

CAUSATION IN HULL INSURANCE

- A Nordic Perspective



University of Oslo
Faculty of Law

Candidate number: 5012

Supervisor: Trine-Lise Wilhelmsen

Deadline for submission: 11/01/2010

Number of words: 17 844 (max. 18.000)

01.11.2010

Content

<u>1</u>	<u>INTRODUCTION</u>	<u>1</u>
<u>2</u>	<u>THE PRACTICAL PROBLEM</u>	<u>2</u>
2.1	The issue	2
2.2	The problem	3
<u>3</u>	<u>LEGAL SOURCES</u>	<u>4</u>
3.1	Introduction	4
3.2	Norwegian Marine Insurance Regulation	4
3.2.1	The Insurance Contracts Act	4
3.2.2	The Norwegian Marine Insurance Plans	5
3.3	The Swedish Marine Insurance Regulation	6
3.3.1	The Insurance Contract Act	6
3.3.2	The Swedish Marine Insurance Plan and the Swedish Hull Conditions	6
3.4	The Danish Marine Insurance Regulation	7
3.5	The Finnish Marine Insurance Regulation	8
<u>4</u>	<u>AN OVERVIEW OF THE CAUSATION PROBLEMS IN MARINE INSURANCE</u>	<u>9</u>
4.1	Introduction	9
4.1.1	The causation requisite	10
<u>5</u>	<u>COMBINATION OF CAUSES IN NORDIC MARINE INSURANCE</u>	<u>12</u>
5.1	Introduction	12

5.2	Combination of Causes in Swedish Marine Insurance	13
5.2.1	Combination of Causes in Danish Marine Insurance	16
5.3	Combination of causes in Norwegian marine insurance	17
5.3.1	The development of the apportionment rule	17
5.3.2	NMIP § 2-13 first subparagraph	18
5.3.3	NMIP § 2-14 Combination of war marine and perils	23
5.4	Advantages and disadvantages with the rules	25
6	<u>INCIDENCE OF LOSS</u>	<u>28</u>
6.1	Introduction	28
6.2	Incidence of Loss and the Swedish Solution	29
6.2.1	Background to the rule in SHIC § 33	29
6.2.2	SHIC § 33 unknown damage	32
6.3	Incidence of Loss under the Danish and Finnish Rules	35
6.3.1	The Danish Solution	35
6.3.2	The Finnish solution	38
6.4	Incidence of Loss under the Norwegian Marine Insurance Rules	39
6.4.1	Introduction	39
6.4.2	NMIP § 2-11	41
6.5	Comparing the Rules on Incidence of Loss in Hull Insurance	45
6.5.1	Similarities between the solutions	45
6.5.2	Differences between the solutions	46
6.5.3	Advantages and disadvantages with the rules on incidence of loss	48
7	<u>DISCUSSION</u>	<u>51</u>
7.1	Introduction	51
7.2	Combination of Causes in Nordic Marine Insurance	51

7.3	Incidence of Loss in Nordic Marine Insurance	54
8	<u>CONCLUSION</u>	<u>55</u>
	<u>REFERENCES</u>	<u>60</u>
	<u>ANNEX (OPTIONAL)</u>	<u>A</u>

1 Introduction

The objective of this paper is to compare the rules on causation and incidence of loss from a hull insurance perspective in the Nordic countries. As a consequence of there being underlying differences in how these questions are resolved, it therefore results in an interesting comparison. In addition, in light of the proposal of a common Marine Insurance Plan for the entire Nordic market a comparison is relevant for the same reasons.

In the Norwegian Marine Insurance Plan 1996, version 2010 (NMIP) the scope of the insurers liability when covered and uncovered perils have contributed to a loss is based on an *apportionment principle*, cf. § NMIP 2-13. This solution is rather unique in relation to the corresponding rules in the Nordic Countries that operate with the *dominant cause principle*. However, the NMIP was used as a prototype to the revision of the Finnish Marine Hull Conditions (FHC) in the year of 2001.¹ As a result, today the FHC has a corresponding rule of apportionment.² Nevertheless, an exception is made to the *apportionment principle* when the loss is attributed to a combination of marine and war perils. In this case the starting point is the dominant cause rule as well.³

Another question related to causation arises in cases where a loss is caused by a peril that can be traced back to a previous insurance period. According to the NMIP § 2-11 first subparagraph the liability of the insurer is triggered when the interest insured is struck by an insured peril during the insurance period. The starting point is thus a *peril has struck*

¹ Wilhelmssen, T.L., & Bull, H.J., *Handbook in Hull Insurance*, 1st edit., Gyldendal Norsk Forlag AS 2007, p. 36.

² Cf. FHC sec. 16 first subsection.

³ Cf. NMIP § 2-14 second sentence and FHC sec. 16.2.

principle which is a different point of departure to the *damage principle* which the remaining Nordic countries operate with.

The approach to the question of causation and incidences of loss thus differ within the Nordic countries. These differences may provide implications both in changing between the conditions and with an implementation of a common Nordic Plan. The question to be answered is what the differences really are, their impact and which solution would be best suited for the whole common Nordic marine insurance market.

Although an all comprehensive comparison between the Nordic rules of marine insurance would be both interesting and relevant at time, the aim of this work will be limited to compare and analyze the selected sections from a hull insurance perspective. Focus is foremost put on a comparison between the relevant Swedish and Norwegian rules.

The thesis will present a short review of relevant legislation pertinent to hull insurance followed by an overview of the general issues of causation and incidence of loss. Subsequently, specific rules dealing with causation and incidence of loss in each country will be reviewed and compared. A more thorough and final comparison will first be done in the conclusion part of the study.

2 The Practical problem

2.1 The issue

The rules originating in the questions of causation and incidence of loss differ within the Nordic countries. For the purpose of creation of a common Marine Insurance Plan it would

therefore be desirable to analyze these differences and similarities in order to create a common insurance policy for the whole Nordic market.

Thus, insurer's liability where a loss can be traced back to a combination of several perils of which some are covered and others not, differs within the Nordic countries. The main rule to the question at hand is to apply the *dominant cause principle*, such that the entire loss is allocated to the peril which is determined to be the dominant cause of the loss. This is the starting point in Swedish and Danish marine insurance law. However, in Norwegian marine insurance law the *apportionment principle* has been applied instead. Consequently, the loss shall be apportioned over the individual perils according to the influence each of them must be assumed to have had on the loss. Nevertheless, there is an exception to this principle. In ship owner insurances a modified *dominant cause principle* has been applied in cases where a loss has been caused by a combination of *marine* and *war* perils. This is also the starting point under Finnish marine insurance law.

Another question of causation relating to the insurer's liability pertains to incidence of loss and situations where the occurrence of damage can be traced back to previous insurance periods. In contradiction to international marine insurance, Norwegian marine insurance law has since 1930 been based on a *peril has struck principle* instead of a *damage has occurred principle*. The point in time when liability attaches to the insurer will thus also in addition differ within the Nordic countries. *First*, the result will depart in situations where the insured interest is struck by a peril but the damage does not occur until after the expiry of the insurance period. *Second*, the result will differ when the loss is caused by perils which can be traced to more than one insurance period.

2.2 The problem

Today a Swedish hull insurer and a Swedish policy holder can choose any insurance policy based on Danish terms, Norwegian or English terms. However, the question of creation of a

common Nordic Marine Insurance Plan has been discussed for some time.⁴ With the inherent differences between the marine insurance legislation of the Nordic countries the issues of causation and incidence of loss would have to be agreed upon by all involved parties before a common solution could be chosen

3 Legal Sources

3.1 Introduction

Shipping by its nature is an international business calling for creation of common legal rules, but unlike many other sectors of the maritime law, there is yet no international convention governing marine insurance.⁵ As a result, each country is still using its own separate national rules and despite the fact that the Scandinavian countries have practically identical Maritime Codes.⁶

3.2 Norwegian Marine Insurance Regulation

3.2.1 The Insurance Contracts Act

Norwegian insurance contracts are regulated by the Norwegian Insurance Contract Act (ICA) of 16 June 1989 (no 69). Part A of ICA regulates casualty insurance. However, Part

⁴ A seminar on the topic was held by the Nordic Association of Marine Insurers, (CEFORS) in Copenhagen in January 2009.

⁵ Wilhelmsen & Bull, *op. cit.*, p. 33.

⁶ Falkanger, Bull, Brautaset, *Scandinavian maritime law – The Norwegian perspective*, 2nd ed. Universitetsforlaget 2008, p. 23 et seq.

A only contains general rules and there are no rules concerning special insurance products.⁷ The provisions in Part A are mandatory for the benefit of persons having a right against the insurance company unless otherwise provided for in the act, cf. ICA § 1-3 first subparagraph. However, there are certain exceptions to the main rule. The exception concerns freedom of contract in professional insurance contracts and the item specifically excluding marine insurance from the mandatory provisions of the act is ICA § 1-3 second subparagraph (c). Thus, background law is only applicable where the solution does not follow from the agreement of the parties or the provisions of the NMIP.⁸

3.2.2 The Norwegian Marine Insurance Plans

The Norwegian Marine Insurance Plans have constituted the key marine insurance conditions in Norway for more than 100 years and have to a considerable extent influenced the drafting of corresponding conditions in other Nordic countries.⁹ The first Norwegian Marine Insurance Plan was published in 1871, and has been revised several times since then. The Plan in force today is the NMIP of 1996, Version 2010 followed with associated commentary. The NMIP is an “agreed document” and has been constructed by a committee consisting of participants from all of the interested parties.¹⁰ A characteristic feature of the NMIP is the broad content of regulations containing all aspects of marine insurance. The structure and the individual clauses of the Plan have more similarity to legislation than to average standard contracts.¹¹ The NMIP is supplemented by extensive and published commentaries that must be regarded as an integral part of the Plan.¹²

⁷ *Wilhelmsen & Bull*, op. cit., p. 27.

⁸ *Commentaries to NMIP § 1-4*, p. 11.

⁹ *Bull, H.J., Norwegian Marine Insurance Plan of 1996, SIMPLY 1997*, p. 123.

¹⁰ *Wilhelmsen & Bull*, op. cit., p. 29.

¹¹ *Wilhelmsen & Bull*, op. cit., p. 29.

¹² *Commentaries to NMIP § 1-4*, p. 13.

3.3 The Swedish Marine Insurance Regulation

3.3.1 The Insurance Contract Act

In Sweden a new insurance contract act was introduced in 2006.¹³ According to section 1:6 first subparagraph, the act cannot be deviated from to the detriment of the insured by any terms or conditions of the contract, if not otherwise stated in the act. However, the freedom of contract prevails in commercial insurance contracts and the act has a mandatory character in relation to transport contracts entered into with consumers only.¹⁴

The new Act constitutes a change in relation to earlier ICA that was partly mandatory in relation to marine insurance contracts. In the motives to the new act it was emphasized that there was a desire for more freedom of contract in relation to these types of insurances due to increasing international competition in the market.¹⁵

3.3.2 The Swedish Marine Insurance Plan and the Swedish Hull Conditions

The first Swedish Marine Insurance Plan was established in 1891. The Plan was revised in 1896 and remained in force until 1957. The plan in force today, the General Swedish Marine Insurance Plan of 2006 (SPL), is of a more limited scope than its forerunners. It primarily deals with general questions regarding marine insurance such as the duty of the insured, the insurance period and alteration of risk. It does, as an example, neither stipulate the risks covered by the insurance or deal with questions of causation or incidence of loss

¹³ Försäkringsavtalslagen 2005:104.

¹⁴ Cf. ICA 1:7 first subparagraph item 1. See also ICA 1:6 second subparagraph providing a mandatory element regarding protection of the rights of third parties.

¹⁵ Bengtsson, B, *Försäkringsavtalsrätt*, Norstedts Juridik AB, Stockholm 2006, p. 188.

specifically. Moreover, SPL was only drafted by a participation of the insurer side and is thus not considered an agreed document.¹⁶

The General Swedish Hull Insurance Conditions were first introduced in 1966. The version in force today is the General Swedish Hull Conditions of 2000 (SHIC). The conditions are a result of a co-operation between the underwriters, shipowners and average adjusters and constitute an agreed document. The SHIC conditions are supplemented with associating notes, although not as extensive as the corresponding NMIP commentaries. References are made to the SPL and ICA in the notes to the SHIC, but since both a new ICA and a new SPL has been enacted since then, these references are out dated.¹⁷

3.4 The Danish Marine Insurance Regulation

In Denmark the rules concerning marine insurance were regulated in the Danish Maritime Code from 1898 to 1930. After 1939 the rules were instead collected in ICA of 1930.¹⁸ These rules had however a minor significance in practice as the most important source of law constituted the Danish Marine Insurance Conventions dating back to 1726. The last Convention that has been introduced is the Danish Marine Insurance Convention of 1934 (DC) and the mandatory rules of ICA have been implemented into the Convention.¹⁹ The Declaratory rules of ICA will only become applicable if specifically stipulated in the Convention or if not otherwise agreed, cf. ICA § 3.²⁰ The DC is seen as a standard contract

¹⁶ Johansson, S. O., *Marine and Other Types of Transport Insurance- a Brief introduction to the Swedish Regulations and Conditions*, Jure Förlag AB, Stockholm, 2008, p. 19.

¹⁷ Sjöassurandörernas Förening, "Cirkulär 35/2005- Villkorsjusteringar", <http://www.sjoass.se/dok/cirk2005.htm>. [accessed 2010-10-22]

¹⁸ Falkanger, T, Bull, H.J, & Rosenberg Overby, L, *Introduktion til Søretten*, 3rd ed., Thomson Reuters A/S København 2008., p. 516.

¹⁹ Ibid.

²⁰ Cf. DC § 1 item 2.

applicable to the extent it is made reference to in the insurance contract.²¹ It contains an extensive set of regulations concerning all types of marine insurance. However, the Convention is of an early date and amendments are often implemented in the individual insurance contract.²² The Convention is considered an agreed document.

The Marine Insurance Convention of 1934 is supplemented by the Danish Hull Insurance Conditions of 1992 (DHIC) which has been developed by the Danish Central Union of Marine Underwriters. The Hull Conditions of 1992 are, with certain amendments, contracted on the foundation of the Convention.²³

3.5 The Finnish Marine Insurance Regulation

The Finish Insurance Contract Act 28.6.1994/543 exempts commercial marine insurance from the mandatory provisions of the act, cf. ICA § 3. The non-mandatory character of the Act in relation to commercial marine insurance contracts thus follows the same line as the rest of the Nordic countries, i.e. freedom of contract.

In contrast to the other Nordic countries Finland does not have a marine insurance plan or a marine insurance convention.²⁴ As far as hull insurance is concerned, the Finnish marine insurance market has over the years used General Hull Conditions for Vessels recommended by the Union of Marine Underwriters and the Shipowners' Association. The General Hull Conditions has, with certain amendments, been used since 1968. However, the conditions had met several problems in the market and new hull clauses were presented in 2002. These conditions were established through the participation of all of the concerned

²¹ Lyngsjø, P, Dansk Forsikringsret, 6 ed. Jurist- og Økonomforbundets forlag, København 1990, p. 296 et seq.

²² Falkanger, Bull & Overby, op. cit., p. 517.

²³ Falkanger, Bull & Overby, op. cit., p. 517.

²⁴ Wilhelmsen & Bull, op. cit., p. 35.

parties and became known as the Finnish Marine Hull Insurance Conditions 2001 (FHC). The Norwegian Marine Insurance Plan (1996) was used as a prototype for the Finnish conditions. As a result, there are similar features between the relevant parts of NMIP and FHC although certain national aspects have been maintained in the Finnish version.²⁵

4 An overview of the Causation Problems in Marine Insurance

4.1 Introduction

The scope of policy cover is the pivotal issue in understanding marine insurance and deals with a number of issues.

The first question is what types of perils the assured is insured against. In hull insurance a number of different perils, such as the perils of the sea, lack of maintenance or perils connected to war, may pose a threat to the ship. Insurers today are free to choose the risks they wish to cover and decline others. Some perils may thus be covered by the insurance, but not necessarily all of them. The main principle in marine risk insurance in the Nordic Countries is that all risks are covered if not explicitly excluded.²⁶

The second question in delineating the scope of cover is defining the casualty or incidence of loss the covered peril must materialize through to trigger the insurers' liability.

The third question relates to the type of loss that will be covered by the insurance. Normally, there are elective alternatives established in the insurance contract as to which

²⁵ Ibid., p. 36.

²⁶ DSK § 50, DHIC § 3.1, NMIP § 2-8, FHC sec. 6 and SHIC § 5 litra e.

losses will be covered. Hull insurance in its most extensive form covers total loss, damage and liability for collision and striking.²⁷

The fourth question deals with the issue of how the different elements in the chain of events are tied together. A connection between the covered perils, the casualty and the loss is required. The relationship between covered perils, casualty and loss is necessary to determine causation and therefore liability.²⁸

4.1.1 The causation requisite

A solely logical causation between the covered peril and the insured loss, as represented by the “*conditio sine qua non*” - principle,²⁹ is not a sufficient requisite to render the insurer liable under the insurance contract. In addition to the logical causation the chain of causation must have legal grounds to render the insurer liable for the loss.³⁰

To give it legal relevance either a principle of *adequate causation* or a principle of *combination of causes* has been used respectively.³¹ The principle of adequate causation focuses on the chain of causation and operates with a condition of closeness between the cause and the loss.³² The principle could also be formulated as a demand that the loss must be an anticipated consequence of the covered peril in order to hold the insurer liable.³³ The principle of combination of causes on the other hand, focuses on the loss being caused by several different causes, where some are inside and some are outside the scope of cover. Thus, in this case, the resultant loss has to be attributed over the different causes according

²⁷ Cf. NMIP § 10-4 and SHIC § 5.

²⁸ Wilhelmsen & Bull, op. cit., p. 79.

²⁹ Stuart Mill’s theory of logical causation: “*A is the cause of B if B would not happen if A had not occurred. A is thus a necessary condition for B*”.

³⁰ Brækhus & Rein, *Håndbok i kaskoforsikring*, Oslo 1993, p. 254.

³¹ Ibid., p. 255.

³² Wilhelmsen & Bull, op. cit., p. 108.

³³ Brækhus & Rein, op. cit., p. 256.

to a principle of attribution.³⁴ The principle of adequate causation does not play a central role in Nordic insurance today, and its main application relates to the question of limitation of too remote losses.³⁵ In marine insurance the question is solved on the basis of the principle of combination of causes, i.e. either as a dominant cause principle or a principle of apportionment.

The question of causation in marine insurance could be summarized into three main cases of causation problems:³⁶

- I. The situation when a casualty and subsequent loss is triggered by a combination of covered and uncovered perils. The uncovered perils can be categorized as objective or subjective perils. The objective perils could be exemplified by damage to the ship due to ordinary wear and tear, error in design or faulty material. The subjective perils could relate to circumstances of the assureds duties of disclosure and due care.
- II. The situation of a combination of marine and war perils leading to loss. This situation is a sub-category of (1). However, as the perils are covered by two separate insurances which stand equally in relation to each other,³⁷ the marine-risk and war-risk insurance respectively, the causation evaluation is slightly different.³⁸
- III. The third situation is somewhat different as it relates to the point in time when the liability of the insurer arises. A difficulty relating to causation occurs in the situation where covered perils have been operating during more than one insurance period. An example of this situation could be a latent damage sustained by the ship

³⁴ Wilhelmsen & Bull, op. cit., p. 108.

³⁵ Cf. Bull, op. cit., 245 and 255, Hellner, op. cit., p. 102 and 108, Tybjerg, op. cit., 84.

³⁶ Brækhus & Rein, op. cit., p. 255.

³⁷ Cf. NMIP § 2-8 and § 2-9, SHIC § 5 and § 7.2 b)-d), DHIC § 4.4., FHC 15.1.

³⁸ Brækhus, op. cit., p. 255 and Hellner, op. cit., p. 108.

during the first insurance year that subsequently operates together with a new peril during the second insurance year causing a new or extended loss.

A fourth situation relating to causation could be cases of *competing causes* where both are sufficient but none are necessary for the loss. However, the question is of little practical significance and has been solved similarly in all Nordic countries.³⁹

In the following an individual account will be given as to how the different Nordic countries have chosen to approach the problems at hand.

5 Combination of Causes in Nordic Marine Insurance

5.1 Introduction

A ship begins a sea voyage knowing that there is a defect in the steering gear that consequently makes it unseaworthy. During the voyage it takes part in a collision, but without fault. On a later occasion the ship runs aground due to the defect steering gear.

Under the circumstances abovementioned the hull insurer will as a main rule indemnify the collision damage but not the grounding damage. Thus, if two perils independent of each other have resulted in separate losses or separate parts of the same loss, each type of loss shall be attributed to the peril that caused the loss in question.

However, the situation will be different if an uncovered and covered peril in combination causes the loss, e.g. where a casualty is partly caused by the defect steering gear and partly by bad weather conditions.

³⁹ Bull, op. cit, p. 244, Johansson, *Varuförsäkringsrätt*, p. 243 et seq, Ivansen, p. 135. Vihma, p. 501 et seq.

In Nordic marine insurance two solutions have been used to solve the question of the insurer's liability when a loss is caused by a combination of different perils. The first method is the *dominant cause principle*. The principle has been established through case law from the turn of the century onwards and has a status of a general insurance law principle in all of the Nordic countries today.⁴⁰ Thus, if the insurance conditions do not provide a specific solution, the dominant cause rule will be applied. This is the case under the Swedish and Danish hull conditions. The dominant cause doctrine is foremost relevant in classifying the perils that has lead to the casualty, i.e. the course of events leading to the casualty. The requisite of causation between the casualty and the loss is less strict and it has been considered sufficient that the casualty has contributed to the loss.

However, Norwegian marine insurance, and later Finnish, has for more than 80 years used an *apportionment principle* when the loss has been caused by a combination of different perils. Instead of finding the dominant cause of a loss, each loss shall be attributed over the individual perils according to the influence each of them must be assumed to have had on the occurrence and the extent of the loss. The rule of apportionment will applied both in the way into the casualty and between the casualty and the subsequent loss.

5.2 Combination of Causes in Swedish Marine Insurance

There is no basis for applying a principle of apportionment in the Swedish hull insurance conditions or the Swedish marine insurance plan.⁴¹ As a result, a casualty that has been caused by a combination of different causes shall be solved on the basis of the dominant cause doctrine.⁴² Thus, the damage shall in its entirety be attributable to the cause that is considered the most "significant" or most "dominant".⁴³

⁴⁰ Cf. Hellner, *Försäkringsrätt*, p. 107 et seq, Lyngsø, *Dansk Forsikringsret* p. 129, Bull, *op. cit.*, p. 245.

⁴¹ Cf. SPL 2006 and SHIC 2000.

⁴² Hellner, *op. cit.*, 108 et seq.

⁴³ Johansson, *op. cit.*, p. 30.

The question of causation in relation to the dominant cause rule can be divided into two sub-issues. *Firstly*, it could be divided into the combination of causes on the way into the casualty, i.e. the question of causation between the peril and the casualty. *Secondly*, it could be divided into the consequences on the way out of the casualty, i.e. the question of causation between the casualty and subsequent losses.⁴⁴

The first sub-issue could be exemplified with a ship whose rudder is damaged during a bombing raid. On a later occasion the ship runs aground and becomes a total loss, whereas the damaged rudder is a contributing factor. According to the dominant cause rule the factor that will be deemed to be the most significant cause of the casualty will be responsible for the loss. However, it is not the cause most immediate in time that must be the most important; the evaluation is instead based on which of several perils has in most influenced the course of events leading to the casualty.⁴⁵ In this way the dominant cause rule makes the rule of adequate causation redundant because as it is established that the damaged rudder was not the main cause of the casualty, there is no further need to evaluate if there was a legally relevant closeness between the rudder damage and the total loss.⁴⁶

The combination of war and marine perils that concur to a loss, as exemplified above, is however specific as it normally relates to two perils that are covered by separate insurances. Consequently, if the insured has obtained insurance cover for both perils he will be covered regardless which peril will be classified as dominant.

Thus, a question of more relevance could be when one peril is covered by insurance and the other is not; implying that the insured will be without insurance cover if the uncovered peril is deemed the dominant cause.⁴⁷ In this relation it can be questionable if the *dominant cause principle* leads to satisfactory results seen from the insured's need for insurance protection. At the other hand, it is not clear how much weight can be attributed to such argument

⁴⁴ Hellner, op. cit., p. 95 and Johansson, S.O, *Varuförsäkringsrätt*, Jura Forlag AB, 2004, p. 235-240.

⁴⁵ Cf. Johansson, *Varuförsäkringsrätt*, p. 238.

⁴⁶ Hellner, op. cit., p. 107.

⁴⁷ Hellner, op. cit., p. 108.

concerning commercial insurance contracts with two professional counterparts.⁴⁸ In any case, the main rule is still that if nothing is specifically stipulated in the insurance contract, that will support an apportionment, the dominant cause rule shall be the point of departure. The result will thus be full compensation or none at all. Only in cases where the uncovered peril has contributed in such a late stage of the course of events that it is possible to distinguish the consequential damage that the peril has caused, an apportionment could be done.⁴⁹

However, in connection with the casualty and subsequent losses, legal doctrine suggests that in cases where the insured event has contributed as a necessary and active condition for the damage or loss, the insurance shall provide cover.⁵⁰ As a result, in cases where an insurance event has occurred in a combination with a new peril resulting in an increase in the damage or loss compared with the situation where the insured event was the sole cause, the insurance event shall be considered the dominant cause if:

- 1) It has been a necessary triggering factor and has contributed to the loss to such extent that it would seem reasonable to let the insured benefit from the protection the insurance was intended to provide.
- 2) The damage or loss would not have occurred in the same way regardless of the influence of the insured event. Thus, if it is probable that the damage or loss would have occurred anyway, the new peril shall be classified as the dominant cause instead.⁵¹

In cases of combination of a covered peril and subjective negligence a stricter evaluation should take place and the main rule shall be applied. Thus, in cases where the negligence of the assured or someone that he is responsible for has influenced the cause of events, the

⁴⁸ Bengtsson, op. cit., p. 86.

⁴⁹ Hellner, op. cit., p. 109.

⁵⁰ Ibid.

⁵¹ Ibid.

insurer shall be free from liability if the subjective negligence has been the main cause of the casualty. But even here, legal doctrine has expressed that there shall not be reason for going so far as to release the insurer from liability if the negligence has only to some extent contributed to the loss in question.⁵²

5.2.1 Combination of Causes in Danish Marine Insurance

In Danish marine insurance law the liability of the insurer is established by DC § 50. It follows from the paragraph that the insurer is liable for damage that has been caused by, an “unfortunate incident” (*ulykkelig Hændelse*) that strikes the insured interest. The notes to the paragraph define the “unfortunate incident” as an incidence that is not expected or are described as “normal” at the inception of the insurance.⁵³ A demand for causation is expressed by the use of the expression “caused by” in DC § 50.⁵⁴ However, neither the paragraph in question nor the other provision of DC takes standpoint to what extent, or if at all, the insurance company is obliged to cover a loss that has been caused by a combination of a covered and uncovered peril under the insurance policy. Nevertheless, the Danish courts have approved the *dominant cause principle* as a main rule.⁵⁵

In a case from World War II, *U 1943.779 (HD)*, concerning a collision of two ships sailing in convoy due to the war conditions, it was expressed that:

The court cannot support the standpoint of the defendant that the damage shall be divided between the marine risk and war risk insurer already on the grounds that there is no basis for such a conclusion either in the legislation or in the insurance contract. Thus, the court concluded that the most significant cause of the casualty was not the war peril, but negligence related to navigation.⁵⁶

⁵² Hellner, op. cit., p. 110.

⁵³ Tybjerg, op. cit., p. 56 et seq.

⁵⁴ Falkanger, Bull & Overby, op. cit., p. 524.

⁵⁵ Tybjerg, op. cit., p. 83 & 104-119.

⁵⁶ Lyngsø, op. cit., p. 305.

In cases where two or more perils in the same causal chain have contributed to the loss, and one of these are not covered by the insurance, the starting point is to use the dominant cause rule as well.⁵⁷

In *FED 2003.2512V* an increase of damage expenses that was due to an error in design was not covered by the insurance conditions.

However, it can sometimes be difficult to solve an individual case with the dominant cause doctrine. In these cases, although the dominant cause principle was applied, the courts have also taken into account the objectives of the relevant insurance provisions in order to achieve reasonable results.⁵⁸ Thus, in situations where it is possible to differentiate between the different perils share of the loss, it could be more appropriate to apply the *principle of apportionment* instead.⁵⁹

5.3 Combination of causes in Norwegian marine insurance

5.3.1 The development of the apportionment rule

In marine insurance during the World War I a large number of legal cases resulting from the combination of war and marine perils were adjudicated based on the dominant cause principle.

In a precedent-setting judgment, *ND1916.209 Skotfos*, it was established that the entire loss was attributable to the factor which was regarded as the dominant cause of the casualty.⁶⁰ However, during the subsequent years a series of judgments were given in dispute between

⁵⁷ Sørensen, op. cit., p. 140.

⁵⁸ Tybjerg, op. cit., p. 83.

⁵⁹ Sørensen, op. cit., p. 141.

⁶⁰ Commentaries to NMIP § 2-13 p. 58.

marine and war insurers. The marine insurers felt that it was unfair that a very strong contributing factor was required for the court to regard the war peril as the dominant cause. As a result of this position the entire cost of the casualty was often apportioned to the marine insurer. Under the revision of the 1930 Plan it was thus decided to adopt a rule of apportionment instead.⁶¹ In this way it opened up for solutions in-between the two extremes, (either A or B) of the dominant cause rule. The apportionment rule was, however, not yet to stay definitively. Due to high incidence of litigation after World War II, it was decided to revert to a dominant cause rule with respect to combination of war and marine perils. One of the reasons for this change was the fact that it was difficult to establish precedence for future disputes since the apportionment rule led to a discretionary evaluation of each individual case.⁶² To combine the standpoints of both the marine and war insurers a modified version of the dominant cause rule was introduced, cf. NMIP § 2-14. It was however decided to retain the apportionment rule for other combination of causes, including cases where perils insured against interacted with perils caused by the assureds' own negligence. The motivation was that the apportionment rule had gradually become part of the general conception of justice and had, to a significant extent, been applied in practical settlements.⁶³

5.3.2 NMIP § 2-13 first subparagraph

The main rule concerning combination of causes is NMIP § 2-13.⁶⁴ The first subparagraph of the provision reads:

⁶¹ Wilhelmssen & Bull, op. cit., p. 110.

⁶² Braekhus & Rein, op. cit., p. 259.

⁶³ Commentaries to NMIP § 2-13, p. 59.

⁶⁴ Cf. FHC sec. 16.1 *“If any loss or damage has been caused by a combination of perils and some of the risks are not covered by the insurance, the loss or damage shall be apportioned in proportion to the contribution by each peril to the occurrence and to the extent of the loss or damage sustained. Compensation shall be paid for loss or damage attributable to the perils which are covered by the insurance”*

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.

As a starting point the rule in NMIP § 2-13 has a general character and shall be applied in all cases of combination of causes. Thus, the paragraph pertains to both independent causes and causes in a casual chain, with disregard of which perils that are concurring.⁶⁵ However, since the in practice most disputed combinations are regulated separately today, i.e. the combination of marine and war perils in NMIP § 2-14, there are few objective exclusions left from the all risk principle in NMIP § 2-8.⁶⁶ As a result, combination of covered perils and the objective exceptions in NMIP §§ 12-3 and 12-4 and combination of covered perils and the provisions relating to the assureds own negligence, e.g. NMIP § 3-25, will constitute the most frequent cases.⁶⁷ The following combination of causes can be distinguished in practice.⁶⁸

- I. In the first situation two objective concurrent causes can occur on the way into the casualty. There are no recent cases concerning this relation today. However, based on earlier cases, it would be correct to say that where it has been a combination of an earlier acting cause and a later direct cause of the casualty, the most weight shall be attached to the latter cause. If the earlier cause shall be attributed any relevance it has to increase the probability for the loss. In other words, the ship has to take a risk it would normally avoid.

- II. In the second situation loss is caused by a combination of two objective causes in a causal chain. Thus, a new cause interferes in the course of events after a casualty has occurred and results in a further loss. In this case the first

⁶⁵ *Wilhelmsen & Bull, op. cit.*, p. 109.

⁶⁶ *Braekhus & Rein, op. cit.* p. 262.

⁶⁷ *Ibid.*, 262.

⁶⁸ *Wilhelmsen & Bull, op. cit.*, p. 114-115.

cause, i.e. the casualty, shall carry the most weight, cf. ND 1977.38 NSC *Vestfold I*.

III. In the third situation the loss occurs in a combination of an objective peril(s) (covered by the insurance) and subjective negligence. This situation could occur in both of the combination cases described in I-II. ND 1098.347 *Vall Sun* gives an example of a combination of failure of complying with a duty of due care and other causal factors.⁶⁹

In relation to the abovementioned, legal theory has deduced a number of criteria for the application of the rule of apportionment. To begin with, it is necessary to distinguish between relevant and non relevant causes. Thus, the prerequisite for applying the rule is that the loss is “caused” by a combination of different perils.⁷⁰ However, it does not mean that every peril that has been a necessary condition for the loss must be considered under the apportionment rule, i.e. if the peril has been rather insignificant the count could be set at zero.⁷¹ As a result, the *apportionment principle* has a possibility to reach the same result as the *dominant cause principle*, i.e. by attributing one peril the count 0 and the other 100.⁷²

The insignificance of a peril giving it a count of zero could be exemplified by ND 1942.360 VKS *Karmøy II*.

KARMØY deviated from the ordinary route due to sea mines laid under the war conditions. The ship run aground and became a total loss due to change of course although the route was considered safe. It was subsequently established that the captain had made mistakes and had acted negligently. Eventually the majority of the court determined that the rules of apportionment could not be upheld due to the fact that the contribution of the war peril in the casual chain could not have increased the probability of the ship running aground. The war

⁶⁹ Commentaries to NMIP § 2-13, p. 61.

⁷⁰ *Ibid.*, p. 60.

⁷¹ Braekhus & Rein, *op. cit.*, p. 262.

⁷² Wilhelmsen & Bull, *op. cit.*, p. 112.

peril therefore would have to be given much more weight as a causal factor for an apportionment to be applicable.

The reason for the legal judgment was that deviation due to a war peril would only be considered relevant if the deviation would have been negligent or unnatural also in times of peace.⁷³ The main rule is thus that in order to be attributed any relevance in the apportionment; the peril must increase the risk for the incurred casualty. Thus, as has been pointed out under the situation of two objective concurrent causes, in combinations of an earlier acting cause and a later direct cause of a loss, most weight shall be attached to the latter. If the former cause shall carry any weight, it must have increased the probability of a subsequent loss. The greater the risk, the greater importance the earlier cause shall be attributed.

Further, the loss can be a combination of two objective causes in a casual chain, as previously outlined above. In these cases the loss shall be attributed according to a degree of probability of the first casualty triggering the subsequent peril and consequently the new damage. Thus, the higher the degree of probability will be, the greater weight shall be attributed to the first peril.⁷⁴ An example is a damaged ship that sails to a repair yard for repairs. During the repairs errors are made resulting in further damage. The circumstances have thus developed in a causal chain between the casualty and the fault and it could be said that the two causes in combination have resulted in the latter damage, which was the case in *Vestfold I*:

The case constituted a combination of causes where a casualty was combined with a subsequent event resulting in new damage. The Supreme Court stated that even if the failure of the repair could not breach the chain of causation from the grounding, the errors committed by the yard were of such character that part of the damage should be attributed to this cause. The grounding was characterized as the event that triggered the chain of causation, whereas the failure of repair was of a less serious character. The damage was thus allocated with 2/3 to the insurer and 1/3 to the assured.

⁷³ Wilhelmssen & Bull, op. cit., p. 112.

⁷⁴ Ibid.

The first cause, i.e. the casualty, was thus considered to carry most weight. However, there is a prerequisite that the casualty qualifies as causal factor of relevance in the first place, i.e. there is a causal chain between the casualty and later events.⁷⁵ Moreover, it has been implied that the judgment in the Vestfold case was also based on a criterion of probability. It was thus maintained that that errors made by a repair yard could be expected and consequently lead to new damage. The errors would probably have been judged differently if the repair yard had acted with gross negligence.

Finally, the rule of apportionment shall be applied to a combination of objective causal factors and subjective negligence. A collision may for example in part be attributed to conditions of bad weather and in part to defective navigating equipment. The collision damage will thus to a certain extent be attributed to the marine insurer that will cover the loss caused by the peril of the sea and in part to the assureds breach of a safety regulation; a excluded peril in NMIP § 3-25.⁷⁶

In *Vall Sun* the arbitration court found that the slipping of the anchors was caused by intense weather, that the anchor chain was too short, and that the ship had too little weight. These factors were all exterior perils that were covered by the insurance. However, to make things worse the ship had also started to dredge. The crucial question was thus why *Vall Sun* did not manage to prevent the casualty after the dredging of the ship. The arbitration court pointed out several causes of nautical character that had contributed to the casualty. More importantly, it was in addition established that the casualty was caused by the fact that the ship lacked propulsion capacity, thus making it unseaworthy and a peril that the assured was liable for. The court found that the apportionment rule was applicable and the loss was distributed with 75 % on the insurer and with 25 % on the assured. The motivation of the arbitration court was that the factors leading to the dredging of the ship and the latter factors that the insurer was liable for had according to the total evaluation constituted a more significant role for the casualty than the lack of propulsion capacity. 75 % of the loss was thus apportioned to the insurer and 25 % to the assured.

⁷⁵ Braekhus & Rein, op. cit., p. 266.

⁷⁶ Wilhelmssen & Bull, p. 112.

It has been pointed out that the case gives little information concerning the criteria the court used to obtain the result. It is therefore not possible to evaluate if weight was put on considerations of deterrence.⁷⁷

5.3.3 NMIP § 2-14 Combination of war marine and perils

In the event of a combination of war and marine perils the starting point is that the dominant cause rule shall apply, cf. NMIP § 2-14 first sentence. However, the second sentence of the paragraph stipulates a modified version of the main rule.⁷⁸ The paragraph reads as follows:

If the loss has been caused by a combination of marine perils, cf. § 2-8, and war perils, cf. § 2-9, the whole loss shall be deemed to have been caused by the class of perils which was the dominant cause. If neither of the classes of perils is considered dominant, both shall be deemed to have had equal influence on the occurrence and extent of the loss

Two questions arise in relation to the paragraph; the first question consist of how strong a class of perils must be to be characterized as dominant, and secondly how equal the perils must be to apportion a 50/50 division.⁷⁹

It has been difficult to give any general guidelines when the first and second sentence will be applicable respectively. However, case law considering the combination of war and marine perils since the World War II can to some extent ease the application of the

⁷⁷ Wilhelmssen & Bull, op. cit., p. 116.

⁷⁸ Cf. FHC sec. 16.2 *“If any loss or damage has been caused both by a peril of the sea or another peril covered by these FHC 2001 Conditions and by a war risk, the entire loss or damage shall be deemed to have been caused by the dominant peril. If neither of the perils was dominant, both of the perils shall be deemed to have contributed to the occurrence of and to the extent of the loss or damage with equal shares.”*

⁷⁹ Braekhus & Rein, op. cit., p. 269.

paragraph.⁸⁰ Thus, taking a standpoint in the wording of “the dominant cause”, a considerable predominance should be implied in order to be able to characterize the peril as the dominant factor. In any case, arbitrary choice between two causes which carry approximately the same weight shall be avoided. An apportionment of 60/40 should probably constitute the upper limit for an equal distribution. If a peril is apportioned 66%, it is twice as heavy, and must be regarded as dominant.⁸¹

In addition, it has in theory been assumed that the content of the dominant cause rule varies depending on the relevant stage in the course of events leading up to the damage such that:

1) If it is a combination of two or more perils on the way to the casualty, it is presumed, in line with the traditional basis of the doctrine, that the evaluation amounts in finding the strongest or most significant cause between the various perils leading to the causality.

2) If it is a situation of a casualty that has occurred in combination with a new peril resulting in increased damage or loss the evaluation is different. Thus, in this case the insured incident is the dominant cause if it has been a necessary triggering factor and has contributed to the loss in such extent that it would be reasonable to let the assured benefit from the protection of the insurance cover.⁸² However, the prerequisite is that the loss or damage could not have occurred in the same way regardless of the incident insured against.⁸³

There are no specific cases concerning the distinction between the first and the second sentence in NMIP § 2-14 today. However, there are two cases concerning tanker

⁸⁰ Ibid. p. 270 et seq.

⁸¹ Brækhus & Rein, op. cit., p. 269 et seq.

⁸² Wilhelmsen & Bull, p. 118.

⁸³ Cf. The evaluation is thus the same as has been presented in 4.2 Combination of causes in Swedish Marine Insurance.

casualties in the Persian Gulf during the Iran-Iraq war concerning the similar rule in the 1964 Plan.⁸⁴

In *ND 1993.464 NA Nova Magnum* it was questioned if the element of war risk was sufficiently significant to apply the equal influence rule in § 21 second sentence (NMIP § 2-14 second sentence). The court decided that it was likely that the collision would not have taken place if the radar had been used in a correct way, which it had not been. There was thus no room for applying the equal influence rule. Thus, the marine peril was determined as the dominant cause of the loss.

In *ND 1989.263 NV Scan Partner* the circumstances were different as there was a chain of causes that lead to the subsequent casualty. In this case the marine peril constituted the dominant cause as the war risk would only gain relevance if it had created a substantial increase of risk for the casualty, which it had not.

Scan Partner was lost during maneuvers of distinguishing fire, which the ship according to a charter party had a duty to participate in. Thus, there was no increase of risk in relation to *Scan Partners* normal activities. Other factors of importance were that it had gone three days since the bombing of *Barcelona* and the total loss of *Scan Partner*. Nevertheless, there was a casual chain between these two incidences as the total loss would not have happened without the previous bombing. However, many other things had also happened between the bombing and the total loss and it could thus not be held as certain that *Scan Partner* became a total loss due to a war peril. The crucial fact was instead that the ship became a total loss during assistance of fire-distinguishing and it did therefore not matter which incidence that had actually caused it.

5.4 Advantages and disadvantages with the rules

As a starting point, a self-evident argument in favor of the *principle of apportionment* is that it constitutes an alternative choice between two extreme solutions and offers a whole range of in-between solutions instead. Therefore there is a possibility of an apportionment

⁸⁴ Commentaries to NMIP § 2-14, p. 63.

consideration of what is most adequate in relation to the specific circumstances in each individual case.⁸⁵

Moreover, it could be maintained that under the apportionment rule the premium is in “correct” proportion to the covered loss. Thus, the insurer is not held liable for the effect of casual factors that fall outside the scope of the insurance cover. The assured has paid premium to be covered against certain risks and therefore has no reasonable claim to be covered against other.⁸⁶

In addition, in situations where a covered peril interacts with the negligence of the assured, the apportionment rule gives a legal basis to allocate part of the loss to the assured without invoking a breach of the duty of care in full. Thus, the apportionment rule provides a more flexible instrument for the settlement than the dominant cause rule.⁸⁷ The element of deterrence will also be better served if it is possible to make a partial deduction from the compensation. Otherwise, in connection to minor faults, it could be tempting for the judge to reach the conclusion that it has not been satisfactorily proven that the assured has been negligent, if the alternative would be to lose the entire insurance cover.⁸⁸ Here, it would also be natural to base the apportionment on an evaluation on probability, and attach weight to the subjective negligence depending on the degree of probability that it would result in a loss. Flexibility in the claims settlement is therefore achieved which in turn eases the relationship between the insurer and the assured than what a strict reduction based on an evaluation of fault would do.⁸⁹

Conversely, the *dominant cause principle* could instead be favorable from technical considerations of law. Thus, the advantage is that it makes it possible to build up a judicial precedent doctrine for typical cases, which is not the case under the apportionment rule

⁸⁵ Commentaries to NMIP § 2-13, p. 58.

⁸⁶ Wilhelmsen & Bull, op. cit., p. 111 and Vihma, V, ”Om samverkande orsaker till ett försäkringsfall”, TfR 1945 s. 501, p. 511.

⁸⁷ Wilhelmsen & Bull, op. cit., p. 111.

⁸⁸ Brækhus & Rein, op. cit., p. 267.

⁸⁹ Commentaries to NMIP 2-13, p. 61.

where it is necessary to make a discretionary distribution depending on the specific circumstances of each individual case.⁹⁰

In addition, it may also be submitted that the rule of apportionment will probably give the assured a less favorable solution than the dominant cause rule in cases of a combination of a casualty and subsequent perils. The general tendency has, both in practice and theory, been to characterize the earlier casualty as the dominant cause. Thus, in the event of an apportionment rule the assured has to accept that the proportion of the loss corresponding to the uncovered peril could be the risk of his own.⁹¹

As a last point, the dominant cause rule conforms to general insurance law and international marine insurance. As a matter of fact, to achieve a common national and international approach to the causation problems, under the amendment of the NMIP 1996 it was suggested that one should revert to a dominant cause rule also for the other combinations of causes than the combination of war and marine perils. However, considering the advantages with the apportionment rule, such an amendment was not included.⁹²

⁹⁰ Ibid., p. 59.

⁹¹ Ibid.

⁹² Wilhelmsen & Bull, *op. cit.*, p. 110 et seq.

6 Incidence of Loss

6.1 Introduction

The incidence of loss defines the point in time when the insurer's liability is triggered.⁹³ If an insurance event occurs instantaneous with the loss, e.g. a ship collides and incurs damage on the spot; there will normally be no difficulty in establishing the time of the casualty and the point in time when the liability of the insurer attaches. However, questions of causation can arise if the course of events, or the progression of damage, crosses between successive insurance periods. Two questions in particular arise in this context:

- 1) How far must the course of events develop in the insurance period to trigger the liability of the insurer?
- 2) Alternatively, when does the liability of the insurer cease in relation to the insurance contract so that later incurred damages will be the risk of a successive insurer or be the risk of the insured?⁹⁴

If the insurance cover is by the same insurer on the same insurance conditions, it can make a small difference for the insured how the loss will be distributed across different insurance periods. For the insurer, however, it may be of importance while the reinsurance cover often differs from year to year. Moreover, if the insurance cover is renewed on different terms or transferred to another insurer at the end of the first period, it can be of economic importance also for the insured if a loss shall be attributed to the "old" or "new" insurance policy.⁹⁵

⁹³ Wilhelmsen & Bull, op. cit., p. 127.

⁹⁴ Wilhelmsen, T-L, *Periodisering av forsikringstilfellet - finnes det en patentløsning*, in *Ånd og Rett: Festskrift til Birger Stuevold Lassen*, Universitetsforlaget, 1997, p. 1077.

⁹⁵ Brækhus & Rein, op. cit., p. 277.

In practice, there are two alternatives as to the point in time when an insurance event has manifested in an insurance period. The first alternative is concentrating on the perils leading up to the loss and the relevant point in time is when the covered peril has manifested in such a way that the loss is a natural and expected consequence of the peril striking. In marine insurance this alternative is named the *peril has struck principle*.⁹⁶ The second alternative is to attach the insurer's liability to the occurrence of the damage instead, either as *damage occurred* or as *damage discovered principle*. The relevant point in time will thus be when the relevant damage has occurred or been established.⁹⁷

The main rule in international insurance law is variations of the *damage principle* and will thus be applicable in all cases the insurance contract is silent as to which principle shall govern the insurance contract.⁹⁸

As a starting point the Swedish, Danish and Finish conditions follow the *damage principle*, meanwhile the Norwegian conditions take point of departure in the *peril has struck principle* instead.

6.2 Incidence of Loss and the Swedish Solution

6.2.1 Background to the rule in SHIC § 33

Before the new ICA, provisions specifically regarding marine insurance could be found in paragraphs §§ 59-78 of the former ICA. However, now as then, no specific rule established

⁹⁶ Bull, H.J, *Forsikringsrett*, Universitetsforlaget AS, 2008, p. 237.

⁹⁷ Bull, op. cit., p. 237 et seq.

⁹⁸ *Ibid.*, p. 238.

the question of the point in time when liability attaches to the insurer. Moreover, legal doctrine has only scarcely commented upon the issue.⁹⁹

However, the starting point when former ICA was still in force was that in lack of a specific regulation, principles similar to those in liability and casualty insurance would also apply to marine insurance. Thus, the insurer was liable for consequential damage that occurred after the expiry of the insurance period if caused by an insured event that occurred within the insurance period.¹⁰⁰

However, legal doctrine has implied that the principles taken from general insurance law do not always lead to optimal results in marine insurance. A difficulty was illustrated by a Norwegian case, *ND 1950 s. 458 NSC Hektor*.¹⁰¹ The case concerned a combination of causes when a latent damage originating from an earlier insurance period and a new peril interoperated and lead to a new casualty in a successive insurance period. In this case part of the consequential damage was attributed to the latent damage and referred back to the previous insurer, while the insurer responsible at the time the new peril struck indemnified the part of the loss that was attributed to this peril. However, the solution was not recognized by the revision of the NMIP 1930 and the succeeding Plan of 1964 deviated from the solution in a new provision, NMIP 1964 § 18. What consequences the criticized Hektor-case and the subsequent “new” Norwegian solution had in Sweden, has not been further commented upon in the relevant legal doctrine.¹⁰²

However, a general wish of getting closer to the NMIP 1964 was expressed in the introduction remarks of the SHIC 1966. It was thus expressed that beyond the wish for more uniform rules in relation to marine insurance in general, the Norwegian plan, *inter alia*, was considered to give a more satisfactory insurance cover. In any case, the aim of SHIC 1966 was not to copy the part relating to hull insurance of the Norwegian Plan but, in

⁹⁹ Cf. Hellner, J, *Försäkringsrätt*, Försäkringsjuridiska föreningens publikation Nr 15, 2nd edit., Stockholm 1965, p. 455.

¹⁰⁰ Cf. Hellner, op. cit., p. 455.

¹⁰¹ Hellner, op. cit., p. 455 in footnote 39.

¹⁰² *Ibid.*, p. 455.

cases it was considered appropriate from the aspects and concepts of Swedish hull insurance follow its main lines in content and structure.¹⁰³

The rule pertaining to situations of unknown damage at the inception or expiry of an insurance period was thus established in SHIC 1966 § 35. It followed from the first subparagraph that if the ship at the inception of the insurance period had a unknown damage or defect as a consequence of an earlier casualty, the damage or defect, if it gave rise to a new casualty, should be deemed to have occurred at the time of the new casualty, or at such earlier point in time when the defect or first damage was discovered. The second subparagraph stated that the insurer was not liable for a casualty after the expiry of the insurance period caused by a defect or damage that existed at the end of the insurance period but was unknown at that time.¹⁰⁴

The commentaries stated that the paragraph had, in essence, been drafted in conformity with the NMIP § 18 second subpara (now § 2-11 second subparagraph) and that it had not a counterpart in the previous conditions or the SPL. The aim of the paragraph was to regulate circumstances of unknown damage to the ship at the inception or the expiry of the insurance period. An example from the notes followed:

A ship runs aground in 1964. The ship is then surveyed and repaired. However, in 1965 a crack formation in the axle is discovered that according to the technical expertise originates from the grounding casualty in 1964. Meanwhile, it is decided that repairs can wait, but before the ship is repaired the ship sustains a fracture in the axle. The crack in the axle is thus a consequence of the grounding in 1964, but as far as the damage was unknown at the expiry of 1964 it will not be attributed to this insurance but forwarded to the point in time when it was discovered and caused “a new casualty”, i.e. in 1965, even though the rupture in the axle first occurred in 1966.

The ideas of forwarding the consequential damage and the technique as demonstrated in the above paragraph could therefore be said to have been inspired by NMIP 1964 § 18. But

¹⁰³ Cf. Introduction to *Kommentar till Allmänna Svenska Kaskoförsäkringsvillkor av år 1966*, Sjöassurandörernas Förening, Sveriges Redareförening och Sveriges Ångfartygs Assurans Förening.

¹⁰⁴ Cf. SHIC 1966 § 35.

still, there are differences between the Norwegian and Swedish solutions which becomes even more apparent compared with the successor of NMIP 1964 § 18, i.e. NMIP § 2-11, and § 33 of SHIC 2000.

6.2.2 SHIC § 33 unknown damage

As has been mentioned above under general Swedish liability and casualty insurance the insurer is, as a main rule, liable for consequential damages caused by a casualty that took place in a previous insurance period but first occurred after its expiry. The same principle will thus apply to marine insurance if nothing is specifically regulated in the insurance contract.¹⁰⁵

However, although the SPL is silent, the Swedish hull conditions do stipulate a rule on causation and incidence of loss.

The notes to SHIC § 33 indicate the *damage principle* in determining the point in time that liability attaches to the insurer. The notes to the paragraph state that in the normal case the casualty and the subsequent damage occur in direct or close conjunction to each other. However, in cases that the casualty and the damage do not occur simultaneously or in close conjunction, the relevant point in time is always computed from the occurrence of the damage.¹⁰⁶

SHIC § 33 stipulates four situations or different points in time the insurers liability will be triggered in relation to unknown damage. The paragraph reads as follows:

¹⁰⁵ Hellner, op. cit., p. 454.

¹⁰⁶ Notes to SHIC § 33, p. 37.

1a) Damage that is unknown at the commencement of the insurance period and that has not given cause to any new damage shall be referable to the insurance that was applicable when the damage occurred.

1b) If it cannot be determined when the unknown damage occurred, the damage is referred to the insurance that applied when the damage was discovered.

2a) Damage that is unknown at the commencement of the insurance period and that gives cause to new damage shall be referable to the insurance that applied when the new damage occurred.

2b) If it cannot be determined when the new damage occurred, the damage is referable to the insurance that applied when the new damage was discovered.

The starting point therefore is the point in time when the unknown damage occurred, cf. § 33 1a). Unknown damage is defined as damage that has not been discovered in connection with a casualty. It does not matter if the casualty itself has been discovered or not.¹⁰⁷ However, if this point in time cannot be determined the damage is to be indemnified by the policy in force when the damage was discovered, cf. § 33 1b).

In SHIC § 33 2a) a special solution is sought that results in a cut-off rule when a previous unknown damage causes consequential loss in a new period. Accordingly, in situations where unknown damage has developed between two successive insurance periods, the primary damage will be “absorbed by”, i.e. attributed to, the consequential loss and covered by the insurer liable at the point in time the consequential loss occurred. Thus, the result is that the insurer liable at the point in time when a new damage occurs shall cover the loss of both the primary damage and the new damage (consequential loss). However, if the occurrence of the unknown consequential damage cannot be placed in time the total damages are covered by the insurer at the point in time in which the consequential damage was first discovered, cf. § 33 2b).¹⁰⁸ Hence the result is that the Swedish solution does not split the primary damage and the new casualty (the consequential loss) between the

¹⁰⁷ Ibid., p. 37

¹⁰⁸ Notes to SHIC § 33, p. 37.

different insurance periods, but always tries to gather the damage to one single point in time.

The conditions of SHIC § 33 rest on the assumption that a loss occurs spontaneously at the same point in time.¹⁰⁹ The provision has therefore no formal impact of damage that has developed slowly during a wide range of time, i.e. in relation to *slow motion* or *progressive* damages. However, the notes indicate a general approach to these types of damages. Thus, it is implied that the costs of progressive damages shall be apportioned proportionally over the relevant insurance periods counted from the point in time the damage started to develop, to the point in time that it was discovered.¹¹⁰

In the final section of the notes to § 33 the rules on the burden of proof are pointed out. According to SHIC § 39 it is the insured that has to prove that the damage is recoverable under the conditions. In cases where full knowledge cannot be gained the assured must at least show that it is most probable that 1) the damage was caused by an occurrence for which the insurer is liable according to § 5 and 2) that the damage occurred during the insurance period. If the damage is unknown and it cannot be shown when it occurred it is presumed that it occurred during the insurance period in which it was discovered. The burden of proof that the damage did not occur in a presumed period lies on the insurer that in such an event has to prove when the damage occurred.

If the insured at the end of an insurance period discovers unknown damage to the ship and decides not to inform the insurer about it two probable consequences of this action could follow: 1) If the insurer can demonstrate when the damage occurred; nothing is gained by the omission to disclose the damage cf. SHIC § 33 1a) and § 39. However, if when the damage occurred cannot be established, the rules of § 33 1b) apply and the damage shall be referred to the point in time when it was discovered. In this case the act of the assured

¹⁰⁹ Ibid, p. 37 et seq.

¹¹⁰ Notes to SHIC § 33, p. 38.

should be judged against the rules on the duty of disclosure in SHIC § 9 with associated sanctions.

SHIC § 3 *Commencement*, could also be mentioned in relation to the question of incidence of loss, not so much for the stipulation of when the insurance period starts and continues, but because of the solution to a distinct situation described in the associated notes.

It follows that in case of damage due to harsh weather and ice that occur between two insurance contracts, the damages shall be distributed proportionally between the two insurance periods according to the number of days sailing in harsh weather and ice respectively.¹¹¹ The solution is motivated by the fact that it could be difficult to establish in conditions of hard weather and passage through ice actually when the damage has occurred. While the Swedish conditions do not have any equivalent to the *peril has struck principle*, a solution has been elected where the damages are divided between the insurance periods according to the relevant days.¹¹²

6.3 Incidence of Loss under the Danish and Finnish Rules

6.3.1 The Danish Solution

The starting point in general Danish insurance law is the principle of the “cause of the damage”, or *skadesårsagsprincippet*. The content of the rule is that the insurer is liable for

¹¹¹ Notes to SHIC § 3, p. 6.

¹¹² Cf. Bertsson, K, Emanuelsson, T, Stranne, W, *Jämförelse mellan svenska och norska kaskoförsäkringsvillkor- Inför en kommande gemensam nordisk plan?*, Kandidatarbete SOL- 09/21, Institutionen för Sjöfart och Marin Teknik, Chalmers Tekniska Högskola, Göteborg 2009.

an insurable event if its cause has operated in the insurance period, even though the consequences first manifest after its expiry.¹¹³ This is however, not the starting point in Danish marine insurance law.

The *damage principle*, *skadesvirkningsprincippet*, is the starting point Danish marine insurance law.¹¹⁴ According to this principle the point of departure is that the damage shall have taken effect and have been ascertained in the insurance period. The damage will in other words be covered by the insurance no matter when the *cause* of the loss operated.¹¹⁵ The prerequisite that the damage shall have taken effect means that there should be some destructive consequences and that these shall have manifested in the insurance period. The detrimental consequences will equal the insured event.¹¹⁶ Damage shall always be referred to the insurance policy that was in force when the damage was ascertained for the first time.

The liability of the insurer is established by DC § 50. The paragraph states that if nothing else follows from the Convention or the insurance contract, the insurer is liable for all damage that is caused by, an “unfortunate incident” that strikes the insured interest. The content of the rule is thus that the insurance covers all perils that can materialize in a casualty that strikes the interest insured, and every consequence of such incident, as long as it consist of an economical damage.¹¹⁷

DC § 50 does not establish in which point in time the unfortunate incident strikes the interest insured, i.e. the question of incidence of loss. However, the notes to DC § 39 establishing the time of the insurance period comment upon the question and the notes to the paragraph indicate that the Convention is governed by *a damage principle*.

¹¹³ Ivan Sørensen, *Forsikringsret*, 5th edit. Jurist- og Økonomforbundetsforlag, 2010 København, p. 145.

¹¹⁴ Mail-correspondence with average adjuster Lars Voigt Larsen, 15.10.2010.

¹¹⁵ Sørensen, op.cit., p. 147.

¹¹⁶ Sørensen, op.cit., 148.

¹¹⁷ Niels Tybjerg, *Dansk Søforsikrings - Konvention af 2. April 1934*, 2nd edit. G.E.C. Forlag, 1963, p. 56.

The significance of the *damage principle* is thus that if a peril threatens to materialize in a casualty, the insurer is only liable if it has actually struck the insured interest after the inception of the insurance period. It could be exemplified by a ship that after the inception of the insurance is struck by fire in the harbor. The insurer becomes liable even though the fire disaster in the harbor started before the commencement of the insurance. However, if the ship has been struck by fire before the inception of the insurance, the insurer is not liable and not liable for the damage that occurs after the inception of the insurance as a consequence of the fire.¹¹⁸

The same reasoning should be applicable on casualties occurring at the expiry of an insurance period. If the casualty has struck the insured interest after the expiry of the insurance period the insurer shall not be liable, even if a peril was threatening the insured interest immediately before the expiry of the period. An example taken from practice is a case from 1931 where a cargo of coal had been heating up the surrounding area over time eventually creating an immediate risk for a fire to develop. As a result of the fire starting after the expiry of the insurance period, the insurer was not held liable.¹¹⁹

However, if the casualty has struck the interest insured before the expiry of the insurance period, the insurer shall be liable also for such consequential damage that has been caused by the event but do occur after the expiry of the insurance. However, the solution is limited by the notion of a “new casualty”. Thus, if the later damage occurs as a new casualty, the notes to § 39 narrow down the liability of the insurer, and he shall be free from liability for damages as far as the effects of the new insured event is concerned. If a ship runs aground and sustains an unknown damage to the machinery and this machinery damage causes a new casualty after the expiry of the insurance period, the insurer must indemnify the damage pertaining to the machinery but not the remaining damage and loss.¹²⁰

¹¹⁸ Tybjerg, op.cit., p. 44.

¹¹⁹ Cf. S.H.D. 7/12 31 (S.H.T. 31. 344).

¹²⁰ Tybjerg, op.cit., p. 45 et seq.

Notwithstanding the short remarks abovementioned, the incidence of unknown machinery damage, the cause of which cannot be established with certainty, at the inception or expiry of an insurance period, is not thoroughly dealt with in the notes to DC § 39. One of the reasons is, that cover for machinery damage was earlier only covered under special clauses, and the question had thus not the same relevance as it has today. The *damage principle* is thus implied in the notes to the DC § 39, although it should be noticed that the DC dates back to 1934 where other circumstances governed the subject matter. However, the *damage principle* is still in use by Danish average adjusters today.¹²¹

6.3.2 The Finnish solution

As seen above, in both Swedish and Danish marine insurance law the temporal liability of an insurer is tied to the occurrence of damage rather than to the point in time when the peril has struck. As a matter of fact, also in general international insurance law the main rule is at present variations of the *damage principle* and the principle will thus be applied if nothing else is specifically stipulated in the insurance conditions.¹²²

In the Finnish hull conditions, there is no specific provision that indicates the point in time when liability attaches to the insurer. However, FHC section 1 stipulates that the contract shall be governed by Finnish law and section 2 of the conditions emphasises that any questions governed by the conditions but not specifically resolved herein shall be resolved in accordance with the general principles that the conditions are based on. Thus, the *damage principle* will be applied.

¹²¹ Mail-correspondence with average adjuster Lars Voigt Larsen, 15.10.2010.

¹²² Bull, op. cit., p. 238.

6.4 Incidence of Loss under the Norwegian Marine Insurance Rules

6.4.1 Introduction

An important reason for choosing the *peril has strike principle* has been the wish to omit the consequences of the *damage principle* in situations when the peril strike the insured interest at the end of the year but the damage does not occur until the next insurance period. The solution was not considered optimal in cases where the insurance contract at the end of the year was transferred to another insurer or where there was a shift in the insurance terms.¹²³ The previous insurer would escape from liability due to that the damage occurred after the change of insurer, and the assured, at the other hand, could risk ending up without insurance cover for the coming year while no insurer would be willing to take the insurance risk.¹²⁴

However, the *peril has struck principle* could also give rise to problematic issues. An insured peril could thus strike the insured interest during the insurance period but materialize in damages first a considerable time after its expiry. Under the relevant principle such damage had to be referred back to the point in time when the peril struck. The insurance company could thus become liable for considerable damages years after the insurance period had expired. Such a solution would be rather unfortunate from both insurance technical and evidentiary reasons.¹²⁵

By the revision of the 1964 Plan, the anti-Hektor clause came into effect (see above under 5.2.1.) and after a minor revision in 1996, the clause became established as it is formatted today in NMIP § 2-11 second subpara. The background for NMIP § 2-11 second subparagraph is the circumstances surrounding the Hektor-case:

¹²³ Bull, op. cit., p. 239.

¹²⁴ Wilhelmsen, op. cit., p. 1078 et seq.

¹²⁵ Ibid., p. 1079.

While *Hektor* was in port in March 1945 the ship was bombed causing damage to the rudder. The damage was later repaired and *Hektor* received a seaworthiness certificate. However, almost a year later, in January 1946, the ship was exposed to lengthy periods of harsh weather leading to the breakage of the ship's rudder heel. The rudder was subsequently lost under calm weather in May the same year. The majority in the Supreme Court concluded that the bombing in 1945 had caused the weakening of the rudder heel which along with the bad and lengthy weather in 1946 had weakened the ship making it unable to withstand the normal strains it was subsequently exposed to. With the conclusion that it could not make any difference that the actual loss had first materialized after the expiry of the insurance period, the loss was apportioned between the war risk insurer of 1945 by 60 % and the marine risk insurer of 1946 by 40 %.

The result of the *Hektor*-case has been heavily discussed and disputed. Three main arguments were put contra the solution in the *Hektor*-case. *Firstly*, it was pointed at the difficulties arising for the insurer to arrange for adequate reserves for each insurance year if obliged to cover extensive damages after the expiry of the insurance period. *Secondly*, the solution could also cause forensic- and evidentiary issues as to what extent the latent damage was actively contributing to a subsequent loss when caused by a combination of different perils. This could lead to disputes and cost- and time consuming investigations not in proportion to the advantages the placement back in time of the damage brought. *Thirdly*, the *peril has struck principle* created problems where a casualty occurred shortly after the ship had been delivered from the building yard and this casualty could be attributed, wholly or in part to a latent defect or damage occurring in the building period. The new insurer would escape from liability and it would at the other side be uncertain if the construction risk insurer would be willing to cover the loss. The need for clear and predictable rules was thus emphasized.¹²⁶

¹²⁶ Braekhus & Rein, p. 280 et seq.

6.4.2 NMIP § 2-11

The point in time when liability attaches to the insurer is regulated in NMIP § 2-11 first subparagraph:

“The insurer is liable for loss incurred when the interest insured is struck by an insured peril during the insurance period”.

The rule implies that it is sufficient that the peril has struck to trigger the insurers liability, i.e. damage must not have occurred during the insurance period. However, if there is no damage there will be no liability. The principle only triggers the insurer’s liability if losses can be attributable to the peril, i.g. if grounding damage results in no loss there is also no subsequent liability.¹²⁷

In cases where the damage occurs simultaneously with the peril striking there will be no differences in applying the *peril has struck principle* or *damage has occurred principle*. However, it acquires independent significance where the ship, on expiry of an insurance period, is struck by a peril and it is obvious that damage will occur, but the peril does in fact not cause damage until the next insurance period. Two classical examples are:¹²⁸

A ship is in port on the midnight of 31st of December 2010 when a fire disaster strikes at a nearby warehouse and it is obvious that the fire will spread to the ship without possibility of moving it away from the fire. Correctly, the fire subsequently strikes the ship but it is actually damaged first on the 1st of January 2011, i.e. when the second insurance period starts to run. According to the principle in § 2-11 first subparagraph the damage that occurs after the turn of the year must be transferred back to the time when the fire-peril struck, i.e. to December 2010. Similarly, if a ship is ice-bound at the end of the year, but without any ice-damage having yet occurred, any ice damage occurring after the turn of the year must be transferred back to the point in time when the ice-peril struck. In contrast, following the damage has occurred principle; the damage would be attributed to the insurer being liable when the damage in fact occurred, i.e. after the turn of the year.

¹²⁷ Wilhelmssen & Bull, op. cit., p. 129.

¹²⁸ Cf. Brækhus & Rein, op. cit., p. 278.

Thus, one of the reasons for introducing the *peril has struck principle* was to avoid the moral risk that could arise if the assured or the insurer could influence which among successive insurance contracts an incidence of loss could be attributed. If for example the assured but not the insurer knew that the peril had struck, the assured could be tempted not to disclose the circumstance. If the he was uninsured he could get insurance or, if he already had cover, renew it on better terms.¹²⁹ However, it could in this relation be questioned if the assureds duty of disclosure in NMIP § 3-1 and the attached sanctions of the insurer would not be sufficient to prevent such practice. In any case it would end up in a dispute pertaining to evidence, which could be inconvenient enough.

However, the main motives for the principle seem to be to protect the assured from being left without insurance cover in the particular situation. The insurer could, on the basis of risk assumptions, be tempted to refuse renewal of the insurance. A new insurer could instead refrain from underwriting insurance for the same reasons. The assured would thus be left in a situation where he would not be able to gain insurance cover, or to gain it only against conditions of a very high premium or deductible.¹³⁰ Although the objective of the moral risk and the protection of the assured could be considered utmost reasonable, the NMIP § 2-11 first subparagraph has been criticized as being contrary to international marine insurance and general Norwegian insurance law.¹³¹ Criticism has also been expressed as to questions of how strong the element of danger must be to affirm that the peril has struck.

NMIP § 2-11 second subparagraph stipulates a modification to the main rule in the first subparagraph. It reads as follows:

“A defect or damage that is unknown at the inception or on expiry of an insurance, and which later results in a casualty or an extension of the damage to other parts, shall be deemed to be a

¹²⁹ Wilhelmssen & Bull, op. cit., p. 129.

¹³⁰ Wilhelmssen, op. cit., p. 1078.

¹³¹ Commentaries to NMIP § 2-11, p. 47.

marine peril which strikes the ship at the time the casualty or damage to other parts occurs, or at such earlier time as the defect or first damage became known.”

The core of the clause is thus that if an unknown defect or damage originating in the previous insurance period causes a casualty or extension of the damage in the new insurance period, the consequential damage shall not be referred back to the first period. The unknown defect or damage is reclassified to a marine peril which strikes the insured interest at that point in time when the casualty or damage to other parts occurs. If the unknown defect or damage becomes known at an earlier point in time this will be the point of departure instead. As a result, the effect of the second subparagraph is that it results in both a combination of a *peril has struck* and *damage has occurred principle*. The primary damage that strikes the ship in the situation described will thus be governed by the *peril has struck principle*. However, the consequential damage will be subscribed to a *damage principle*.

The central part of the provision is therefore that it divides the chain of causation into two main categories. Firstly, it categorizes the original and unknown defect or damage, which constitutes the “primary damage”, (cf. SHIC § 33 1a)). Secondly, it categorizes the development of this primary damage (or defect) into casualty or further damage, i.e. the “consequential damage” (cf. § SHIC 33 2a)). A new incidence of loss is thus established by the reclassification of the defect or damages to a marine peril which strikes the ship at the point in time that the new damage or casualty occurs.¹³²

The provision applies to “defect or damage” which the ship had at the inception or expiry of an insurance period, but which was unknown at that time. According to the commentaries the term “defect” is general and covers any kind of defect regardless of the cause, e.g. error in design, material and workmanship.¹³³ There is also no limitation as to the point in time the “defect must have occurred”. Defects during building periods are also

¹³² Wilhelmsen & Bull, op. cit., p. 130.

¹³³ Commentaries to NMIP§ 2-11, p. 50.

included. The defect does not constitute a loss as a condition for compensation, thus there is no actual liability triggered before the defect develops into damage.

The notion of “unknown damage” covers each and every form of damage, regardless of its nature or cause. It can be caused by a previous unknown defect or by a previously known casualty. In relation to NMIP § 2-11 the term causality could be described as a demand for a physical damage to the ship resulting from the fault, for example a part having cracked or broken.¹³⁴ Further as the purpose of the provision is to prevent attribution of damage back in time the notion of “damage to other parts” should have a narrow interpretation.¹³⁵

A prerequisite for applying NMIP § 2-11 second subparagraph is that the defect or damage was “unknown” at the expiry and the inception of the insurance period. Neither the insurer nor the assured shall have had knowledge of the defect or damage. The requirement is motivated by the wish to counter fraudulent collaboration between the shipowner and the crew. There is a tendency in demanding that a larger circle of persons must have been unaware of the damage or defect to make the rule applicable. The negative delimitation of the term is drawn by a subordinated crewmember, unaware of the significance of the damage or defect in question.¹³⁶ However, if the chief engineer has knowledge of a crack in the shaft but omit to report this to the shipowner, the replacement costs of the primary damage and any consequential damage shall be covered by the earlier insurer, i.e. not the insurer during whose insurance period the costs took place. The target of the rule is to prevent fraudulent behavior of those who are duty-bound to report to the insurer and shipowner.

In the commentaries to the NMIP it is also referred to slow motion damage. Such form of continuous damage can be relatively common in conjunction with extraordinary corrosion,

¹³⁴ Wilhelmssen & Bull, op. cit., p. 131.

¹³⁵ Ibid., p. 132.

¹³⁶ Commentaries to NMIP § 2-11, p. 53.

but can also occur to all kinds of latent damage.¹³⁷ In practice the solution has been to allocate it on a *pro rata basis* among the insurances in effect when the damage developed.

6.5 Comparing the Rules on Incidence of Loss in Hull Insurance

6.5.1 Similarities between the solutions

The starting point in Norwegian marine insurance is thus to allocate the loss (back) to the insurer in whose insurance period the insured interest was struck by a covered peril. The starting point in the remaining Nordic countries is when the damage occurred. Although different point of departures, it should be remarked that the casualty and the damage often occur simultaneously with the peril striking, and the insurer's liability is thus triggered at the same point in time. More precisely, the result will lead to the same result in three situations:¹³⁸

- I. In situations where the peril insured against materializes through a casualty, for instance a stranding, and this immediately results in a loss there are no differences between the principles relating to the timing of damage. The result will thus be the same in all Nordic countries.
- II. In situations of unknown damage when the peril will strike at the same time as the damage occurs, for example in the event of hull damage which the ship accumulates over a long period of time but which is not discovered until the ship is docked. In these cases it may be difficult to document the exact time when the peril struck and

¹³⁷ Ibid., p. 55.

¹³⁸ Cf. Wilhelmssen & Bull, *op. cit.*, p. 128 -129.

the damage occurred but, as a main rule, the damage occurs concurrently with the peril striking. Thus, the result is the same also in this case.

- III. The third situation will relate to the loss; the *peril has struck principle* and the *damage principle* will only trigger the liability of the insurer in cases where losses can be attributable to the peril. Thus, if the ship is struck by a peril without incurring any damage or loss, e.g. the ship runs aground but no damages occur and the ship subsequently manages to refloat on its own, the insurer will not be liable for any compensation.

Thus, in all three situations illustrated above the principles pertaining to the question of incidence of loss in the Nordic countries will lead to the same result.

6.5.2 Differences between the solutions

One of the major differences between the Nordic solutions will relate to the situation where a casualty and subsequent damage to the ship does not occur instantaneous or to situations of unknown defect or damage that later manifest in loss.

Assume that an unknown defect, an error in material, develops into a crack in 2010. The crack constitutes an unknown damage in 2010. In 2011, at the beginning of a new insurance period with a new insurer, the crack develops into a breakdown of machinery. Under the Norwegian conditions the breakdown of machinery will be covered by the 2011 insurer whereas the 2010 insurer will be liable for the crack according to the rules established in NMIP § 2-11 second subparagraph. According to the Swedish conditions instead, both the crack and breakdown in machinery will be covered by the 2011 insurer, cf. SHIC § 33. The SHIC § 33 2a) does not split the “primary” and “consequential” loss the

way NMIP § 2-11 second subparagraph does. If the fault in 2010 constitutes in a latent defect instead, which subsequently results in damage, this damage, i.e. the primary damage, will be attributed to the 2011 insurer in both cases. The *damage has occurred principle* which is the fundamental point of SHIC § 33 and the special rule in NMIP § 2-11 second subparagraph thus conform in this circumstance.

The implications of the differences between the rules can also manifest in situations where a shipowner decides to change conditions between two subsequent insurance periods. If taking the ice bound ship in December with damage occurring after the turn of the year as an example,¹³⁹ and the insurance contract was first subscribed on Swedish and then Norwegian hull conditions it would result in that the shipowner would not get any cover of the loss. The Norwegian conditions would refer to the point in time when the peril struck, i.e. in December 2010, which was a point in time before the liability of the Norwegian insurer did attach. The Swedish insurer at his side would claim that the damage occurred in January 2011 and should therefore be covered by the Norwegian insurer. Moreover, the situation could be problematic in cases of unknown or latent damage. If in this situation the insurance contract is first affected on Swedish and later on Norwegian conditions the shipowner could lose his cover for the “primary damage”, i.e. the Norwegian conditions would refer the primary damage back in cases where the Swedish conditions would absorb the primary damage covering it at the same point in time where the consequential damages arose. A last illustration may be a casualty where a consecutive damage, originating from the same peril is apportioned over 3 policy periods with 1/3 on each year, as it consequently repeats itself (i.e. there is no consequential or new damage). The unknown damage from the known peril thus repeats consequently even if it is thought to be repaired each time. Under NMIP the claim would in full fall under the first period pursuant to the *peril has struck principle* while under the Swedish conditions each incidence of damage had to be dealt with separately. If we further assume that the vessel was insured on Swedish hull conditions during the first year and on the NMIP during the subsequent years instead, the assured would recover 1/3 from the first policy and nothing from the subsequent

¹³⁹ See 5.4.1.

policies. But the situation may well be the opposite where the assured would attain a “double cover”. However, the examples may appear theoretical as usually “change in conditions”- clauses will be provided when changing between insurance conditions. Nevertheless, in theory, if a shipowner would consider changing the insurance conditions for the fleet, notice should thus be taken to the sometimes subtle and sometimes more apparent differences between the rules of incidence of loss relating to the Nordic hull conditions. Shipowners might want to change conditions without running the risk of falling in between two sets of conditions or loose foreseeability as to the insurance provisions. Today it generally should be the brokers and underwriters function to assist with providing “change in conditions-clauses”¹⁴⁰ or similar assistance, thus taking care of such pitfalls.¹⁴¹

6.5.3 Advantages and disadvantages with the rules on incidence of loss

The *damage principle* can create problems if it is certain that damage will occur at an inception or expiry of an insurance period but when the damage has not yet materialized. First of all, the result can seem unfair. More importantly, it can become problematic for the insured if the insurer knows about the damage and by reasons of risk assessment neglects to renew the insurance. Where the insured but not the insurer knows about the damage the insured may deceitfully try to gain the next insurance policy on better terms, this will inflict with the duty of disclosure of the insured, but it can be very hard for the insurer to prove intent in this situation.¹⁴²

¹⁴⁰ Cf. CEFOR - Clause no. 3 *Change of Conditions Clause*, http://www.cefor.no/insurance_cond/InsuranceCond.htm, [accessed 2010-10-11].

¹⁴¹ Cf. Loss Prevention Circular No. 02-01, “*Damage to Ballast Tank Coating and the 1996 Norwegian Marine Insurance Plan*”, comparing English and Norwegian Conditions, http://www.gard.no/ikbViewer/page/preventing-losses/area/article?p_document_id=7946, [accessed 2010-10-11].

¹⁴² Wilhelmssen, op.cit., p.1078 et seq.

Difficulties pertaining to evidence could arise in situations where time has passed since the damage occurred and the point in time when the damage was discovered and subsequently claimed. It can be difficult for the assured to establish at which point in time the damage occurred and claim liability from the insurance company liable at this time. As the assured has the burden of proof that the damage occurred in the relevant point in time, the standpoint of the assured against the insurance company may stand weak.¹⁴³

The disadvantage for the insurance company, at the other hand, lies in the risk of being obliged to cover damage that occurred in an earlier insurance period when the accounts for the year as well as the reinsurance settlement has already been completed. A re-opening of the insurance year could thus cause both practical and economic inconveniences. Depending on the individual reinsurance conditions, there is a possibility that the insurance company could, in addition, lose its reinsurance cover for the particular loss which could then amount in a severe economic drawback for the company in question.¹⁴⁴

The motives for creating the exception to the *peril has struck principle* in § 2-11 second subparagraph was that it would lead to impractical results if a insurer had to cover an unknown damage that first materialized and extended in an new casualty maybe years after the relevant insurance cover had ended. This was an unsatisfactory solution both from evidentiary aspects as to the limited ability in proving when the peril struck. It could also complicate the situation for the insurer in terms of accounting and reinsurance.¹⁴⁵ The same motives could thus be considered the basis for the special solution in § 33 2a), i.e. where an earlier unknown damage is absorbed and referred to the point in time when the consequential damage occurs.

The difference is that in SHIC § 33 there will be no evidentiary questions as to when the “primary” unknown damage arose; it is simply absorbed by the consequential damages.

¹⁴³ Bull, op. cit., p. 238.

¹⁴⁴ Ibid.

¹⁴⁵ Wilhelmsen, op. cit., p. 1079.

According to § 2-11 second subparagraph this question still has to be answered.¹⁴⁶ In conformity to general principles of the burden of proof in insurance contracts it rest upon the assured to prove when this damage occurred, cf. NMIP § 2-12.¹⁴⁷ In this way the application of SHIC § 33 may seem easier. However, the commentaries to NMIP § 2-12 express that although the assureds burden of proof includes to show that the peril has struck at a time when the insurer covered the risk, it will not always be appropriate to invoke this rule against the assured. If both insurances are taken out on Norwegian conditions, the assured may as an alternative claim advance payments according to NMIP § 5-7.¹⁴⁸ Nevertheless, in the plan revision of NMIP 1964 a result in part close to the Swedish solution was discussed, i.e. a rule of presumption was proposed so that the damage should be referred to the point in time it was discovered if the insurer was not able to show that it had occurred in an earlier period of time.¹⁴⁹

The damage principle may seem natural while the damage will constitute a distinguishable incident that can be easily established. A reason for applying the principle is thus also motivated by the fact that in cases of, e.g., complex machinery damages it can be difficult to establish when the perils struck. However, the strongest argument for the *damage principle* has over the years been that it conforms to international marine insurance law.

¹⁴⁶ Wilhelmsen, op. cit., p.1080.

¹⁴⁷ Cf. also DC § 81 and SHIC § 39.

¹⁴⁸ Commentaries to NMIP § 2-12, p. 56.

¹⁴⁹ Wilhelmsen, op. cit., p. 1080.

7 Discussion

7.1 Introduction

In this final part of the study discussed topics under subsection 4 and 5 will be evaluated and summarized. First the result of the comparison between the rules on combination of causes in the Nordic countries will be evaluated and subsequently the considerations in relation to the rules of incidence of loss will be presented.

The purpose of this work has been to evaluate and discuss the differences between the rules on causation and incidence of loss that exist in the individual marine insurance plans and hull insurance conditions in the Nordic countries. The work has also briefly reviewed the implications a common Nordic Marine Insurance Plan would have on these specific rules.

It would be of great interest to do more research regarding all aspects of the rules on causation, i.e. to consider the rules on burden of proof or the influence of the risk assessment in relation to the different solutions on causation.

In the limited scope of this study the rules on burden of proof and a complete presentation on all elements of the rules on causation could not be reviewed and might be considered as a shortcoming of the study. However, due to the complexity of the subject, only a narrow aspect of the questions on causation in marine insurance could be reviewed.

7.2 Combination of Causes in Nordic Marine Insurance

The result of *the apportionment principle* under the Norwegian and Finnish conditions and the *dominant cause principle* under the Swedish and Danish conditions can lead to similar and different results depending on 1) the combination of causes as such and 2) the different stages in the course of events. The result will thus be that:

1) There are no differences between the national insurance policies when two objective concurrent causes occur on the way to the casualty and the insurance event has been caused by a combination of marine and war perils. Thus, the dominant cause rule will be the basis in all Nordic countries. However, the Norwegian and Finnish conditions have taken it a step further and established that if neither of the perils is considered dominant, both shall have equal influence on the occurrence and extent of the loss.¹⁵⁰ The target is thus an equal division in cases where it would seem random to characterize one of the perils as the dominant.¹⁵¹ In Swedish and Danish marine insurance no apportionment of the liability between the marine and war risk insurer has been accepted. However, a division of the loss has been suggested in the legal doctrine as a modification to the dominant cause rule in cases where it cannot be proved which peril was the dominant cause of the loss. The dominant cause rule has thus been criticized to lead to unreasonable results in cases where the perils have been equally dominant.¹⁵²

Moreover, in other cases when a covered and uncovered peril concurrently causes a casualty, e.g. bad weather and an error in design, there is also as a starting point no grounds for making a reduction based on the Swedish or Danish hull insurance conditions. The combination of causes shall thus be decided upon using the dominant cause rule. However, in the Norwegian and Finnish conditions there is room for an apportionment.

2) The second situation refers to the circumstance where a loss is a combination of two objective causes in a causal chain. Thus, a new cause interferes in the course of events after a casualty has occurred and results in a further loss. In these cases the apportionment rule can give the assured a less favorable solution than the dominant

¹⁵⁰ Cf. NMIP § 2-14 sec. sentence and FHC 16.2.

¹⁵¹ *Wilhelmsen & Bull*, op. cit., p. 117.

¹⁵² *Hellner*, op. cit., p. 108 with reference to Schmidt, F, *Faran och försäkringstillfället*, Lund 1943, p. 234-239.

cause rule. According to the *dominant cause principle* the earlier cause will normally be characterized as the dominant cause in full while it can be apportioned under *the principle of apportionment*. The requisite for determining the first casualty as dominant is however that the new peril would not have occurred regardless of the first casualty.

- 3) The third situation is when the loss has occurred by a combination of objective perils covered by the insurance and subjective negligence. In this case the dominant cause rule will lead to an “either or solution”, while the apportionment rule opens the door for a discretionary reducing of the compensation.

Thus, there are advantages and disadvantages with each rule. As has been expressed above the dominant cause rule can seem unfair in cases where the concurring causes have equally caused the loss. In these cases the apportionment rule in NMIP § 2-13 and the modification to the dominant cause rule in § 2-14 second subparagraph will lead to more “fair” results. Moreover, it has been maintained that the premium under an apportionment rule will be more “correct” in relation to the loss. The apportionment rule could therefore seem as a more balanced and compromised solution between all interests involved.

The idea of an apportionment rule has over the time been debated in both the Swedish and Danish legal doctrine and the solution of *a principle of apportionment* is thus not completely foreign. Introducing the Norwegian solution as the common solution in the Nordic Marine Insurance Plan would therefore not seem completely random. Moreover, in the period of more than 80 years it has been used in Norwegian marine insurance and it appears that it has functioned well. It has constituted a practical and workable alternative to the traditional dominant cause doctrine. Further, from the comparison above it could be questioned if it would constitute major impacts for the remaining Nordic countries to change to an apportionment rule. The fact is that the apportionment rule gives a possibility to reach the same result as under the dominant cause rule, i.e. by attributing one peril the count 0 and the other 100.

The rules on the combination of marine and war peril are as a starting point the same. Moreover, as indicated above wishes for a similar solution of the modification to the dominant cause rule in NMIP § 2-14 second sentence and section FHC 16.2 has been expressed both in the Swedish and Danish legal doctrine. The Norwegian or Finnish based solution could thus constitute an appropriate solution for the common Nordic Marine Insurance Plan.

7.3 Incidence of Loss in Nordic Marine Insurance

As seen above under subsection 5, different jurisdictions work with different approaches regarding incidence of loss that crosses between successive insurance policies. Considering the presented material it could be concluded that there are no perfect rules but advantages and disadvantages with each solution. Nevertheless, the question is which solution would be “the best fit” for the whole Nordic market.

The solution in NMIP § 2-11 does not conform to the solutions in the other Nordic conditions or to international standard, and could thus create application difficulties if it was opted for in the Nordic Marine Insurance Plan. This has been a strong argument against the *peril has struck principle* ever since it was first established in 1930. Nonetheless, it should be noticed that the differences between the principles may not be as immense as they can seem at a first glance.

Even though the NMIP § 2-11 first subparagraph provides a different starting point in comparison to the point of departure of the damage principles, a considerable restraint has been imposed to the main rule in the second subparagraph of the provision. The practical effect of the rule will therefore to a large extent result in a *damage principle* solution.¹⁵³

In addition, it could be emphasized that the provisions of the NMIP are well-established and have been influential in the drafting of the corresponding conditions in the other

¹⁵³ Bull, op. cit., SIMPLY 1997, p. 131.

Nordic countries.¹⁵⁴ Based on the presented material, the same could, at least in part, be said about the solution in NMIP § 2-11.

As a last remark, as the principle in NMIP § 2-11 is a conciliation of the *peril has struck* and the *damage has occurred* principle it could be the patented solution¹⁵⁵ and the final compromise between the different principles.

8 Conclusion

Clear and predictable rules are needed in marine insurance to govern the relationship between the insurer and the insured.

Thus, in the common Nordic Marine Insurance Plan, there should be little ambiguity to govern the cases of occurrence of a marine casualty.¹⁵⁶

A common Nordic Marine Insurance Plan could be attractive for both insurers and their clients in order to foster the growth of the insurance industry and promote marine trade.

Therefore, instead of promotion of particular regional plans, efforts should be undertaken to develop and implement a joint solution.

The implementation of a joint policy may not be so far-fetched, since as far as the marine insurance rules are concerned, there is already a great deal of unanimity between the Nordic countries. Moreover, mechanisms already exists to further refine the existing rules with regular legal revisions, as seen in the Norwegian Marine Insurance Plans.

¹⁵⁴ Ibid, p. 123.

¹⁵⁵ Cf. Wilhelmsen, *Periodisering av forsikringstilfellet - finnes det en patentløsning*, Ånd og Rett: Festskrift til Birger Stuevold Lassen (footnote 38).

¹⁵⁶ Bull, SIMPLY 1997, p. 138.

The questions of causation and incidence of loss have for many years been discussed in the legal doctrine. Each principle is fairly well known and the differences may eventually be smaller than initially assumed. In fact with each participating country contributing with the soundest part of their insurance doctrines, the resulting agreed document may stand out as superior to its predecessors. It could thus be anticipated that after a transitional implementation period the new insurance policy would be operated with ease in all participating countries.

The separate Nordic marine insurance plans and hull insurance conditions already have great similarities and a common legal tradition unlike the disparate English and American rules.

It may be therefore be anticipated that creation of a common causation and incidence of loss legal platform in the Nordic Marine Insurance Plan may not be as daunting as it first appeared to be.¹⁵⁷ Creation of a common organized insurance structure could be advantageous for the economic development and growth of the whole Nordic region. This could speak in favor of erasing the last differences within the Nordic marine insurance legislation, in the questions of causation and incidence of loss as well.

¹⁵⁷ See also Bertsson, K, Emanuelsson, T, Stranne, W, *Jämförelse mellan svenska och norska kaskoförsäkringsvillkor- Inför en kommande gemensam nordisk plan?*. (footnote 66)

References

Statutes

Swedish Insurance Contracts Act 2005:104

Danish Insurance Contracts Act 28.6.1994/543

Norwegian Insurance Contracts Act 1989-06-16-69

Finnish Insurance Contracts Act 1930-04-15-129

Marine Insurance Conditions

Norwegian Marine Insurance Plan of 1996, Version 2010

General Swedish Marine Insurance Plan 2006

Finnish Marine Hull Insurance Conditions 2001

General Swedish Hull Conditions 2000

Danish Hull Insurance Conditions of 1992

Danish Marine Insurance Convention of 1934

Case Law

ND 1989.263

ND1981.347

ND 1977.38

ND 1950.458

ND 1942.360

Secondary Literature

Bengtsson, B, *Försäkringsavtalsrätt*, Norstedts Juridik AB, Stockholm 2006

Brækhus, S, Rein, A, *Håndbok i Kaskoforsikring - På grunnlag av Norsk Sjøforsikringsplan af 1964*, NIFS, Oslo 1993

Bull, H.J, *Forsikringsrett*, Universitetsforlaget AS, 2008

Bull, H.J, *Norwegian Marine Insurance Plan of 1996*, SIMPLY 1997

Falkanger, T, Bull, H-J, Brautaset, L, *Scandinavian maritime law – The Norwegian perspective*, 2nd ed. Universitetsforlaget 2008

Falkanger, T, Bull H.J, & Rosenberg Overby, L, *Introduktion til Søretten*, 3rd ed., Thomson Reuters A/S København 2008

Johansson, S. O., *Marine and Other Types of Transport Insurance- a Brief introduction to the Swedish Regulations and Conditions*, Jure Förlag AB, Stockholm 2008

Johansson, S.O, *Varuförsäkringsrätt*, Jura Forlag AB, 2004

Kommentar till Allmänna Svenska Kaskoförsäkringsvillkor av år 1966, Sjöassurandörernas Förening, Sveriges Redareförening och Sveriges Ångfartygs Assurans Förening

Lyngsjø, P, *Dansk Forsikringsret*, 6 ed. Jurist- og Økonomforbundets forlag, København 1990

Hellner, J, *Försäkringsrätt*, Försäkringsjuridiska föreningens publikation Nr 15, 2nd edit., Stockholm 1965

Sørensen, I, *Forsikringsret*, 5th edit. Jurist- og Økonomforbundetsforlag, København 2010

Tybjerg, N, *Dansk Søforsikrings - Konvention af 2. April 1934*, 2nd edit. G.E.C. Forlag, 1963

Tybjerg, N, *Assurandørens Ansvar*, det Berlingske Bogtrykkeri København 1952

Vihma, V, "Om samverkande orsaker till ett försäkringsfall", Tfr 1945 s. 501

Wilhelmsen, T.L, & Bull, H.J, *Handbook in Hull Insurance*, 1st edit., Gyldendal Norsk Forlag AS 2007

Wilhelmsen, T-L, *Periodisering av forsikringstilfellet - finnes det en patentløsning*, in Ånd og Rett: Festschrift til Birger Stuevold Lassen, Universitetsforlaget, 1997

Internet sources

Sjöassurandörernas Förening, "Cirkulär 35/2005- Villkorsjusteringar",
<http://www.sjoass.se/dok/cirk2005.htm>. [accessed 2010-10-22]

CEFOR - Clause no. 3 *Change of Conditions Clause*,
http://www.cefor.no/insurance_cond/InsuranceCond.htm, [accessed 2010-10-11]

Loss Prevention Circular No. 02-01, "Damage to Ballast Tank Coating and the 1996 Norwegian Marine Insurance Plan", comparing English and Norwegian Conditions,
http://www.gard.no/ikbViewer/page/preventing-losses/area/article?p_document_id=7946,
[accessed 2010-10-]

Oral sources

Mail-correspondence with average adjuster Lars Voigt Larsen, 15.10.2010

Other sources

Bertsson, K, Emanuelsson, T, Stranne, W, *Jämförelse mellan svenska och norska kaskoförsäkringsvillkor- Inför en kommande gemensam nordisk plan?*, Kandidatarbete SOL- 09/21, Institutionen för Sjöfart och Marin Teknik, Chalmers Tekniska Högskola, Göteborg 2009

References

List of Judgements/Decisions

Treaties/Statutes

Secondary Literature

Annex (optional)