with the spirit of the times, provide their cover for much more lines. The P&I clubs worldwide insure the following groups of liabilities:

- liability for collision;
- liability for crew;
- liability for cargo;
- liability for passengers and other persons onboard;
- liability for general average and salvage;
- liability for pollution;
- other liabilities (like: liability for property, wreck removal, legal costs etc.).

Among these lines the cargo claims (i.e. claims of cargo owners vs carriers) hold the second place as per severity and frequency among all other types of claims.¹⁷

To the cargo liability are dedicated Rule 34 of Gard, Rules 5.1-5.4 of Skuld and Rules 4 and 5 of The Swedish Club.¹⁸

As mentioned above, I will base the research on the Gard Rule 34 and refer to other clubs' Rules if they differ essentially.

¹⁷ The information based on the presentation by Andreas Brachel (Gard) "Introduction to P&I – The background, the rules and the wet stuff".

¹⁸ The Skuld's Rules 5.1-5.2 are enclosed hereto as an Annex II and The Swedish Club's Rules 4-5 are enclosed hereto as an Annex III.

The Rule 34 – Cargo Liability – consists of two sections: the first one covering Member’s liability for loss, shortage, damage and some other responsibilities; the second one covering liability for loss caused by delay. Also, the section 1 itself splits the cover provided into two paragraphs. Here is the extract of the both sections:

1 The Association shall cover the following liabilities when and to the extent that they relate to cargo intended to be or being or having been carried on the Ship:

*a) **liability for loss, shortage, damage or other responsibility** arising out of any breach by the Member, or by any person for whose acts, neglect or default he may be legally liable, of his obligation properly to load, handle, stow, carry, keep, care for, discharge or deliver the cargo or out of unseaworthiness or unfitness of the Ship;*

*b) **liability for loss, shortage, damage or other responsibility** in respect of cargo carried by a means of transport other than the Ship, when the liability arises under a through or transhipment Bill of Lading, or other form of contract, providing for carriage partly to be performed by the Ship,*

*2 The Association shall cover **liability** pursuant to compulsorily applicable rules of law **for loss caused by delay** in the carriage of cargo, provided that the Association shall in no circumstances cover liabilities, costs or expenses arising out of the failure to arrive or late arrival of the Ship at the port or place of loading.*

Thus, let’s follow the wording and investigate first



1.2 Who Is Covered

The Rule states: “*breach by the Member or by any person for*” whom “*he may be legally liable*”. So, it is self-evident that cargo liability cover extends to the Member of the P&I Club. But as far as the vast majority of Members are legal entities it is important to know who is understood under this term.

In order to obtain a correct explanation we refer to the introductory provisions of the Rules, Part I, Chapter 1. Here the Rule 1 gives the following interpretation of a '*Member*': in the first instance, these are an owner, operator or charterer of a ship; in the second instance, it may also refer to co-assured and affiliate, if that can be drawn from the context. Below I will expand a bit each of the terms providing the meaning accepted in P&I insurance.

'Owner' of a ship, just as in relation to any other property, may be either physical or legal person having a title to the ship. It is noteworthy that even the part owner of the ship is eligible to enter the P&I club.

'Operator' of a ship is a person (either physical or legal), acting on behalf of the owner, but for own account, which is responsible for technical and/or commercial services of the ship. An operator should be distinguished from a manager (or managing organization) which is independent entity acting both on behalf and for account of the owner.

'Charterer' – according to the Gard's Rule 1.3 this term is to signify all types of charterers (voyage, time, etc.) except of bareboat or demise charterer. The rationale here is that with the chartered ship the latter type of charterer accepts navigational and commercial control over it and builds the crew and business on his own and thus can be equalized to the owner.

As to co-assureds and affiliates: in the role of co-assured can appear shipbuilders, mortgagees and other interested parties; affiliate – understood just in its common sense – is a smaller administrative and structural element (for example, manager) or unit (for example, branch) of the whole organization.

In order to investigate who can be considered as '*any other person*' for whom the Member '*may be legally liable*' it would be helpful to apply to the underlying maritime rules. Let's, for instance, address the Norwegian Maritime Code 1994, the Section 276 (Loss Due to Nautical Fault and Fire) which deals with the exception cases to the carrier's liability for damages during the carriage of cargo. We already know who can be meant under 'Member' (owner, operator, charterer); so if we

consider a situation from the perspective of charterer (which can easily be a carrier) and follow the text of the Section, we see that it lists ‘the master, crew, pilot or tug or others performing work in the service of the ship’ as a key persons. The last part – ‘others performing work in the service of the ship’ – is also quite wide and may include many direct and indirect ‘servants’ of the vessel and cargo, operating onboard or ashore: agents, stevedores, warehouse workers and other independent contractors. So, we may conclude, that those ‘*persons*’ are servants of the Member and/or the ship and /or the cargo.

Thus, the central persons covered herewith are: owner, charterer, operator (which are usually legal entities), and also master, crew, others working for the service of the ship (physical persons) for whom the former group may be held vicariously liable.

The next comes



1.3 What Is Covered

For the purpose of constructional clearness the present section is divided in two paragraphs according the structure of the Rule 34.

1.3.1 Damage etc.

We will look at “what is covered” from two angles:

- (i) what causative actions or inactions are covered, and
- (ii) what consequences are covered.

(i) The Association provides cover for ‘*any breach by the Member*’ or ‘*acts, neglect or default*’ committed by the persons defined above in 1.2 for whom the Member may be legally liable in respects of their obligation to process the cargo in due course, i.e. ‘*to load, handle, stow, carry, keep, care for, discharge or deliver*’ it properly. Such obligations are normally arranged and detailed by a contract of carriage (Bills of Lading, charterparties, seawaybill etc.), though may

emerge in tort or be regulated by statute. Further discussion of this legal line (contractual one) appears below in 1.4.

‘Breach’ which is referred to in the working is literally understood as a break; in legal sense it is a failure to perform something, typically a contract, a duty, a warranty. ‘Act’, ‘neglect’ and ‘default’ can be interpreted as actions, disregard to exercise due care or attention and failure to fulfill or perform an obligation respectively.

The Association also covers *‘liability ... arising ... out of unseaworthiness or unfitness of the Ship’*. As will be discussed later on, in 1.4, the underlying laws¹⁹ require a Member and in his person a carrier, to exercise due diligence before and at the beginning of the voyage to make the ship seaworthy. Seaworthiness comprises physical integrity of the ship, its’ proper manning, sailing documents and papers being in required order etc. While ‘fitness’ can generally be assimilated to ‘seaworthiness’, the former has more to do with ship’s and its’ cargo handling premises and equipments’ working state, capacity and ability as in respect to each particular voyage and/or type of cargo. For example, the British Marine Insurance Act, Section 39(4) defines ‘seaworthiness’ as follows:

*“A ship is deemed to be seaworthy when she is reasonable fit in all aspects to encounter the ordinary perils of the sea of the adventure insured.”*²⁰

(ii) Moving further to the consequences covered by the P&I Club, it should be said that the Association covers several liabilities related to cargo which is *‘intended to be or being or having been carried on the Ship’*. These are:

- liability for loss;
- liability for shortage;
- liability for damage;
- other responsibility.

¹⁹ The Hague Rules and the Hague-Visby Rules.

²⁰ Principles of Law Relating to International Trade. Nicholas Kouladis. Springer, 2006, p. 263.

‘Loss’ can be understood in two meaning: either physical or financial loss. Physical loss implies total destruction of cargo and impossibility of its’ restoration (for example, disappearance as a result of washing over the board). Financial loss can occur when the cargo’s market value changes (naturally decreases) due to some fluctuations.

‘Shortage’ means physical lack of weight (in case of bulk cargo) or units (packages, containers etc. – in case of general cargo) in comparison with information shown in the Bill of Lading or other transport document. At the same time it is known for the people working in the maritime industry that some types of cargo “lose weight” naturally, due to inherent features or customary trade conditions. This regularity mainly relates to bulk cargo (such as, for example, cereals or oil products), which may lose in weight in course of loading operations, or certain cargo (some food products), which may shrink due to variation of temperature. Of course such cases are excluded from coverage provided by the Association. However, an inaccuracy thought to be a shortage may also be deceptive, i.e. when really no shortage takes place and the difference is caused by faulty measuring devices at the port of loading. This formally constitutes a basis for initiating a claim and is usually followed by routine procedures of P&I clubs aimed at discovering the true circumstances.

‘Damage’ is a physical or chemical change of the characteristics of cargo. It can be both apparent, visible, when the cargo’s integrity is broken, or latent, hidden, when the defect can be found only upon opening or under a special expertise. For example, bottles of wine may break during an inaccurate transportation – apparent, visible damage, or otherwise the bottles may remain intact but the wine inside spoils because of the breach of temperature regime and becomes unfit for use – latent damage. The outcome of such damage should be a financial loss to a cargo owner.

‘Other responsibilities’ are usually other legal liabilities which may arise towards a third party, for example, consequential loss (like business interruption, loss of profit etc.) suffered by a third party.

Finally, it is important to emphasize that Gard covers only the legal liability of the Member for loss, shortage, damage etc. As a rule such legal liability will be determined and stipulated by the

contract of carriage and/or statutory law. In other words the Association does not extend the cover for liabilities arising out of commercial, partner, ex gratia and similar agreements and arrangements of the Member because of the plain principle that this does not suits the vision of mutuality: the Club only covers the risks that are commonly accepted by carriers, but not those additional risks that a carrier has accepted for commercial reasons.

1.3.2 Delay

As the abovesited paragraph – section 2 of the Rule 34 – shows the Association provides the cover for losses caused by the delay in carriage of cargo. This cover depends on the jurisdiction in question as the decisive factor here is the categoricity of the applicable law: if it is a compulsory liability, which cannot be changed by agreement, than the P&I insurance will be provided. A bit more extensively this cover will be considered in 1.6.1 below, after the presentation and discussion of the underlying and related notions in 1.4.

Meanwhile we are moving further to



1.4 When Is It Covered

1.4.1 Fundamental Principles / Approach

First to mention is the general rule about the availability of the cover provided by the Association. It appears in the Rule 2.4 – The Cover:

‘A Member is only covered in respect of liabilities, losses, costs and expenses incurred by him which arise:

- a) in direct connection with the operation of [...] the Ship; and*
- b) in respect of the Member’s interest in the Ship; and*
- c) out of events occurring during the period of entry of the Ship for the relevant risk in the Association.’*

Actually the listed conditions outline the main principles of the cover provided by P&I insurance. They are cumulative, i.e. necessary to be met altogether. Once more to be stipulated that cover is provided for legal liabilities only, while the basis of the legal liability under which it arises, is irrelevant for the purpose of the cover. It means that such liability may be based on negligence as well, save that it is legally covered either by a contract or by an applicable legislation. If a non-standard cover or a cover for liabilities which are not in conformity with the Association's Rules is required, the insurer should be informed and the respective approval should be obtained beforehand.

Just to extend a bit the literas above, I would like to add that respectively:

- a) This condition emphasizes the need for a proved causal link between the operation of the specific insured ship and the occurrence giving rise to legal liabilities, loss, cost or expense.
- b) There also should be the Member's interest in the ship, which is a general requirement having to be existent at the time of effecting the insurance cover and lasting throughout the validity of the cover.
- c) The cover is provided solely for liabilities, losses, costs and expenses which arise out of events occurring during the period of the entry of the ship in the Association. So, it is up to the Member to declare and prove the conformity to this requirement. Though the event giving rise to a claim should be promptly notified to the Association, there can be some complicated circumstances or overlapping situations (for example, it can happen that the damage becomes visible and apparent only in definite time period after the causative event) which may lack the certainty as to the time of occurrence of such events.²¹

Returning directly to the Rule 34, we will continue basing on points a) and b) of its' section 1.

²¹ The Rule 80 – Time of occurrence – deals with this issue.

1.4.2 Cover for carriage by the entered Ship

The P&I cover for Member's liability for cargo is valid towards cargo '*intended to be or being or having been carried on the Ship*'. It means that the cargo should be in custody of the Member (shipowner, charterer) or in other words in custody of the carrier if considered in terms of the contract of affreightment. The legal extent and scope of the custody may vary from country to country and depends on the governing law. But luckily there exists somewhat called international private law and also international institutes²² working towards enhancing and promoting harmonization, conformity, unification and modernization of the law of international trade and inter alia international regimes for the carriage of cargo by sea.

Currently the international trade community is still lacking the legal unanimity as to statutory regulation of the sea carriages. Instead there exist several international Conventions providing more or less clearness and stability in this area.

As the Gard's Rule 34 is largely based on such notions as are contract of carriage, Bill of Lading, and moreover directly refers to those international Conventions' regulations of these instruments, we will take an overview of all of them and see the peculiarities of the cover for cargo.

The Hague Rules (Brussels, Belgium, 25 August 1924)

International Convention for the Unification of Certain Rules of Law relating to Bills of Lading

Initiated by ILA,²³ the Convention was drawn with the main purpose of regulation of rights of the holders of Bills of Lading towards shipowners. It imposed some minimum liabilities on the shipowner/carrier in return to some rights for limitation. Thus, the foremost obligation of the carrier is to provide a seaworthy vessel for the start of the voyage and exercise due care during the carriage.

²² IMO, UN and its' Commission UNCITRAL in particular, Council of Europe, UNIDROIT etc.

²³ International Law Association, <http://www.ila-hq.org>.

The Hague Rules is usually applied to export cases. The most interesting points for us in the frame of the present Thesis is the scope of liability of a carrier: when it starts, what factors may influence changes in it, what are available remedies and possible limitations.

The liability of the carrier is limited with the ‘carriage of goods’ which is meant as *“the period from the time when the goods are loaded on to the time when they are discharged from the ship”*²⁴. In professional terms it is referred as “tackle-to-tackle” principle, i.e. it is defined by the moments when ship’s loading and discharging equipment touches the cargo.

There are a number of absolute liabilities of the carrier requiring him to exercise due diligence right before and at the very beginning of the voyage to:

- make the ship seaworthy
- properly man, equip and supply the ship
- make the vessel and its’ cargo-carrying parts (holds, refrigerators etc.) safe for cargo reception, carriage and preservation – in other words to make the ship cargoworthy.

The correct execution of these duties makes the carrier inviolable for deficiencies occurring after departure and also makes him eligible to seek protection under the list of exclusions set out in the Art. 4, - 2 of the Hague Rules (for example: negligence of servants, fire, perils of sea, acts of war etc.).

In case the carrier is found liable for the damage to or loss of cargo the liability is limited to GBP 100 in gold value²⁵ per package or other unit.

It should be noted that the right of limitation is not available if an ad valorem Bill of Lading – declaring exact value of goods – is issued.

²⁴ Art. 1, e.

²⁵ Some states have the limitation converted into own currency, for example: Australia – AUD 200, Canada – CAD 500, USA – USD 500.

The Hague Rules are adopted by, for example: Argentina, Australia, Canada, Cuba, India, Israel, Japan, Kuwait, Monaco, New Zealand, Portugal, Tanzania, Turkey, USA.²⁶

The Hague-Visby Rules (Visby, Sweden, 23 February 1968)

This is actually a protocol to the Hague Rules which adopted some amendments proposed by CMI²⁷ and was, thus, designed for Hague Rules update. The Rules entered into force in June of 1977.

The principal change was the increase of maximum liability to 666.67 SDR or 10,000 Poincaré Francs per package or unit and the introduction of alternative limitation based on weight – that is 2 SDR or 30 Poincaré Francs per kilo of the gross weight.²⁸ Also the availability of the benefit of the limitation of liability was precluded if it was proved that the damage was a result of the carrier's conscious intent or recklessness (to the contrary, the Hague Rules do not refer to any special type of conduct in this instance).

They are adopted by, for example, Scandinavian, Benelux countries, Egypt, France, Germany, Italy, Poland, Spain, Switzerland, UK.²⁹

The Hamburg Rules (Hamburg, Germany, 31 March 1978)

United Nations Convention on the Carriage of Goods by Sea

Adopted and signed by a diplomatic conference on 31 March 1978, the Convention establishes a uniform legal regime governing the rights and obligations of shippers, carriers and consignees

²⁶ Handbook on P&I Insurance. Sjur Brækhus & Alex Rein. 3rd edition by Jeremy Kingsley, p. 156-157.

²⁷ Comité Maritime International, <http://www.comitemaritime.org>.

²⁸ SDR or Special Drawing Rights – an international reserve asset, created by the IMF – International Monetary Fund in 1969, were introduced in the Hague-Visby Rules as a new measure for the compensation later, by the further Protocol of 1979.

²⁹ Handbook on P&I Insurance. Sjur Brækhus & Alex Rein. 3rd edition by Jeremy Kingsley, p. 149.

under a contract of carriage of goods by sea. It was prepared by UN Agencies UNCTAD³⁰ and UNCITRAL³¹ at the request of developing countries. The Convention entered into force on 1 November 1992.

Although the philosophy behind the Hamburg Rules differs fundamentally from both the Hague and the Hague-Visby Rules, the basis of liability is still a fault with a reversed burden of proof, i.e. the presumption is that the carrier is liable for any loss or damage unless the opposite is proved through showing that “all measures that could reasonably be required to avoid the occurrence and its consequences” were taken (Art. 5, - 1).

But there are some following radical peculiarities about the Hamburg Rules:

- they apply to voyages both “to” and “from” the contracting state;
- the carrier is responsible for the goods in “the period during which s/he is in charge of the goods at the port of loading, during the carriage and at the post of discharge” (Art. 4, - 1), i.e. from the time of taking over the goods and until their delivery;
- the exemption under fire and nautical fault are removed;
- the carriage of live animals is included;
- the liability for the unwanted consequences of deck carriage, if it is realized contrary to agreement with the shipper or usage of trade or statutory rules, is recognized;
- the limitation ceiling is raised to 835 SDR per package or other shipping unit, and to 2.5 SDR per kilogramme of the gross weight;
- the time bar period for cargo claims is extended by one more year (in comparison to earlier Conventions) and is two years.

The Hamburg Rules are adopted by, for example: Chile, Morocco, Senegal, Tunisia, Uganda.³²

³⁰ United Nations Conference on Trade and Development.

³¹ United Nations Commission on International Trade Law.

³² Handbook on P&I Insurance. Sjur Brækhus & Alex Rein. 3rd edition by Jeremy Kingsley, p. 163.

The Rotterdam Rules (Rotterdam, the Netherlands, 11 December 2008)

Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

It has been worked out under the auspices of UNCITRAL, started from spring 2002.

This Convention establishes a uniform and modern legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door carriage that includes an international sea leg. The Convention builds upon and provides a modern alternative to earlier conventions relating to the international carriage of goods by sea.

The Rotterdam Rules provide a legal framework that takes into account many technological and commercial developments that have occurred in maritime transport since the adoption of those earlier conventions, including the growth of containerization, the desire for door-to-door carriage under a single contract, and the development of electronic transport documents. The Convention provides shippers and carriers with a binding and balanced universal regime to support the operation of maritime contracts of carriage that may involve other modes of transport.³³

There is a hot discussion and dispute around the Rotterdam Rules between different interests: shipping bodies, transportation and logistics companies, customs, professional unions and organizations, international chambers, committees, commissions etc. Each party tries to put forward, defend and argue own benefits and disadvantages.³⁴

Anyway the time will show the result. The ceremony for the opening for signature will be held on 23 September 2009.

³³ The extract from http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html.

³⁴ For some examples the “View of the European Shippers’ Council”, dated March 2009, and “A Position Paper by the International Chamber of Shipping” of May 2009, are enclosed as an Annex IV and Annex V. The European Shippers’ Council is the very first criticizer of the Rotterdam Rules which sees them as “undoubtedly the most complex international convention on liability and conditions of carriage there has ever been.” Another view of the International Chamber of Shipping is a supportive one.

As the P&I clubs' (including of course the Scandinavian clubs) rules for cargo liability are traditionally based on the Hague or the Hague-Visby Rules, the period of custody and therefore liability of the carrier/Member under the Gard's Rule 34 is limited to "tackle-to-tackle" period.³⁵ During this period the carrier/Member is obliged '*properly to load, handle, stow, carry, keep, care for, discharge or deliver the cargo*'. It means that the carrier should show himself as a competent, prudent and reasonable person having general good practice in carriage of goods by sea while processing the particular cargo entrusted to him, for example: take necessary precautions when stowing fragile cargo, giving more care and attention to cargo during stormy weather, ensuring that cargo is delivered to the authorized receiver etc.

It is interesting to make a parallel to other Scandinavian P&I Clubs' approach to the matter. Thus, contrary to the Gard's wording providing no specific time frame for the implied period of custody, both Skuld and The Swedish Club do specify such term.³⁶

Thus, Skuld allows '*21 days of the date on which loading of the cargo on the vessel commences or should commence*' and '*21 days of discharge from the vessel*'.³⁷

The Swedish Club stipulates that liabilities, costs or expenses related to cargo being lost, damaged etc. are covered '*before, during or after the contracted transport*', subject to the limitation '*to a period starting 14 days before the commencement of the transport and ending fourteen days after its completion*'.³⁸

³⁵ Other less favourable to the Member terms, such as are the Hamburg Rules, will not influence the availability of the P&I cover only if they are incorporated into the contract of carriage solely because of mandatory application of law (Rule 34.1, iii).

³⁶ The Rule 5.1-5.2 of Skuld and the Rules 4 and 5 of The Swedish Club which relate to the Clubs' liability for cargo are enclosed to the Thesis as Annex II and Annex III.

³⁷ Rules 5.2.2 and 5.2.16 respectively.

³⁸ Rule 4, Section 2.

There is a peculiarity underlying the P&I club's rules which naturally flows from the postulate of the application of the Hague or the Hague-Visby Rules that all of them are mostly built on a assumption that the Bill of Lading to be used in the sea carriages of cargo (more on the Bills of Lading in 1.5.1 below). However other documents, mostly waybills and similar are also accepted as a proper papers.

1.4.3 Cover for the Carriage on other Means of Transport

The Rule 34.1.b³⁹ applies to the liability of the Club's Member arising whilst the cargo is outside of the entered (covered) Ship's custody. It deals with two possible ways of transportation:

- i) through or, as also referred to, combined or multimodal, i.e. involving types of transport other than the sea transport, and
 - ii) transshipment, i.e. realized only by sea transport, but involving different vessels,
- both governed by the relevant Bill of Lading '*or other form of contract*'.

The underlying principles behind such extension of cover derive from national laws⁴⁰ and international conventions relating to different modes of transport. In brief, they usually provide that the contractual carrier (i.e. the one issuing the Bill of Lading) is regarded responsible for the entire venture, even if the part of it is carried out by another, so called actual carrier.

However, when dealing with cases involving through or transshipment Bills of Lading it should be remembered that at least one part of the whole carriage has to be performed by sea and on the entered ship; the cargo should at least have been intended to be carried on the entered ship; the contract under which the liability of the Member arises should be approved by the P&I Club; and the damage or loss should occur in course of the discharge of the corresponding contract of carriage.⁴¹

³⁹ As cited on the page 17 above.

⁴⁰ For example, The Norwegian Maritime Code, Section 285 "The carrier's liability for a sub-carrier".

⁴¹ Gard Handbook on P&I Insurance. Edgar Gold. 5th edition. Arendal, 2002, p. 386.

As an example involving the loss during a through transportation, a case from a manual⁴² can be given: a container loaded with 3000 men's suits was carried under a through Bill of Lading from Columbia to the USA and discharged in New York. It was temporarily stored in the premises of a haulage company prior to the on-carriage to a final inland destination. But the container was stolen from these premises. A claim for USD 335,000 was initiated against the carrier. After the negotiations the alternative sum of USD 200,000 was agreed. The haulage company paid USD 100,000 as it was the maximum amount they were liable for under their own liability insurance. Thus, the carrier's P&I club was left with the remaining USD 100,000 to be covered.

When mentioning the '*other form of contract*' in the 34.1.b above we can think of a waybill which is a document generally similar to an ordinary or conventional Bill of Lading, but to the contrary to the latter, is a non-negotiable paper which thus cannot be transferred to the third parties. Accordingly, the carrier is obliged to deliver the cargo only to the person named as a consignee in the waybill or otherwise as instructed by the shipper, and has no obligation towards the person merely presenting the waybill at the destination port. One more peculiarity about the waybills is the area of their use: usually they are used in inner trade, both in geographical and commercial senses, i.e. they are actively employed by coastal traders or within large or structured/complex companies, between affiliates. Though the Rules of P&I clubs are based on either the Hague or the Hague-Visby Rules recognizing Bills of Lading as a central document for the contract of carriage, most waybills expressly incorporate one of these international conventions and make possible to apply P&I Rules to waybills as well.

When touching upon the issue of multimodal transportations it would be useful to extend our research to cover some general questions relating to the international regimes in this sphere.

With joint efforts of several international bodies: CMI, IMO, UNCTAD, ICC, EU, working on drafts, on the 24th of May, 1980, in Geneva, the United Nations Convention on International Multimodal Transport of Goods was adopted. It is either signed or ratified by 13 states (including

⁴² Gard Handbook on P&I Insurance. Edgar Gold. 5th edition. Arendal, 2002. Page 376, the Case Study.

Norway) as yet, while in total 30 parties needed to set it in force. Thus, below are given international instruments acting separately in area of air, road and rail transportations.

Air

In area of air transport the Convention for the Unification of Certain Rules relating to International Carriage by Air or simply the Warsaw Conventional of 1929, followed by numerous Protocols, exists. For the aim of modernization of the archaic and complicated system of the Warsaw Convention the Montreal Convention for the Unification of Certain Rules of International Carriage by Air was adopted in 1999. The cardinal achievement of the Montreal Convention is that it consolidates all the various Warsaw-system conventions in one single text. It therefore provides certainty as to the applicable international air convention and the contracting parties' corresponding rights and obligations.⁴³

Road

The road transportations are regulated by the Convention on the Contract for the International Carriage of Goods by Road or CMR of 1956, entering into force in 1961. It can be compared to Hague Rules as it was also aimed to standardize conditions related to the contracts used and questions of the carrier's liability.

Rail

The rail transport regime is governed by the Convention Concerning International Transport by Rail, so called COTIF. It was adopted in 1980, unifying the earlier two conventions (dealing with cargo and passenger liability) in this area and entered into force in 1996.

In comparison to the Gard Rules, for the purpose of the cover on other means of transport both Skuld and The Swedish Club's Rules expressly mention (exclude) also any liabilities, costs or expenses for loss, shortage, damage or delay occurring

⁴³ From the Report by the UNCTAD Secretariat "Carriage of Goods by Air. A Guide to the International Legal Framework" - http://www.unctad.org/en/docs/sdtetlb20061_en.pdf, p. 13, para 35.

- iii) during lightering operations, except insofar as lightering is approved by the Association or occurs in port and is customary (Skuld, Rule 5.2.3) /
in respect of cargo during contractual and customary lighterage (The Swedish Club, Rule 4, Section 2, para 2).

Lighter (also called stevedore barge) is a vessel carrying cargo between transporting ship and a port/coast.

Thereby, we have overviewed main prerequisites for the P&I cover for cargo liability. But even if all the moves are done correctly it might still does not work just because it is not the rule with the game. So, in the next section we will scrutinize the exclusions from the cover which will finally clarify the extent and the boundaries of the protection and indemnity provided by the clubs.

1.5 Exclusions

The first to be stressed in this section is the reservation made by the Association: *'provided that unless and to the extent that the Association in its discretion shall otherwise decide'*. Right here we see the reference to the possible application of the 'Omnibus Rule'.⁴⁴

Otherwise *'the cover under this Rule 34.1 [as considered above in 1.1 to 1.4] does not include'*:

1.5.1 Non-Production of a Bill of Lading

"liabilities, costs and expenses arising out of delivery of cargo under a negotiable Bill of Lading without production of that Bill of Lading by the person to whom delivery is made except where cargo has been carried on the Ship under the terms of a non-negotiable Bill of Lading, waybill or other non-negotiable document, and has been properly delivered as required by that document, notwithstanding that the Member may be liable under the terms of a negotiable Bill of Lading issued by or on behalf of a party other than the Member providing for carriage in part upon the Ship and in part by another mode of transport"

A Bill of Lading is a document bearing three key functions:⁴⁵

- it is a receipt for the goods, either received⁴⁶ or loaded,⁴⁷ issued by the master, the ship's agent or the charterer's representative to the shipper or his agent; it shows the conformity of the apparent condition of the cargo to its contractual description;
- it is evidence of the valid contract of carriage which either incorporates the full terms of the contract⁴⁸ or shortly refers to the latter by naming it;

⁴⁴ Rule 2.5 – The Cover.

⁴⁵ "Scandinavian Maritime Law. The Norwegian Perspective." Thor Falkander, Hans Jacob Bull, Lasse Brautaset. 2nd edition. Oslo, 2004, p. 259.

⁴⁶ "Received for shipment" Bill of Lading.

⁴⁷ "Shipped" Bill of Lading.

⁴⁸ Connaissance integral.

- it is a document of title giving the right of claiming the delivery of goods to the person legally holding the original Bill of Lading.

A Bill of Lading is a negotiable, i.e. transferable, document. This feature bears the main danger about it. It is very common practice (especially in oil trade) that cargo consignment is repeatedly re-sold in the course of the voyage. However, the carrier is authorized to deliver the cargo only to the first person who is able to present the original Bill of Lading⁴⁹ – either the named consignee or the rightful endorsee; it is so even if the person requiring the delivery of the cargo to him can prove his identity (in case of named consignee Bill of Lading). It is also to mention that the Bills of Lading are traditionally issued in number of three authentic originals “to the order of” or generally “to order” and also copies marked as “non-negotiable”, if so requested. So, it is evident that they can easily circulate and utter caution is required when endorsing, accepting or otherwise dealing with the Bills.

Consequently it is highly risky to decide to deliver the cargo without the Bill of Lading not being produced against the delivery. Moreover that the wrongful delivery is not covered by P&I clubs, being regarded as an utterly imprudent action. But in practice it quite often happens that the carrier is requested to deliver the cargo against the Letter of Indemnity which promises the protection against any possible liability arising out of such delivery without production of original Bill of Lading. Since the P&I clubs leave this question up to their Members, the latter are however advised to obtain a firmly secured Letter of Indemnity⁵⁰ against such delivery. For instance, Gard advises its Members to obtain a letter countersigned by a first-class bank / A-ranked bank and if the liability to be stated in the letter the limit to set to be not less than 200% of the CIF⁵¹ value of the cargo.

Here is an example from practice: the vessel carried a consignment of steel coils under the Bill of Lading “to order”. At the port of discharge the party pretending to be an authorized consignee

⁴⁹ Unless there is a reasonable suspicion that the other originals are possessed by completely different party(ies).

⁵⁰ See the Annex VI.

⁵¹ Cost, Insurance, Freight. International Commercial Terms.

could not present the original of the Bill. The master refused to deliver the cargo and ordered to discharge and store it in a warehouse until the original Bill was presented. The agents, though duly instructed, failed to comply with the master's directions and delivered the cargo to that person without presentation of the original Bill of Lading. The shippers raised a claim against the carrier as they have never been paid for the cargo. Consequently, the losses were born by the shipowner as the P&I cover was not available after such breach.

The situation is seen in other light if the delivery is done properly as a result of a carriage under a non-negotiable Bill of Lading or waybill or other similar. As already considered above, on the page 31, non-negotiable Bills and other similar papers do not represent the documents of title and are not the ultimate prerequisite to obtain the delivery of the cargo.

Even if the Member becomes liable under the terms of a negotiable Bill of Lading used later, after the lawful delivery under a non-negotiable Bill (in case of through transportation), the Association does not withdraws the cover.

1.5.2 Non-Production of a Non-Negotiable (Straight) Bill of Lading

“liabilities, costs and expenses arising out of delivery of cargo carried under a non-negotiable bill of lading, waybill or similar document without production of such document by the person to whom delivery is made, where such production is required by the express terms of that document or the law to which that document, or the contract of carriage contained in or evidenced by it, is subject, except where the Member is required by any other law to which the Member is subject to deliver, or relinquish custody or control of, the cargo, without production of such document”

This proviso is a novation in the Gard Rules, having been effective for about 1.5 years so far, from the 20th of February, 2008. The occasion for its' introduction was mainly a difference in some countries' approach to the interpretation of a straight Bills of Lading,⁵² the respective practice

⁵² I.e. issued directly “to A” as opposite to “to the order to A”, making it non-transferable (non-negotiable) under the laws of some countries.

adopted by carriers and finally some recent court decisions related to the nature of such Bills. To set is brief:⁵³ the straight Bills of Lading has been regarded as a non-negotiable document with sequential effects (non-production against delivery etc.); the belief however disproved by common law countries' courts; thus, for the purposes of the cargo delivery the straight Bills to be treated equally to the standard "to order" Bill of Lading.

1.5.3 Liability in excess of the Hague/Hague-Visby standard

"liabilities, costs and expenses which would not have been incurred by the Member if the cargo had been or could have been carried on terms no less favourable to the Member than those laid down under the Hague or Hague-Visby Rules, save where the contract of carriage is on terms less favourable to the Member than those laid down in the Hague or Hague-Visby rules solely because of the relevant terms of carriage being of mandatory application"

Under this exception the Association stipulates that it will not cover the Member's liabilities, costs and expenses which result from that fact of application of the terms of carriage less favourable to the carrier (and the Member respectively) that the standard of the Hague or the Hague-Visby Rules. The latter are considered the criterion of the maximum possible liability (including the extent of cover and the limitation ceiling) acceptable under the rules for cargo liability of P&I clubs.

There are lots of cases handled by the practitioners which involve the conflict between contractual and conventional terms for cargo carriage. The problem is caused by the fact that the commercial realities are constantly and rapidly outdating the former standards, which often do not fit the practical projects, pursuits and requirements of the parties.

However, taking into consideration the diversity of national laws and non-uniformity of international regimes in this area, P&I clubs admit the cases where their Members are mandatorily

⁵³ For the extended commentary see "Gard Guidance to the Statutes and Rules", Richard Williams, Arendal 2008 (6th ed) or <http://www.gard.no/pages/GardNO/Publications/Guidances/GardGuidanceToStatutesRules>, pp. 204-205.

required to accept the terms of carriage being less favourable to the carrier than the model level of the Hague and Hague-Visby Rules. For example, if the carriage is realized from or to the state where the Hamburg Rules, being much more stringent towards the carrier, or any other national laws of the similar nature are utilized under the compulsory operation of law, the Member will be given the cover under the Rule 34.1, proviso iii.

And to the contrary, the Association does not grant the coverage to the cases where the greater liabilities imposed on a carrier is a result of voluntary agreement between respective parties, i.e. where such level of liability could have been avoided or abated. For example, there is a practice that some car manufacturers dictate and require that any damage to their new vehicles to result in the car being written off and scrapped. In order to preserve the manufacturer's reputation they will not allow a repaired car to be sold, nor even stripped for spares. So, it can be a case that a carrier agrees to such provision to retain a client and keep him content. The P&I Club will consider such agreement as a voluntary one and will always limit the liability according the conventional standards.

Gard advised of the recent, yet not entirely resolved case where the P&I cover was declined in view of a charterparty clause providing that there will be an automatic payment to charterers (by way of deduction in freight) for any cargo shortage over a certain level. This clause effectively removed all limitations and defences available under the Hague and the Hague-Visby Rules. Here again the proviso in question has been applied as to support the negative decision.

1.5.4 Different port of discharge

“liabilities, costs and expenses arising out of the discharge of cargo at a port or place other than that stipulated in the contract of carriage”

It is natural that Gard will not cover its' Members for liabilities arising out of a breach of a contract that represents the discharge of cargo at a port or place different from that provided by the contract

of carriage. However it is the practice to insert so called ‘liberty clause(s)’⁵⁴ into contracts of carriage which gives the carrier a right to deviate in extraordinary circumstances, for example, war actions, epidemic etc. But acting to the contrary to those contractual provisions deprives the carrier of the benefits otherwise exercisable under the Hague or the Hague-Visby Rules.

Though the Association strictly excludes the alternative discharge from its coverage, it advises the Members, if circumstances force to do so, to obtain a firm instruction from their cargo interests or, if the latter is unavailable, a secured letter of indemnity from the receiver or other third party and also demand a full set of original Bills of Lading to be presented.

1.5.5 Failure to (timely) arrive and to load cargo

“liabilities, costs and expenses arising out of the failure to arrive or late arrival of the Ship at port of loading, or the failure to load any particular cargo or cargoes in the Ship, other than liabilities, costs and expenses arising under a Bill of Lading already issued”

This is often the situation when due to the poor arrangement a ship becomes overbooked and has no space to load the part or even the whole consignment of a cargo. Another common reason may be an inappropriate weather condition. Anyway, the failure to load the cargo as well as the failure to arrive or arrive in time, bears a real risk for the expecting cargo to be spoiled or delayed. As the above situation does not fall under the concept of mutually shared risks, as far as arises from the Member’s individual agreements and arrangements, it is excluded from the P&I cover.

⁵⁴ For instance, the charterparty between Select Commodities Ltd and Valdo SA (The “Florida”) contained the following liberty clause: “In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Owner or the Master is likely [...] to make it unsafe, imprudent, or unlawful for any reason [...] to discharge the cargo at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port, the Owner or the Master [...] whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the cargo there, may discharge the cargo into depot, lazaretto, craft or other place; or the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the Master or the Owner may consider safe or advisable under the circumstances, and discharge the cargo, or any part thereof, at any such port or place or the Owner or the Master may discharge and forward the cargo by any means at the risk and expense of the cargo. [...] Such discharge shall constitute complete delivery and performance under the contract and the Owner shall be freed from any further responsibility.” The case considered by Mr. Justice Tomlinson. Lloyd’s Law Reports, 1 Lloyd’s Rep. 1.

There is an exclusion from this exclusion, i.e. the approved cover for those cases where the Bill of Lading has already been issued for the cargo intended to be loaded on a ship. As usual, the unloaded cargo may be left behind because of the negligence of longshoremen, terminal operators or other servants of the carrier.

1.5.6 Ad valorem Bills of Lading

“liability arising out of carriage under an ad valorem Bill of Lading where a value of more than USD 2,500 (or the equivalent in any other currency) per unit, piece or package is declared and in the case of Bills of Lading subject to the Hague or Hague-Visby Rules where a value of more than USD 2,500 (or the equivalent in any other currency) per unit, piece or package is also inserted in the Bill of Lading, to the extent, in any such case, that such liabilities, costs and expenses exceed in the aggregate USD 2,500 (or the equivalent in any other currency) in respect of any unit, piece or package”

As once mentioned above, on the page 25, this is the Bill of Lading declaring the exact value of the cargo which is inserted in the Bill upon the request of the shipper. As the P&I clubs base their cover upon comparatively widely recognized international conventions (the Hague and the Hague-Visby Rules) which set the certain limitation to the permissible compensation extent, they do not grant any extra cover in excess of those conventional limits. However, the Association allows the limit of USD 2,500 (or its' equivalent in other currency as may be agreed) per unit, piece or package.⁵⁵

The Note beneath the proviso says that Gard is able to act as an agent in order to arrange an additional cover for those shipments involving the carriage of the cargo with declared value.

⁵⁵ That is, for instance, 2.5 times more than the limit provided under the Hague-Visby Rules (666.67 SDR) (the average rate USD/SDR as per August 2009).

As the Gard's representative advised, in practice such Bills of Lading are exclusively rare event. No one in the Association, working with dry cargo claims, could remember relevant cases to be even declared during the last 20 years (the maximum of experience of an advising person).

1.5.7 Carriage of valuables

“liabilities, costs and expenses arising out of the carriage of specie, bullion, precious or rare metals or stones, plate or other objects of a rare or precious nature, bank notes or other forms of currency, bonds or other negotiable instruments, whether the value is declared or not, unless the Association has been notified prior to any such carriage, and any directions made by the Association have been complied with”

The types of valuables, precious items and instruments listed in this proviso are traditionally excluded from any kind of insurance, be it property, cargo or liability insurance. Similarly it is not possible to obtain such cover with P&I clubs. However, the latter admit some exceptional cases when such shipments of valuables are notified in advance, i.e. prior to the conclusion of the contract of carriage, agreed in details (as per security measures etc.) and complied with the insurer's instructions and guidelines. If so done, the carriage of valuables will be insured.

1.5.8 Shortage of cargo upon discharge

“liability for shortage arising from failure to discharge all cargo on board unless the Member can show that all reasonable and applicable discharge methods were attempted”

The classical example of the situation giving rise to such claims, called ROB⁵⁶ cargo claims, is the carriage of viscous oil products that usually remain on tanks' walls and pipelines.

⁵⁶ ROB stands for 'remaining on board'.

The main duties imposed on the carrier here are to make all reasonably possible endeavors and to use all appropriate methods to discharge the cargo in full (to pump the residuals if follow the reference to oil product cargo above). Save this requirement is complied with, the claim can be accepted and the liability for the shortage covered.

1.5.9 Issue of ante-dated and post-dated Bills of Lading

“liabilities, costs and expenses arising out of the issue of an ante-dated or post-dated Bill of Lading, waybill or other document containing or evidencing the contract of carriage, that is to say a Bill of Lading, waybill or other document recording the loading or shipment or receipt for shipment on a date prior or subsequent to the date on which the cargo was in fact loaded, shipped or received as the case may be”

As the title itself shows, it is clear that an ante-dated Bill of Lading is one stating a date which is prior to a correct date of either receipt or shipment or loading, while a post-dated Bill reflects a date which is subsequent to the correct date of such actions.

The alteration of any essential characteristics of the Bill of Lading is considered a fraud. The date of the Bill is an essential feature of the documents as far as it may be decisive in respect of the price of cargo (for example, when goods are loaded during a transition period from one price regime, or maybe even customs regime if it is relevant for the particular type of the contract of carriage, to another); it also can serve as a proof for timely (in terms of particular contract of carriage) shipment or loading.

The same applies to other documents containing or evidencing the contract of carriage, as may be a waybills and similar.

The Association in its commentaries⁵⁷ points out two problematic moments connected with inaccurate or wrongful dating of the Bills of Lading.

The one is a shipping or loading of multiple units of cargo constituting one consignment. In this case each individual Bill should be dated with its own true date of either shipping or loading.

Another ambiguous issue is connected to the commingling which is common in the industry. In case of phased (step-by-step) loading of cargo on board in different ports it is usual to indicate the date of the last loading which is also equalized to fraud and a denial of the insurance cover as a consequence.

1.5.10 Incorrect description of the cargo

“liabilities, costs and expenses arising out of the issue of a Bill of Lading, waybill or other document containing or evidencing the contract of carriage, known by the Member or the master to contain an incorrect description of the cargo or its quantity or its condition”

The Bill of Lading is issued upon a respective request of the shipper. The information provided by the latter as to the quantity/number/volume/weight, apparent condition, mode of packing etc. of the goods, is entered into the Bill by the issuer (typically the carrier in person or the master as an authorized representative). While the carrier is not required to be an expert in all kinds of cargo carrying onboard, he is required to apply general knowledge and experience in addition to common sense and reasonable diligence to assure that the declared parameters are in conformity with the presented cargo.

The carrier inspects only the external condition of the cargo, but if even this outer test raises any reasonable grounds for suspecting inaccuracy or a probability of any further, non-visible, deficiencies, he should rather protect himself by putting some reservation in the Bill, like: “quality

⁵⁷ Gard Guidance to the Statutes and Rules. Richard Williams. 6th edition. Arendal, 2008, p. 210.

unknown”, “condition unknown”, “weight unknown”, “said to contain” etc. It is highly advisable that the carrier should not rely upon the shipper’s argument or persuasion and issue the ‘clean Bill of Lading’. The Letters of Indemnity usually offered by shippers in return for the ‘clean’ Bills of Lading are deceptive in their nature and generally unenforceable.⁵⁸

In addition to the details as above, for instance, The Swedish Club in its Section 3 – Liabilities for bill of lading particulars, mentions also the port of loading or discharge as to being evidenced correctly.

1.5.11 Deviation

“liabilities, costs and expenses arising out of a deviation or departure from the contractually agreed voyage or adventure which deprives the Member of the right to rely on defences or rights of limitation which would otherwise have been available to him”

To fall under the proviso entirely the deviation should meet the following ‘requirements’ simultaneously:

- The deviation should be unreasonable and unjustifiable. To put it simple, the most correct route is considered to be the normally used, customary one. If a vessel veers from its’ course for bunkering this, of course, will not constitute a deviation. Neither the divergence because of objective circumstances (for example, potentially dangerous weather) will be regarded as a deviation. Nor doing so in order to realize necessary repairs. Even the losing the right route because of negligent navigational error is not seen as a deviation because it lacks the factor of intention. Also always justified are deviations forced under a consideration of safety: of a vessel, of the cargo, of a life or of the property.

⁵⁸ As per “Gard Guidance to the Statutes and Rules”, Richard Williams, Arendal 2008 (6th ed) or <http://www.gard.no/pages/GardNO/Publications/Guidances/GardGuidanceToStatutesRules>, pp. 211, lines 26-27.

- The deviation should be only in the interest and for the sole benefit of the carrier or shipowner. Otherwise, if it benefits other involved parties as well (for example, cargo interests) or generally is necessary for the success of the whole adventure, it will not constitute deviation.
- The deviation should deprive the Member of the rights for defenses or limitation which would have been available to him if he had not deviated.

As we remember from the Chapter II, the deviation was an indirect reason for enlarging the competence of protecting clubs. Though in the case of “Westenhope” which deviated without justification from the scheduled route the club provided the partial compensation for the lost cargo, this type of the breach of the terms of the agreed voyage was set as an explicit exclusion as in respect of the P&I insurance cover.

Some half-century later in the case *Stag Line Ltd v Foscolo Mango & Co.* (1932) the rightful deviation was described as follows:

‘What departure from the contract voyage might a prudent person controlling the voyage at the time and maintain, having in mind all relevant circumstances existing at the time, including the terms of the contract and interests concerned, without obligation to consider the interest of any one as conclusive.’⁵⁹

In addition to the first bulleted point above it should be noted that the geographical sense of deviation is the classical understanding of it, while laws of some states (for example, the USA) extend the notion to apply to other terms of the contract of carriage as well. Thus, deck carriage (if not allowed under custom or convention), employing the vessel other than agreed, storage peculiarities, unauthorized transshipment etc. will also be considered an infringement or breach and form a deviation.

⁵⁹ Gard Handbook on P&I Insurance. Edgar Gold. 5th edition. Arendal, 2002, p. 399.

Here is a reference to one example from a court practice illustrating an unauthorized and reckless stowage on deck; though it is not a Scandinavian one, but from New Zealand: in the case *Nelson Pine Industries Ltd. v. Seatrans New Zealand Ltd. (The "Pembroke")*⁶⁰ the machinery – a new press for MDF fiberboard plant, carried from Bremerhaven, Germany, to the port of Nelson, New Zealand, was stowed on deck despite an express clause in the contract which required the under-deck carriage. The carriage had place in autumn (1990), and the ship encountered violent seas and weather en route. On arrival the cargo was inspected. The tarpaulin cover to the open top container with the componentry was found to be torn. Three of the packing cases were very wet and the details inside showed signs of rust – the machinery suffered salt-water rusting. The losses were estimated as much as USD 258,771.61. The Judge considering the case, Mr. Justice Ellis, concluded that the carrier, and in particular the master and its agent, knew that damage to some of the machinery carried on deck was probable but still recklessly proceeded with such stowage. Thus, any limitation was refused.

Interesting to note that the Rules of The Swedish Club deal with both deck cargo and deviation. They contain a separate section (Section 8) within the Rule 4 (Liabilities in respect of cargo) for deviation *‘whether geographical or other forms of deviation such as by delay or by non-performance’*, while the issue of deck cargo is regulated separately, within the Section 1:

‘For deck cargo, cover is afforded by the Association provided that the vessel, cargo and containers and similar articles of transport are suitable for deck carriage in all the circumstances and that the bill of lading, waybill or other document containing or evidencing the contract of carriage contains a valid liberty clause to carry such cargo on deck and either

(a) states that the cargo is being so carried and excludes all liability for loss or damage to such cargo or;

(b) makes the carriage subject to the Hague Rules or the Hague-Visby Rules.’

⁶⁰ Lloyd's Law Reports , [1995] 2 Lloyd's Rep. 290.

Returning to the bulleted 'requirements' above and extending the last point above we might conclude that if the deviation, otherwise falling under the definition (i.e. being unjustifiable), does not affect carrier's rights to avail himself of limitation and other benefits, the cover under the proviso xi will still be provided to the Member.

The Note inserted after the proviso stipulates that the Association can provide or assist in arranging additional cover for deviation. Terms and conditions to be worked out by the Association's underwriting department in each particular case and agreed with the interested Member.

1.5.12 Somewhat about exclusions of other clubs

There are few exclusions stated in Skuld's Rules which are not found in the Rule 34. For example, Rule 5.2.18 leaves out the cover for *'loss of or damage to cargo carried on a semi-submersible heavy-lift vessel or any other vessel designed exclusively for the carriage for heavy-lift cargo, unless the cargo is carried under a contract which has been approved by the Association'*.

Also the Rule 5.2.7 emphasizes the general approach – that *'the standard insurance shall not cover liabilities, costs and expenses arising out of [...] carriage of cargo on terms which are contrary to terms required by the Association'*.

In addition there is no special attention given to the paperless trade in the Gard's Rule 34. However the Rule 4, Section 5 of the Swedish Club's Rules and Rule 5.2.17 of Skuld's Rules specifically exclude the cover for participation in or use of paperless, i.e. electronic, trading.

There are two senses in which the terms 'paperless trade' and 'electronic document' (typically the Bill of Lading) can be used: the one is related to the type of communication by which the electronic transmission are done – this one, of course, does not represents any concerns and fears for P&I clubs; another meaning is the creation of electronic data which takes place of the 'old-fashioned' paper Bill of Lading, making it impossible for existing regimes of international conventions to apply. As far as the Rules of the International Group of P&I Clubs are based on such conventions it is neither beneficial to clubs, nor advisable to Members to use these electronic systems for exchange of the Bills of Lading.

Gard and The Swedish Club provide the following definition for the electronic trading system:

'An electronic trading system is any system which replaces or is intended to replace paper documents used for the sale of goods and/or their carriage by sea or partly by sea and other means of transport and which:

(a) are documents of title, or

(b) entitle the holder to delivery or possession of the goods referred to in such documents, or

(c) evidence a contract of carriage under which the rights and obligations of either of the contracting parties may be transferred to a third party.’

Skuld gives the following wording for the paperless trading:

‘(i) participation in or use of any system or contractual arrangement the prominent purpose of which is to replace paper-based documentation in shipping and/or international trade with electronic messages, including, without limitation, the Bolero system,

(ii) Use of a document containing or evidencing a contract of carriage which is created or transmitted under such a system or arrangement, or

(iii) The carriage of goods pursuant to such a contract of carriage.’

So, the most widely spread is the system called Bolero. It was founded in 1998 by SWIFT – a software company, and the Through Transport Club (or TT Club) – a company providing insurance and risk management services to transport and logistics industries. The purpose declared by Bolero is “to enable paperless trading between buyers, sellers, logistics, banks, agencies and customs”.⁶¹

The main restriction about this system is its’ close nature. It works only if all parties of the operation are using Bolero.

Another restricting moment is the low level of liability. The maximum liability that Bolero may bear towards the user in respect of any one event, or series of event, is USD 100,000.

Moreover Bolero is designed with a focus on cargo interest which naturally are always opposite to those of carriers’ ones.

⁶¹ From Bolero’s web-site, page http://www.bolero.net/company/corporate_overview.html.

As a result it is not surprising that P&I clubs put provisions excluding their liability for any losses, costs or expenses arising out of use or participation in any type of electronic trading system, unless this is agreed in advance, to the extent that such liability would not have arisen under a paper trading system, again unless the particular club decides otherwise within its' discretion.

1.6 What Else Is Covered

1.6.1 More cover within the Rule 34 (Delay)

As stated in the introductory section of the current Chapter, the Rule 34 – Cargo Liability – consists of two sections. The first one we tried to cover above. Extending the aforesaid above, in section 1.3.2 Delay, the second section of the Rule 34 provides liability for the loss caused by delay only if such liability is stipulated by compulsorily applicable law.

This cover to be distinguished from ‘failure to arrive or late arrival of the Ship at the port of loading’ which also bears real risk for cargo to be delayed, but which is excluded by the power of proviso iv of the Rule 34.1.

The rules of mandatorily applicable law cannot be avoided by inserting exemption clauses into the contracts of carriage or charterparties. Thus, for instance, the Hamburg Rules specially deal with this matter and consider that if there is no special agreement regulating this issue, ‘*delay in delivery occurs when the goods have not been delivered at the port of discharge [...] within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case*’.⁶² Further the Convention states that the goods may be treated as lost if they have not been delivered within 60 consecutive days following the expiry of the time for delivery’⁶³ as per the previous citation. Neither the Hague, nor the Hague-Visby Rules guarantee any cover for delay, either when the exact date of delivery was agreed upon or not.

1.6.2 Additional cover

Though, as already noted in the very beginning, the P&I insurance is a named risk insurance, the P&I clubs retain the right to extend the cover in cases especially agreed in advance. Thus, Gard

⁶² Art. 5. -2.

⁶³ Art. 5. -3.

provides in the Appendix I to the Rules, para 4, that it is possible to grant other additional insurances for different liabilities and risks not covered under the standard provisions.

Skuld has a special Rule 5.4 dealing with such additional covers. It lists in detail which exclusion could fall under the additional insurance. For example, if expressly agreed separately the insurer can arrange an extra cover for liabilities for cargo loss, shortage or damage which occurs earlier or later than the stipulated period of the carrier's custody, i.e. for the purpose of Skuld's Rules – more than 21 days before loading or more than 21 days after discharge from the vessel; also additionally insured can be valuable, precious cargo (works of art, rare metals and stones, currency, financial instruments etc.).

As far as the listing of the Rule 5.4 is exhaustive, it logically derives that there still are absolute exclusions which the P&I insurer will never offer its Members for coverage, such as, for example: failure to arrive or late arrival to the port of loading or failure to load or delay in loading;⁶⁴ issuance of the ante-dated or post-dated Bill of Lading or that one containing incorrect descriptions; discharge of the cargo at an alternative (non-contractual) port or place; failure to discharge all the cargo on board; misdelivery of cargo (either without production of a negotiable Bill of Lading or to a wrong person – in case of non-negotiable Bill of Lading or similar document) etc.

1.6.3. Extra handling costs

I do not intent to go much inside to investigate the Gard's Rule 35 – Extra handling costs. The reason for it is that this Rule mainly has a purpose to extend a cover for hull insurance policies. But I would like just to mention some distinctive points around it as far as it also has some relation to the Association's liability for cargo as well.

⁶⁴ This time element related matters (time of arrival, period of loading) are considered to be a part of an operational process of a Member and thus forming his own risk.

The principal peculiarity is that under the Rule 35 Gard provides a cover for extra costs and expenses which are suffered **directly by its' Members** and not by the third parties as is the case with cargo liability under the preceding Rule 34.

There are two fields of activities for which extra costs are provided:

- i) handling and discharge, and
- ii) discharge and disposal

- i) Handling and discharge become necessary when there is damage either to ship or to cargo. Actually, the cover under this part of the Rule 'switches on' if costs and expenses are '***necessarily consequent***' upon that, i.e. they are directly caused by such damage.

The type of the damage to the ship must fall under the coverage provided by the standard hull and machinery policy, even though being unenforceable because of being within the limits of deductible in some particular cases. Thus, such damage might encompass the damage to the ship's hull, equipment and machinery caused by a typical marine peril (fire, collision, striking etc.).

The damage to cargo is usually understood as mixing, drench, hardening etc. that requires segregation, drying, breaking up and similar measures.

It is important that costs and expenses incurred by the Member should be **extraordinary**, not envisaged in normal course of cargo processing operations, **or** at least **supplementary** to those operations. They cannot be a '*part of the daily running costs and expenses of the Ship*'⁶⁵ or in other words form the Member's operational expenses. Nor can they fit the normal expenses connected to such operations, they should be over and above such normal costs (for the due comparison previous records and information are usually required).

⁶⁵ Rule 35.b.iii.

- ii) Discharge and disposal come to the place when cargo is rejected by the consignee. The reason for the rejection is irrelevant, though in most cases it is damage to cargo.

There should be no right of recovery of such costs and expenses from any other party. If, for example, the Member is entitled to recourse against the charterer under the existing charterparty, the Association will not participate in settlement of extra handling costs.

Ending the Chapter III we can state that the balance between categories 'cover' and 'exclusions' is quite clear and **firm**, though at the same time **flexible** enough to fit special circumstances and needs of the interacting parties.

CHAPTER IV - CONCLUSION

So, the examination of the extent of the cover provided by P&I clubs in respect of cargo liability of their Members is now completed. I have discovered many nuances, lot of interrelated factors which form the coverage.

When I was just thinking about the possible area and framework of my research and starting working on materials, I was wondering whether P&I insurance was so original and actual; my conjecture was that it overlaps in part with other types of marine insurances. Now it is obvious for me that the cover offered by P&I clubs is **unique** and it does not repeat or intersect with other insurance existing in the field (hull, cargo etc.).

The cover by P&I clubs is **complex**, but maybe just as any other type of insurance. The main supportive argument for this statement is that the P&I cover is not triggered if there is a right and prospects of a possible recovery under any other insurance. Since the P&I insurance, as an independent insurance line, was created as a supplement to those covers which were excluded under traditional hull policies, it has been enriching the extent of its cover by peculiar, tailor-made solutions⁶⁶ which were excluded under other existing standards. If speaking, for instance, about Gard, nowadays this principle is secured by its Rule 71 – Other insurance – of the Part V on general limitations. So, the activation of P&I cover is connected to existence and operation of other insurances. It implies not only other lines insurances, but double insurance within one and the same risk category as well.

When and if it is proved that there will be no overlapping with other insurers, the next filtration stage is to be passed – the conduct of the Member. The Association will not provide the cover for liabilities, losses, costs or expenses which are caused or linked to the Member's wilful misconduct, being either an intentional act or a deliberate omission.⁶⁷ Also out of cover are of course those

⁶⁶ Like covering ¼ of the damage to hull which was falling out of the standard hull insurance policies.

⁶⁷ Gard Rule 72 – Conduct of Member.

liabilities etc. arising out of unlawful activities of the Ship, such as: contraband, hazardous trade, unsafe voyages etc.⁶⁸

After the assessment of these general prerequisites comes debate around the particular rule relating to the type of P&I cover. In case of our interest in question it is a cover for the Member's cargo liabilities. Besides the matter of solely fitting the frame for the cover and exempting the exclusions, other issues may arise, for example: jurisdiction, relevance of international regime, applicable laws etc. And finally, the deductible is naturally to remember as well. Gard has its standard deductibles set in Appendix V. Here we see that, for example, the deductible for *'liabilities, costs and expended covered under Rule 34 and arising out of any one cargo carrying voyage'* amount to USD 17,000.⁶⁹

Thus, it seems quite sophisticated to put the details of the puzzle altogether at once. But still, as already mentioned, the P&I insurance is both steady and adaptable to the varying everyday conditions.

Will the P&I insurance undergo any significant changes in the nearest future (for instance, in connection of new possible conventional reality, I mean the Rotterdam Rules)? I do not think so. The international network of P&I clubs is co-ordinated smoothly and is operating effectively; the regulations related to the legal field, the scope and the extent of the provided cover are well-burnished and harmonized. This mechanism will not be influenced and altered so easily and cardinally. However, I believe, that if there are some new trends in the world shipping industry as a whole, some innovative changes may be also introduced in the rules of P&I clubs. Because actually it has always been a characteristic feature of the P&I insurance – to keep the pace with times while serving the needs of this truly global industry.

⁶⁸ Gard Rule 74 – Unlawful trades etc.

⁶⁹ For example and comparison, the primary deductible for the same liabilities stated by Skuld is USD 10,000 (Appendix 4 - Deductibles).

Bibliography

List of Judgements/Decisions

Nelson Pine Industries Ltd. v. Seatrans New Zealand Ltd. (The "Pembroke"). Lloyd's Law Reports, [1995] 2 Lloyd's Rep. 290.

Select Commodities Ltd and Valdo SA (The "Florida"). Lloyd's Law Reports, [2007] 1 Lloyd's Rep. 1.

Treaties/Statutes

Gard Statutes and Rules 2009.

Skuld Statutes and Rules 2009.

The British Marine Insurance Act 1906

The Hague Rules. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Brussels, 25 August 1924

The Hague-Visby Rules. The Protocol to the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading. Visby, 23 February 1968

The Hamburg Rules. United Nations Convention on the Carriage of Goods by Sea. Hamburg, 31 March 1978

The Rotterdam Rules. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea. Rotterdam, 11 December 2008

The Swedish Club Rules for P&I Insurance 2009/10.

Secondary Literature

Gard Guidance to the Statutes and Rules. Richard Williams. 6th edition. Arendal, 2008

Gard Handbook on P&I Insurance. Edgar Gold. 5th edition. Arendal, 2002

Handbook on P&I Insurance. Sjur Brækhus & Alex Rein. 3rd edition by Jeremy Kingsley.

Introduction to P&I. Christopher Hill, Bill Robertson, Steven J. Hazelwood. 2nd edition. London New York Hong Kong, 1996

Law of International Business in Australasia. Robin Burnett, Vivienne Bath. 4th edition. Sydney, 2009

Principles of Law Relating to International Trade. Nicholas Kouladis. Springer, 2006

Scandinavian Maritime Law. The Norwegian Perspective. Thor Falkander, Hans Jacob Bull, Lasse Brautaset. 2nd edition. Oslo, 2004

Electronic Sources

www.igpandi.com

www.i-law.com

www.law.com

www.un.org

www.uncitral.org

www.unctad.org

www.wikipedia.org

Personal communications

Andreas Brachel, Claims Executive / Lawyer, Gard. E-mails and telephone conversation. 02 August - 25 August 2009.

Patrik Almström, Claims Executive, Team Göteborg I, The Swedish Club. E-mails. 02 August - 17 August 2009.

Annex

- I** The Gard Rule 35 – Extra Handling Costs
- II** The Skuld Rules 5.1-5.2
- III** The Swedish Club Rules 4-5
- IV** Gard's Standard Form Letter of Indemnity
- V** View of the European Shippers' Council
- VI** A Position Paper of the International Chamber of Shipping

Gard Rules 2009

PART II. P&I Cover

Rule 35 | Extra handling costs

The Association shall cover extra costs and expenses, in excess of the costs and expenses which would otherwise have been incurred:

a) in handling and discharging cargo where the extra costs and expenses are necessarily consequent upon damage to the cargo or damage to the Ship which would have been covered by the Hull Policies had the Ship been fully insured on standard terms without deductible;

b) in discharging or disposing of cargo which has been rejected by the consignee, provided that there shall be no recovery under this Rule 35 of extra costs and expenses which:

i) the Member has recourse to recover from any other party; or

ii) are excepted from cover under Rule 46(a), or

iii) form part of the daily running costs and expenses of the Ship.

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Part III
P&I Cover

5. Cargo Liability

5.1 Cover

5.1.1 The standard insurance shall cover the member's liability for cargo loss, shortage, damage, delay or other responsibility occurring in relation to the carriage of cargo on the entered vessel.

5.2 Exceptions

However the standard insurance shall not cover liabilities, costs and expenses arising out of any of the following,

5.2.1 failure to arrive or late arrival of the vessel at the port of loading, other than any such liabilities, costs and expenses arising under a bill of lading already issued.

5.2.2 loss, shortage, damage or delay occurring prior to loading, except insofar as loss, shortage or damage occurs in the port of loading within 21 days of the date on which loading of the cargo on the vessel commences or should commence,

5.2.3 loss, shortage, damage or delay occurring whilst the cargo is in the custody of another carrier or during lightering operations, except insofar as lightering is approved by the Association, or occurs in port and is customary,

5.2.4 failure to load or delay in loading any particular cargo in the vessel, except insofar as liabilities, costs and expenses arising under a bill of lading already issued,

5.2.5 the issue of a bill of lading, waybill or other document containing or evidencing the contract of carriage which

a) is antedated or postdated,

b) contains a description of the cargo or its quantity or condition which the member or an officer of the vessel knows is incorrect, or

c) should be claused to show that the cargo is carried on deck and is not so claused,

5.2.6 carriage of cargo on terms less favourable to the member than the Hague or Hague-Visby Rules, except insofar as the contract of carriage is on less favourable terms solely because of the compulsory application of the Hamburg Rules by virtue of the place of loading or discharge,

5.2.7 carriage of cargo on terms which are contrary to terms required by the Association, 5.2.8 carriage of cargo under a contract providing for carriage partly in the entered vessel and partly by some other means of transport, except insofar as the Association approves the contract,

5.2.9 carriage of cash, banknotes or other forms of currency, bullion, works of art, precious or rare metals or stones, plate or other objects of a rare or precious nature, specie, bonds or other negotiable instruments,

5.2.10 carriage under an ad valorem bill of lading, waybill or other document containing or evidencing the contract of carriage in which a value in excess of USD 2,500 per unit, piece or package is declared or stated, except insofar as liability does not exceed USD 2,500 per unit, piece or package,

5.2.11 deviation or departure from the contractually agreed voyage or adventure which deprives the member of the right to rely on defences or rights of limitation which would otherwise be available,

5.2.12 delay, except insofar as liability arises because of the application of the Hague or Hague-Visby Rules or compulsory law,

5.2.13 discharge of the cargo at a port or place other than the port or place provided for in the contract of carriage,

5.2.14 failure to discharge all the cargo on board, except insofar as the member takes all reasonable steps to discharge the cargo,

5.2.15 delivery of cargo

a) carried under a negotiable bill of lading or similar document of title without production of that bill of lading or document by the person to whom delivery is made, or

b) carried under a non-negotiable bill of lading, waybill or similar document,

(i) to a person other than the person named in such bill of lading, waybill or document as the person to whom delivery should be made except where delivery is made under a waybill to a person lawfully nominated by the shipper as the person to whom delivery should be made, or

(ii) without production of the original document by the person to whom delivery is to be made where there is a legal obligation to produce such document, except where there is also a requirement under any other applicable law obliging the carrier under the contract of carriage contained in or evidenced by document to deliver or relinquish custody or control of the cargo without production of such document.

5.2.16 loss, shortage, damage or delay occurring on land after discharge, except insofar as it occurs in the port of discharge within 21 days of discharge from the vessel,

5.2.17 participation in or use of an electronic trading system (as defined in Appendix 1) unless such system has been approved in writing by the Association, or

5.2.18 loss of or damage to cargo carried on a semi-submersible heavy-lift vessel or any other vessel designed exclusively for the carriage of heavy-lift cargo, unless the cargo is carried under a contract which has been approved by the Association (as referred to in Appendix 6).

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RULE 4 Liabilities in respect of Cargo

Section 1 Cargo liabilities

Liabilities, costs or expenses for loss, shortage, damage or other responsibility relating to cargo before, during or after the contracted transport by the entered ship.

The cover afforded by the Association is limited to a period starting fourteen days before the commencement of the transport and ending fourteen days after its completion.

For cargo which is the property of the Member, cover is provided by the Association to the same extent as if the cargo had been the property of a third party.

For deck cargo, cover is afforded by the Association provided that the vessel, cargo and containers and similar articles of transport are suitable for deck carriage in all the circumstances and that the bill of lading, waybill or other document containing or evidencing the contract of carriage contains a valid liberty clause to carry such cargo on deck and either

- (a) states that the cargo is being so carried and excludes all liability for loss or damage to such cargo or;
- (b) makes the carriage subject to the Hague Rules or the Hague-Visby Rules.

Where the value of any cargo is declared in the bill of lading, waybill or other document containing or evidencing the contract of carriage, the liability of the Association is limited to the amount per unit of such cargo which follows from regulations issued by the Association.

Section 2 Cargo liabilities during through transports and lighterage

Liabilities, costs or expenses in respect of cargo during through transports while the cargo is in the care of another carrier provided that the transport is performed under a through or transshipment bill of lading or other document of carriage approved by the Association providing for carriage partly to be performed by the entered ship.

Liabilities, costs or expenses in respect of cargo during contractual and customary lighterage.

Section 3 Liabilities for bill of lading particulars

Liability for incorrect or incomplete description of the cargo or other incorrect statements in a bill of lading, waybill or other document containing or evidencing the contract of carriage, except that there shall be no recovery in respect of liabilities, costs or expenses arising out of

(a) the issuance of an ante dated or post dated bill of lading, waybill or other document containing or evidencing the contract of carriage, which records the loading, shipment or receipt for shipment on a date prior or subsequent to the date on which the cargo was in fact loaded, shipped or received,

(b) the issuance of a bill of lading, waybill or other document containing or evidencing the contract of carriage with a description of cargo, its quantity or condition, or of its port of loading or discharge which the Member or the Master of the entered ship knew to be incorrect.

Section 4 Liabilities for delivery of cargo

Liability for misdelivery of cargo except

(a) as regards a negotiable bill of lading or similar document of title when delivery has been made without the production of that Bill of Lading or document by the person to whom delivery is made,

(b) as regards a non-negotiable bill of lading, waybill or similar document when delivery has been made to a person who is neither named in the document as the person to whom delivery should be

made nor, as regards waybill, is lawfully nominated by the shipper as the person to whom delivery should be made,

(c) as regards a non-negotiable bill of lading, waybill or similar document when delivery has been made without production of that bill of lading, waybill or document by the person to whom delivery is made, where such production is required by the express terms of such bill of lading, waybill or document or by operation of law.

Section 5 Paperless trading

Unless the Association otherwise decides there shall be no recovery from the Association in respect of liabilities, losses, costs and expenses arising from the use of any electronic trading system, other than a system approved by the Association, to the extent that such liabilities, losses, costs and expenses would not (save insofar as the Association in its sole discretion otherwise determines) have arisen under a paper trading system.

An electronic trading system is any system which replaces or is intended to replace paper documents used for the sale of goods and/or their carriage by sea or partly by sea and other means of transport and which:

- (a) are documents of title, or
- (b) entitle the holder to delivery or possession of the goods referred to in such documents, or
- (c) evidence a contract of carriage under which the rights and obligations of either of the contracting parties may be transferred to a third party.

A “document” shall mean anything in which information of any description is recorded including, but not limited to, computer or other electronically generated information”.

[...]

Section 8 Deviation

The Association shall not be liable to compensate the Member for liabilities, costs or expenses for which the Member has become liable as a consequence of a deviation whether geographical or other forms of deviation such as by delay or by non-performance.

Where the Member has reported the deviation to the Association as soon as he became aware of it, the Association may at its discretion agree to cover the Member fully, partly or against special conditions or an additional premium. Where the Association finds it necessary for the Member to arrange a special insurance to cover the deviation, the Association may agree to arrange such a cover on the Member's behalf and at his expense.

RULE 5 Liabilities in respect of Delay

Liability pursuant to mandatory rules of law for loss caused by delay in the carriage by the entered ship of passengers, luggage and cargo.

Standard Form Letter of Indemnity
to be given in return for delivering cargo
without production of the original Bill of Lading

To: [insert name of Owners]

[insert date]

The Owners of the [insert name of ship]

[insert address]

Dear Sirs

Ship: [insert name of ship]

Voyage: [insert load and discharge ports as stated in the bill of lading]

Cargo: [insert description of cargo]

Bill of lading: [insert identification numbers, date and place of issue]

The above cargo was shipped on the above ship by [insert name of shipper] and consigned to [insert name of consignee or party to whose order the bill of lading is made out, as appropriate] for delivery at the port of [insert name of discharge port stated in the bill of lading] but the bill of lading has not arrived and we, [insert name of party requesting delivery], hereby request you to deliver the said cargo to [insert name of party to whom delivery is to be made] at [insert place where delivery is to be made] without production of the original bill of lading.

In consideration of your complying with our above request, we hereby agree as follows:

1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability, loss, damage or expense of whatsoever nature which you may sustain by reason of delivering the cargo in accordance with our request.
2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the delivery of the cargo as aforesaid, to provide you or

them on demand with sufficient funds to defend the same.

3. If, in connection with the delivery of the cargo as aforesaid, the ship, or any other ship or property in the same or associated ownership, management or control, should be arrested or detained or should the arrest or detention thereof be threatened, or should there be any interference in the use or trading of the vessel (whether by virtue of a caveat being entered on the ship's registry or otherwise howsoever), to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such ship or property or to remove such interference and to indemnify you in respect of any liability, loss, damage or expense caused by such arrest or detention or threatened arrest or detention or such interference, whether or not such arrest or detention or threatened arrest or detention or such interference may be justified.
4. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility, or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.
5. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you, or otherwise to cause all original bills of lading to be delivered to you, whereupon our liability hereunder shall cease.
6. The liability of each and every person under this indemnity shall be joint and several and shall not be conditional upon your proceeding first against any person, whether or not such person is party to or liable under this indemnity.
7. This indemnity shall be governed by and construed in accordance with English law and each and every person liable under this indemnity shall at your request submit to the jurisdiction of the High Court of Justice of England.

Yours faithfully

For and on behalf of [insert name of Requestor]

The Requestor.....

Signature