negligence. The liberal interpretation is that the section does not affect insurance policies at all. Then there is an intermediate opinion, probably held by the majority, that the policy would be effective so long as the director himself pays the premium. That is the interpretation adopted in the Australian Companies Act of 1981 which has a section based on the old 205 with an additional clause providing that an insurance policy which indemnifies a director or auditor against his own negligence is not rendered void so long as the premiums are not paid by the company or a subsidiary.

Premiums for liability insurance are likely to be substantial and not all directors would willingly incur the cost personally. A possible alternative is to prevent if possible a duty of care from arising. Articles could contain a clause drafted in accordance with the principle accepted in "Hedley Byrne v. Heller".

For example, one private company has a clause reading as follows:

> "... no director or other officer shall be liable for any loss, damage or misfortune which may happen to or be incurred by the Company".

So I finish these comments on liability with the question:

> "Would such a clause be effective"?

2. UPDATE ON MARITIME LAW
by John M. Maskell, Solicitor

At the turn of the century Britain was at the height of its imperial and maritime power. Legislation rarely leads, but generally reflects the views of society at any given time. At the time an enormous proportion of the world's trade was carried in British ships, and an even larger proportion of those ships and cargoes were insured at Lloyd's. Nowhere other than England had a body of maritime insurance law grown up to any serious extent, and Parliament in the many statutes which were passed in that period, clearly wished to ensure that the British shipowner and British underwriter was properly protected. Under the Merchant Shipping Act 1894 and the Marine Insurance Act 1906 these principles were enshrined and those acts still form the basis of a large part of British marine law at the present time.

It is impossible to consider marine insurance in isolation. Since 1906 Lloyd's, while remaining the most important insurance centre for marine risks, had had its position eroded by insurance companies in a number of other

jurisdictions. They have traditions which are not based solely on English concepts of underwriting law, and those companies have been subjected to market pressures, perhaps by parties who have as strong an economic base as the underwriter and/or underwriting company itself. Accordingly, terms and conditions of policies do vary and the cover provided by underwriters is not uniform. Obligations on the assured and the underwriter do not necessarily follow the traditional British pattern and I shall endeavour to discuss.

The two areas which I would like to examine relate to what I would call the basic concepts of insurance and the terms of the contract itself, and one of the problems of maritime fraud as it relates to marine insurance.

Contracts of insurance, as everybody knows, differ from ordinary contracts in that they are described as being of "utmost good faith". I would commend to any of you who would wish to consider this topic in more depth to read an article in the Lloyd's Maritime & Commercial Law Quarterly for February 1986 written by Mr. Anthony Diamond QC. He deals with certain problems in marine insurance and has looked at the subject in somewhat greater depth than I would be able to do today. It should be borne in mind that although insurance is described as a contract of utmost good faith, it is a contract which is freely negotiable between the insurer and the assured. This is particularly relevant when it comes to the terms and conditions of the policy, to which I will refer later when dealing with the question of marine fraud.

With regard to the general background, one can see that the whole concept of British marine insurance is very different from those in other jurisdictions. Essentially in England the test is that the assured must disclose to the underwriter every material circumstance which is known to him and which could influence the judgment of the prudent underwriter in taking the risk or fixing the premium. Now, as I understand the position in other jurisdictions, there is a far greater duty on the part of underwriters who write a particular class of business to enquire and ask questions that would be deemed relevant within his knowledge of underwriting that type of business. In other words the underwriter abroad cannot sit back as can the underwriter in England and rely upon the assured to acquaint him with all relevant facts. Of course, it must be borne in mind that it is the assured who essentially has all the relevant facts at his disposal regarding a particular insurance which he wishes to place. On the other hand, it has always seemed to me absurd that an underwriter, who specialises in writing a particular class of business, can sit back and use none of the experience which he has acquired to find out from the broker further pieces of information which he needs, in order to come to his business decision. One can see why in the United Kingdom the law was framed the way it was. It was there to protect the underwriter and make

certain that Britain could maintain its pre-eminent position in the insurance market. Although, underwriters say that they are in the business of paying claims, and this often brings a cynical smile to the mouths of certain brokers, it is of course true that if no claims were paid there would be no business done. Clearly, the underwriter needs to protect himself against obviously bogus claims but perhaps in this country we have gone slightly too far and have tilted the balance between insurer and the insured too much towards the underwriter, since the way in which we deal with matters in this country gives the underwriters a chance to have a second guess.

What should be done about this? Is anything likely to change? I think one can fairly safely say that very little is likely to happen within the next 12 months. With our entry into the common market our insurance laws are beginning to harmonise and EEC directives with regard to insurance will ultimately make their mark, although it is difficult to see exactly when they will take effect. Marine insurance is not at present covered by any directives. Similarly UNCTAD is trying to redress the balance between the developed nations and the developing nations. Generally speaking it is the developed nations who have the insurance companies and the economic power, and the developing nations who are their customers. The Marine Insurance Act is now 80 years old. The tests that are laid down in the Act have withstood criticisms for a number of years and will probably continue to do so. However, I question whether perhaps there should not be some slight change of emphasis. The change will not merely come about through market force for as one has seen in the insurance market over the last decade, rates have both hardened and softened without there being any material alteration to the way in which marine policies are written. The basic problem is that perhaps there is too much power in the hands of underwriters when it comes to deciding what is material and relevant. It enables them to look at a problem with the advantage of hindsight, and it all is often very difficult for the assured to know what the prudent underwriter would wish to know. An assured may consider a point as totally immaterial and indeed, that point may well have seemed immaterial at the time when the contract was made. Once a claim is made the same point can achieve an importance out of all relevance to its original significance, but it is very difficult for the assured to establish that this was not a point with which the prudent underwriter would not have wished to have been concerned. Perhaps the law is right, but perhaps also there might be a marginal shift in the balance, particularly where an underwriter is writing a specialist risk to give the assured a little more protection.

This particular point leds me on to a short consideration of a particular clause in the Institute Cargo Clauses. The incorporation of this particular clause has caused considerable discussion within the marine insurance world

and does bear a little further study. Maritime fraud has become big business. As many of you are aware, maritime fraud has been on the increase. For many years the most obvious example of maritime fraud was the shipowner deliberately sinking his ship. Reported cases on this subject go back for many years. What has occurred in the last 20 years has been a substantial increase in what can loosely be called "documentary" fraud. They take a variety of forms. Sometimes vessels are sunk in deep water as a result of collusion between the shipowner and the owner of the goods, when in fact the owner of the goods has not ever put them on board the vessel. This enables the shipowner to claim under his hull policy and the cargo owner to claim under his cargo policy. Sometimes the goods are physically put on board but are diverted either by the shipowner for his own purposes, or again in collusion with cargo interests. It was always suggested that this was the way in which the various Lebanese factions financed their war. Certainly large number of cargoes travelling peaceably between "A" and "B" seemed to arrive at a Lebanese port where they were seized under some spurious legal process, and often sold. Proceeds then went to buy arms. The examples are manifold and have caused tremendous problems for many people over a number of years.

In order to try and combat marine fraud the Institute of London Underwriters drafted new clauses, one of which 4.6, provided that in no case would the insurance cover "loss damage or expense arising from insolvency or finanical default of the owners, managers, charterers or operators of the vessel". I for one when I first saw this clause viewed it with some degree of horror. I applauded the sentiments behind it, but felt that it was far too draconian in effect. There was no doubt that such a clause may prevent cheap tonnage from being used, but it could penalise innocent shippers or consignees for the indiscretion of others.

It also seems to me that this clause presupposes that the problem area is that of the shipowner. This is just not always true. Cargo insurance frauds are often perpetrated by people who never bother to charter a ship at all, but merely make fraudulent declarations and pay premiums on non-existent cargoes. As a result of this criticism many people said that the clause perhaps ought not to be applied where the insured had taken reasonable steps to ascertain that the carrier had sufficient resources. On a practical basis, it is often very difficult for an assured to make the necessary enquiries. One has only to look at the number of first class shipping companies that have collapsed in the last few years to know that such a clause could provide a very powerful weapon in the hands of underwriters, when a consignor has validly consigned his goods to a first class British liner company that then goes into liquidation. Should he be deemed to know that his is likely to happen? Should he perhaps chose foreign tonnage with one ship Panamian companies that look better on paper but might not turn out to be so? The pure wording as it stood in my view could provide severe difficulties.

The feeling against the clause was sufficiently strong that the Institute Commodity Trade Clauses made a variation. There they said in no case would the insurance cover "loss damage or expense caused by insolvency or financial default of the owners, managers, charterers or operators of the vessel where, at the time of loading of the subject matter insured on board the vessel, the Assured are aware or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage. This exclusion shall not to apply when this insurance had been assigned to the party claiming hereunder who has bought or agreed to buy the subject matter insured in good faith under a binding contract." This revision of the clause was to cover the CIF situation where documents were purchased giving the purchaser the right to goods on board a particular vessel. The original contract of insurance would have been made by the seller, and the person who was claiming under the contract might not have known at that time from whom he was going to buy or indeed on what ship the goods were loaded. If he were to claim under the original clause one could see that he might be debarred from making a proper and reasonable claim. He of course would have had little or no opportunity in normal circumstances to check before the insurance contract commenced.

Time does not permit a closer examination of these two clauses, and does not permit anything more than the most cursory overview of this particular problem. Which of the two clauses is likely to be finally adopted is uncertain. There is quite clearly an ambiguity. Perhaps the problem will in fact resolve itself when policies are broked, by means of negotiation. As I said insurance contracts are freely negotiable. In this area of redrafting the clauses, there perhaps might be changes within the next 12 months, but as can be seen the present situation is slightly unsatisfactory and perhaps gives underwriters more power than they really need. It might also be suggested that it is very difficult to see what an innocent assured could do to cover himself in such a situation.

Forecasting the future is usually hazardous exercise. 80 years have gone past since the Marine Insurance Act came into force, so it is unlikely to change drastically within the next 12 months. Nonetheless, as I have endeavoured to show, there are areas of legitimate concern where perhaps academic and intellectual though ought to be given to the practical problems which exist on an every day basis. I certainly do not claim to have the answers to the situation, but I hope in raising in your minds legitimate areas of concern, it will at least provoke discussion to achieve what I think everyone wishes to achieve, a fair and balanced insurance market.