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Содержание

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ПРАКТИКА

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Causation and Burden of Proof in Nordic Marine Insurance

I. Introduction

When marine casualties occur, the insured, who may be a ship-owner, a yacht owner or a cargo owner or other party having an insurable interest in these or other properties insured by marine insurance, will seek to be indemnified by the insurer who are often called underwriters. The assured is the party entitled to indemnification and is most often the policyholder having procured the insurance as well. In cargo insurance, a seller selling with CIP and CIF Incoterms shall procure insurance in favour of the buyer who is the assured. In hull and yacht insurance, mortgagee clauses make the mortgagees the assured, sometimes co-assured together with the owners.

The insurer, average adjuster or court determining whether the assured is entitled to be indemnified will then apply the insurance conditions to see whether the occurrence, a materialization of a risk, which is called peril in marine insurance language, was an insured event, in other words a peril insured against[1]. The operation of insurance conditions, and sometimes law, may then lead to different results. Some causes of damages, i.e., perils, are covered, some are excluded. In marine (and other) insurance, it is possible that a policy and related conditions cover all risks unless expressly excluded,[2] or that only the risks that expressly listed are covered[3]. Even in the latter case there may be exclusions.

There may be concurrent causes, the treatment of which from the point of view of indemnification is different. The time factor may also be relevant and one has to determine when a cause of damage arises and when the damage occurs as these instances may be relevant according to the insurance conditions.

The rules of causation come into application together with the conditions and law. In case of dispute, the insured seeking indemnification must prove that the damage was caused by a peril insured against. The rules of causation and burden of proof are thereby interlinked.

The purpose of this article is to study the rules of causation and burden of proof in Nordic marine insurance and compared with marine insurance practice especially in England.

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[1] Under English law, there is a definition of "Maritime perils" in section 3 of the Marine Insurance Act, 1906.

[2] E.g., the Nordic Marine Insurance Plan 2013, version 2019, the French Marine Insurance Package 2010/2012, Clause 1.1.1 as well as Institute Cargo, Clauses A.

[3] E.g., Institute Time Clauses Hulls, 1983, Clause 6.1, the war risks cover under Clause 2–9 of the Nordic Marine Insurance Plan and Institute Cargo, Clauses B and C.

II. Marine insurance in the Nordic countries

The Nordic countries referred to here are Denmark, Finland, Norway and Sweden. Politically and culturally, also Iceland belongs to the Nordic family of countries but due to the size and nature of its economy, Iceland stays out of the Nordic cooperation in marine insurance or civil law.

Historically, each of the Nordic countries has had its domestic marine insurance markets and industry establishing its own standard conditions. For instance, the Finnish Hull Conditions 2001 were designed for Finnish hull insurers. Cargo insurance has been more international in the sense that some two thirds of world trade has for a long time been insured by the English Institute Cargo Clauses. Similarly, the Finnish exports have been insured by the Institute Clauses but imports often with equivalent domestic clauses, the latest version of which are from the year 1993.

Although the national conditions are fit and convenient for small-scale insurance and smaller craft, marine underwriters and their clients have turned to the use of pan-Nordic conditions. This is particularly true in hull and related ship-owner insurance. In practice, Norwegian Marine Insurance Plans became a common ground for all Nordic marine insurance. Local associations of marine insurers ceased their activities a couple of decades ago and the cooperation of the industry now takes place under the umbrella of *Cefor,* which is the central and the only organisation of Nordic marine insurers. A Standing Revision Committee in which Cefor and the Nordic ship owners' associations are represented keeps the Plan up to date.

The idea of a Plan is to combine statutory, contractual and case material into one document, nowadays website, which is also an "agreed document" resulting from negotiations between insurers and their clients. The Plan is supplemented by sector-specific insurance conditions for hull, cargo and small craft. The Plan is supported by the Commentary, which clarifies many issues of interpretation and practice.

The current version of the Plan is Nordic Marine Insurance Plan 2013, version 2019, hereinafter referred to as the Nordic Plan. It should be noted that the Nordic Plan is in universal use especially in hull insurance and constitutes an alternative to the Institute Time Clauses – Hulls of 1983 (ITHC83)[4].

Average adjusters have played a significant role in the settlement of marine insurance disputes in Nordic countries. In Finland and Sweden, average adjusters can issue binding adjustments that can be appealed against before Maritime Courts. Also in Denmark and Norway there have been statutory provisions about the role of average adjusters. The Nordic Plan makes the adjustment by average adjusters in accordance with the relevant national provisions the fallback dispute settlement method. Obviously, the parties may subject their dispute to arbitration as well. The benefit for shipowners as assureds of average adjustments is that insurers cover the costs of the adjustments. Nordic average adjusters are moreover represented in the drafting of the Nordic Plan. In practice, the procedure before the Finnish and Swedish average adjusters resembles arbitration although it is very uncommon to organize oral hearings[5].

III. Causation

III.1 General Remarks

The rules of causation in marine insurance largely follow general rules of causation which are applied in the law of torts and in criminal law. These principles are often characterized by high levels of abstraction. The central problem of marine insurance law is how to deal with a combination of causes. The problem becomes relevant when two or more causes are necessary to result in a loss but

[4] For a clause-by-clause comparison between the Nordic Plan and ITHC83, see: https://cefor.no/clauses/comparison/.

[5] See *Railas L.* The Non-Judicial Settlement of Maritime Disputes in Finland // Russia Maritime Arbitration Journal. 2019. and. *Johansson S. O.* Settlement of Disputed Marine Insurance Claims. Stockholm Institute of Scandinavian Law, 1957–2010. P. 121–133.

none of them are sufficient alone. The question can emerge so that one of the combined causes is covered by insurance and another is excluded or covered by another insurance so that a choice or apportionment may have to take place between the two. A typical example in historical perspective is the separation between maritime and war risks or perils. Combination of causes also becomes relevant in situations where the damage is partly caused by the insured's failure to notify changes in risk or take precautions.

Another issue related to causation is the time of the peril touching the insured property. We can distinguish between the time when the peril, i.e. the cause of damage, took place on the one hand, and the time when the damage appeared as a consequence of the peril on the other.

III.2 Combination of causes

I start this section from English marine insurance principles, which are certainly better known to the world at large.

English marine insurance builds on the principle of proximate cause. In order to establish the right of recovery under a marine insurance contract, the loss must be shown to have been proximately caused by a peril insured against. There is a Latin legal maxim "*Causa proxima non remota spectatur*" from which the principle derives. Section 55 of the English Marine Insurance Act provides as follows:

> *"Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against".*

The *causa proxima* is the cause proximate in efficiency, not necessarily the cause nearest in time[6]. Furthermore, proximate cause seeks to discover the real cause or the common sense cause[7]. English case law provides further expressions of the common sense aspect: "Causation is to be understood as the man in the street, and not as either a scientist or metaphysician, would understand it". Similarly: "Cause here means what a business or seafaring man would take it to be the cause without too microscopic analysis but on a broad view"[8].

The proximate cause rule resembles the Nordic dominant cause rule. According to this rule, in the case of combination of perils the whole loss shall be deemed to have been caused by the class of perils which was the dominant cause[9].

The dominant cause rule was created in Norway at the beginning of the 20th century, also by court practice[10]. There were many cases in which the combination of causes covered by maritime and war risks insurances led to the finding of maritime risks being the dominant causes.

As a consequence, the Norwegian marine insurers introduced in the 1930 Marine Insurance Plan the so called division principle. This principle has ever since remained in the Norwegian Marine Insurance Plan which has now become the Nordic Plan. Clause 2–13 of the Nordic Plan states as follows:

> *"If the loss has been caused by a combination of different perils, and one or more of these perils are not covered by the insurance, the loss shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the occurrence and extent of the loss, and the insurer shall only be liable for that part of the loss which is attributable to the perils covered by the insurance".*

[6] Leyland Shipping Co. v. Norwich Union Fire Insurance Society The "Ikaria" [1918] A.C. 350.

[7] Becker Gray & Co v. London Assurance Corpn. (The "Kattenturm") [1918] A.C. 101, Wayne Tank & Pump Co. Ltd. v. Employers' Liability Assurance Corpn. Ltd. C.A. [1973] 2 Lloyd's Rep. 237.

[8] Lord Wright in Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport (The "Coxwold") H.L. (1942) 73 Ll.L. Rep. 1.

[9] See Clause 2–14 of the Nordic Plan.

[10] Rt 1916.1117 *Skotfos*, ND 1976.76 Kra, ND 1916.209 NH; *Bull H. J.* Sjøforskringsrett. Oslo, 1980. P. 79.

Clause 2–14 of the Plan addresses the combination of maritime and war perils and builds on the dominant cause rule as the main rule. If neither cause is dominant, there shall be equal division meaning that the insured will get compensated only to the extent the risks are covered by the relevant insurances[11].

The other Nordic countries Denmark, Finland and Sweden had traditionally applied the dominant cause principle in their own marine insurance conditions, but the division between marine and war risks did not follow this method[12]. However, the Nordic influence led the Finnish Hull Conditions to include provisions (§ 16) similar to Clauses 2–13 and 2–14 of the Nordic Plan.

III.3 Causation and time

Causation has a time dimension as well. Sometimes visible damages occur long after the cause, namely the insured peril, has taken place. Clause 2–11 touches upon this issue as follows:

> *"The insurer is liable for loss occurred when the interest insured is struck by an insured peril during the insurance period.*
>
> *If an unknown defect results in damage to the insured vessel, the defect shall be deemed to be a marine peril that strikes the interest insured at the time the damage starts to develop.*
>
> *If unknown damage in one part of the vessel results in damage to another part or parts of the vessel, the original damage shall be deemed to be a marine peril that strikes the interest insured at the time the damage to the other part or parts starts to develop".*

The above last two paragraphs build on the assumption that the defect which strikes the interest insured (such as a vessel) is unknown to the assured. Should the assured know of the defect, he could acquire more insurance cover. Therefore, Clause 2–11, fourth paragraph, provides as follows:

> *"Where a defect or damage existing at the inception of the insurance, which is known to the assured but not to the insurer, gives rise to damage (in the case of defects) or new damage to other parts (in the case of existing damage), the liability of the insurer shall not exceed the amount the assured would have been able to recover under the insurance on risk at the time the assured first acquired knowledge of the relevant defect or damage".*

The Average Adjuster in Finland has issued an adjustment[13] in a yacht insurance where a yacht was insured with insurer A until 30 August 2012 and with insurer B as from 31 August 2012. The assured claimed indemnity on the basis corrosion damage sustained by the yacht. The parties had agreed that the cause of corrosion was a defect caused to the land cable connected to the yacht when at bay. The Average Adjuster considered that the defect to the cable had been struck during the validity of the policy of insurer B which was therefore ordered to indemnify the repairs of the corrosion damages. The factual circumstances in this case did not give insurer A any role in covering the damage, but the situation could have been different if in the light of the evidence it had been found that the defect had been caused already during the validity of the policy of insurer A. The applicable insurance conditions were silent about the time aspect. Should the principles of Clause 2–11 of the Nordic Plan have been applied, the Average Adjuster could have considered the peril to have struck the yacht when the corrosion occurred during the validity of the policy of insurer B irrespective of the fact that the cable

[11] The War Risks Insurance covers according to Nordic Plan Clause 2–9 the following named risks only:
– war and warlike conditions;
– capture/confiscation;
– riots, strikes, sabotage, terrorism etc.;
– piracy and mutiny.

[12] *Riska O.* Riskfördelning vid sjötransport, Kaskoförsäkring och gemensamt haveri. Helsinki, 1971. P. 111. and *Riska O.* Försäkring av driftsintresse. Helsinki, 1964. P. 95. *et seq.*

[13] EV2/2017, 6.6.2017.

might have been defected already during the validity of insurance A.

IV. Burden of proof

IV.1 The main rules of the burden of proof

The question of burden or onus of proof becomes relevant almost every time the insurer and the assured disagree about the insurance cover of a casualty. The party who has the burden of proof must prove that there is an insured event by proving the causal link, i.e. that the damage to the insured property was caused by a peril insured against. There are usually other things to prove, such as the quantum of the damage, as well. The fact that a party must prove these things mean that the party bears the economic risk that a fact the party alleges becomes proven. An average adjuster, judge or arbitrator must come to the conclusion that a fact exists. Should this not be the case, the party alleging the fact must bear the economic consequences for this not happening.

Insurance law generally vest the burden of proof on the assured. Clause 2–12 of the Nordic Plan provides:

> *"The assured has the burden of proving that he has suffered a loss of the kind covered by the insurance and of proving the extent of the loss.*
>
> *The insurer has the burden of proving that the loss has been caused by a peril that is not covered by the insurance, unless other provisions of the Plan provide to the contrary".*

As the Nordic Plan is generally construed so that everything is covered unless specifically excluded, this marks more work on the insurer. An exclusion not listed in the Nordic Plan is the unseaworthiness of the vessel. Should the insurer wish to invoke unseaworthiness as an exclusion, the burden of proving rests equally with the insurer[14].

Similarly, under English law, it rests with the assured to prove that the loss or damage claimed for under a policy has been due to an insured peril[15]. The formulation of the policy is important in this respect. If the policy covers named risks as for instance the Institute Time Clauses Hulls 1983 do, the assured has to put forward evidence of the occurrence of one of the named perils and the insurer only has to prove the applicability of an exclusion. It should be noted, however, that the perils of the seas or maritime perils are widely defined in Section 3(2) of the Marine Insurance Act 1906.

If the assured submits evidence sufficient to show that the loss or damage was probably caused by an insured peril but the underwriter puts forward an alternative theory as to the cause, the matter will be decided on the balance of probabilities[16] and, in order to succeed, the party upon whom the onus of proof rests must show that there is preponderance of probability to support his case. If the probabilities are equally balanced, the party upon whom the onus rests will fail to prove his case[17].

The so called "all risks" policies where everything is covered are easier for the assured. Clause 2–8 of the Nordic Marine Insurance Plan starts as follows:

> *"An insurance against marine perils covers all perils to which the interest may be exposed, with the exception of: (...)".*

The assured still has the burden of proving that a loss or damage results from a peril insured against. Marine insurance is against fortuities not inevitabilities. The English Ma-

[14] See *Bull.* Op. cit. at P. 123.

[15] Cobb & Jenkins v. Volga Insurance Co. of Petrograd (1920) 4 Ll.L.Rep. 178.,

[16] This is the standard Anglo-American proof requirement in civil cases. According to Wikipedia, saying something is proven on a balance of probabilities means that it is more likely than not to have occurred. It means that it is probable, i.e., the probability that some event happens is more than 50 %.

[17] United Scottish Insurance Co. Ltd. v. Bristol Fishing Vessel Mutual War Risks Association Ltd. (The "Braconbush") (1944) 78 Ll.L.Rep. 70.

rine Insurance Act, Rule for Construction 7 (First Schedule), states as follows:

> *"7. The term "perils of the seas" refers only to fortuitous accidents or casualties of the seas. It does not include any ordinary action of winds and waves".*

It is normal that insurance conditions and practice require loss or damage to be caused to the insured property by sudden and external causes, which normally must also be unpredictable. Therefore, the assured is nevertheless to prove that an insured event has taken place, and the insurer does not need to put forward a theory of what actually had happened. Should the assured be able to put forward a prima facie case of an insured event, the insurer must then demonstrate that an exclusion applies. Insurance conditions and practice take into account some events that the assured must take actions against, the so called safety regulations, the failure to observe of which may lead to the loss of cover in total or partly[18]. Normally, insurance conditions cover negligence. Under English law, negligence of the assured or the master or crew does not count, only willful misconduct[19]. Under Nordic insurance law and the Nordic Plan, gross negligence may lead to the loss or reduction of indemnity. This is in line with the differences between English and Continental contract laws. Under the latter, limitations of liability are usually not possible in the case of gross negligence whereas English law makes this possible. Clause 3–33 of the Nordic Plan provides namely as follows:

> *"If the assured has brought about the casualty through gross negligence, any liability of the insurer shall be determined based on the degree of fault and circumstances generally"*[20].

On top of the above instances, there may be situations which may result from negligence, but are nevertheless unrecoverable from insurance as they are not unexpected. For instance, loss or damage caused by a ship running out of fuel due to an error of the crew would not necessarily be covered[21]. This is a grey area where the circumstances including the commercial relations of the insurer and the assured play a vital role.

IV.2 The extent of the burden of proof

Although the burden of proof normally rests with the assured, the size of the task depends on how high the threshold is. It was already mentioned earlier that under English law the burden of proof means the proof under the "balance of probabilities", which means that a fact or an explanation of cause is more probable than another. Furthermore, the probability is measured by what a normal person would perceive to be probable. This seems to be the Nordic view as well.

The Nordic insurance and marine insurance literature has a relatively uniform view that the burden of proof of the assured should not be too high. According to one view, any decision should be based on a finding of circumstances which seems to be most probable. In doing this, strict burden of proof rules could be ignored. The reason is that the casualty may destroy the chances to produce evidence[22]. Furthermore, the insurer must accept the assured's

[18] The assured is bound to observe safety regulations. Clause 3–22 of the Nordic Plan provides as follows:

"A safety regulation is a rule concerning measures for the prevention of loss, issued by public authorities, stipulated in the insurance contract, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society".

[19] Section 55(2)(a) of the English Marine Insurance Act, 1906.

[20] See the Commentary of the Clause at http://nordicplan.org/Commentary/Part-One/Chapter-3/Section-5/#-3-32.

[21] Clause 12–3 Inadequate maintenance etc. of the Nordic Plan provides as follows:

"The insurer is not liable for costs incurred in renewing or repairing a part or parts of the hull, machinery or equipment which were in a defective condition as a result of wear and tear, corrosion, rot, inadequate maintenance and the like".

[22] *Hellner J.* Försäkringsrätt. Stockholm, 1965. P. 111. *et seq.* See also *Pineus K.* Assurandören hos dispachören. Gothenburg, 1978. P. 37–39. and *Riska O.* Riskfördelning vid sjötransport. P. 87–107.

information to the extent this information is not improbable and requirements for proof have to remain within reasonable limits[23].

Sometimes mysterious casualties occur and assureds, why not insurers, put forward theories that are in principle possible but sound improbable. Under English law, it is the balance of probabilities that has to be considered not the reverse balance of improbabilities[24]. In the case *Popi M,*[25] an aperture opened in the ship´s shell plating in calm seas causing her to sink in deep water. As there was no evidence as to the cause of the aperture, the ship-owners advanced the theory that the vessel had been struck by a submarine, constituting a loss by perils of the seas. The insurers pleaded that aperture was simply caused by wear and tear. This theory was, as it sounds, extremely improbable or even virtually impossible. The two first instances of courts found that the vessel was lost by perils of the seas thereby accepting the submarine theory. The House of Lords, however, reversed the decision as not being in accord with common sense and held that the shipowners had discharged the burden of proof of loss by an insured peril, as the true cause of the loss was still in doubt and that the judge was not compelled to choose between theories that were improbable.

The Average Adjuster in Finland has also been confronted with cases where the causes have been difficult to prove. In one case,[26] a yacht had sunk at sea due to leakage. The assured put forward a theory that the yacht had been damaged by hitting a quay whereas the insurers did not accept this theory. There were statements by people on board about leakage noticed. Although yachts normally sustain hits with quays, it was found that the assured had met the burden of proof as lifting the yacht from the bottom of the sea in order to prove the cause would have cost disproportionately.

In another case[27] before the Average Adjuster in Finland, a vessel had sunk in the winter whilst at port at the Saimaa lake in Eastern Finland. It was discovered that the cooling valve of the vessel made of cast iron had burst. The assured claimed to have taken care of proper maintenance for winter by filling the pipes in connection with the cooling valve with ethylene glycol, and that the cause of the damage was sabotage by an intruder to which the valve had been subjected with a view to sinking the ship. The insurer accepted that maintenance was properly done but presented a theory that ethylene glycol might have leaked out the pipes which would then have caused the burst of the valve, which would have been excluded due to unseaworthiness of the vessel. The Average Adjuster noted that although sabotage was in principle possible as suggested by the assured, the circumstances shown would have made the suggested sabotage so complicated and illogical to be carried out that according to an ordinary course of events it would be highly improbable. In this way, the "man of the street" or "general life experience" approach as to probability was applied.

In a hull and machinery case,[28] the question arose, whether two occurrences of breakdown of the turbocharger of the main engine within a short period of time were to be considered one or two casualties. In this case, the issue was whether one or two sets of deductibles (there were two different deductibles for each and every casualty) should be applied. Another situation, in which the issue of one or more casualties is relevant, is when the sum insured per each and every casualty may be exceeded such as in collision cases. The Average Adjuster considered that the party asserting that there is only one casualty, the Owners, had the burden of proving that there was one and the same dominant cause behind the two turbocharger breakdowns in order to benefit from a single set of deductibles. The Owners had put forward arguments based on a surveyor report according

[23] *Riska O.* Op. cit. P. 89–90. and *Pineus K.* ND 1951.535 SHD.

[24] *Lambeth R.J.* Templeman on Marine Insurance. Sixth Edition, London, 1986. P. 201.

[25] Rhesa Shipping Company S.A. v. Edmunds (The "Popi M") H.L. [1985] 2 Lloyd´s Rep. 1.

[26] EV3/2017, 6.7.2017

[27] EV 4/2017 , the "Jupiter"

[28] EV3/2020, the "Karoli"

to which the damages were caused by increased vibration which had led to the loosening and unscrewing of bolts holding the cover of a lubricating nozzle, and, after the lubrication had ceased, the turbochargers collapsed. The Average Adjuster found that the Owners had met their burden of proof by reasonable standards.

V. Conclusion

The above presentation shows that there are striking similarities in the approaches to the issues of causation and burden of proof in both the Nordic countries and under English marine insurance law and practice. The establishment of an insured event or proving that a damage was caused by a risk or peril insured against is not "rocket science", although technical evidence including surveyor and technical expert reports are frequently resorted to. Creating unsurmountable obstacles to proving causation would make marine insurance largely devoid of purpose. The assured must nevertheless prove to a reasonable extent that the loss or damage was caused by an event or peril insured against as insurance is against fortuities and not inevitabilities.

How to deal with a combination of causes or the time factor between a cause and resulting damage as divided between different policies are matters to be resolved by insurance conditions and are primarily of the insurer's concern. The assured should obviously always see to it that there is sufficient cover to protect him.

I would like to use this opportunity to congratulate the Maritime Arbitration Commission for its 90-th Anniversary and wish it success for the years ahead.