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Exclusions of Risk and Duties Imposed on the Insured

A STUDY IN INSURANCE LAW

BY JAN HELLNER

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Exclusions of Risk and Duties Imposed on the Insured

A STUDY IN INSURANCE LAW

BY JAN HELLNER

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Introduction

In the law of insurance we distinguish between such clauses in insurance contracts as determine the risk covered by the insurance and such as impose duties on the insured. This distinction is particularly important in those countries where the legislation on insurance contracts gives detailed rules, largely compulsory, about the duties imposed on the insured, while laying down few or no rules regarding the determination of the risk. Such is the case in the Scandinavian countries as well as in France, Germany and Switzerland. In all these countries, the insurer is free to make whatever exclusions from the risk insured he likes, but his possibilities of regulating the duties of the insured are strictly limited by statute. Consequently, the problem arises how to distinguish between legitimate exclusions of risk and duties imposed on the insured. A problem, in many ways similar but also in important respects different, arises in English and American insurance law with regard to exclusions of risk, conditions and warranties.

The following study treats the problem now mentioned mainly from the point of view of the Swedish Insurance Contract Act of April 8th, 1927, to which the other Scandinavian Insurance Contract Acts are, on this as on most other points, substantially similar. Other systems of insurance law are brought into account for the purposes of the general discussion and in order to illustrate the features peculiar to Scandinavian law. The aim of the study is, on the one hand, to show the difficulties involved in the distinction, which seem to be largely the same in all the European Continental systems, and, on the other hand, to discuss the solution of the practical problems, in which, it is maintained, the details of the particular system under which the matter is to be decided are of considerable importance.

It is often said that in principle the distinction made between exclusions of risk and duties imposed is perfectly clear. "*Beide unterscheiden sich so klar wie Negation und kategorischer Imperativ*", says a German authority.¹ By excluding a risk, the insurer decides under what conditions he will be liable to pay the insurance indemnity, and certain types of damage are excepted in advance from the insurance cover. By imposing duties, the insurer prescribes certain types of conduct, non-compliance with which will liberate him wholly or partially from the liability to pay the insurance indemnity.²

A few simple examples will make the nature of the distinction clearer. A common clause limiting the risk is that excluding war hazards from the insurance cover. A more specialized clause determining the risk is the one that excludes from certain fire insurances damage to electrical equipment caused by short-circuits and other electrical phenomena. The principal duties imposed on the insured (besides that of paying the premium) are, according to the Scandinavian Insurance Contract Acts, (1) the duty of informing the insurer about the risk when entering into the contract (which corresponds to the rules about misrepresentation and non-disclosure in Anglo-American insurance law), (2) the duties concerning increase of risk and safety regulations put down by the insurer and (3) the duties concerned with the actual occurrence of a loss, which include preventing or diminishing an imminent loss as far as possible, not causing the loss wilfully or negligently, and giving notice to the insurer of the loss. Some of these rules, notably those of informing the insurer of the risk when entering into the contract, are common to all branches of insurance, whereas the rules are more varied as regards, for example, increase of risk.

We shall here be concerned only with what is called "damage insurance", that is, insurance other than life, accident and sickness

¹ Prölss, *Versicherungsvertragsgesetz*, 7. Aufl., 1952, Anm. 3 zu § 6. Cf. also e.g. Picard & Besson, *Les assurances terrestres*, 1950, pp. 200 f.

² The term used in the German and Swiss Insurance Contract Acts is *Obliegenheit* (to which there is no corresponding term in the Swedish language). There has been considerable discussion both in German and Scandinavian legal theory about the appropriateness of the concept of duty (German "*Rechtspflicht*", Swedish "*förpliktelse*") in this case. See e.g. Bruck & Möller, *Kommentar zum Versicherungsvertragsgesetz*, 8. Aufl., 1953, Anm. 5—11 zu § 6, F. Schmidt, *Faran och försäkringsfallet*, 1943, pp. 15 ff., Ussing, in *Ugeskrift for Retsvæsen*, 1944, pp. B 139 f.—The use of the term "duty" in this study implies no opinion as to the legal problems involved. Obviously the choice of a term can be no argument in deciding questions of law.

insurance. The Scandinavian Insurance Contract Acts apply to marine insurance also, and accordingly we shall have to take some account of this branch of insurance, although the principal subject is non-marine insurance. In another direction the subject is limited by excluding such problems as are specially connected with informing the insurer of the risk and with the actual occurrence of the loss. Accordingly, the relationship between exclusions of risk, on the one hand, and safety regulations and increase of risk, on the other hand, form the main subject of the study.

Among the clauses which raise problems of the type to be discussed here, there are some that have attracted special attention in several legal systems. In motor insurance, the insurer may stipulate to be free from liability for damage which occurs when the car is driven by a driver who is drunk or who has not a valid driving licence. These clauses may vary in detail, but they seem to constitute problems everywhere. Do they mean that damage occurring under these circumstances is an excluded risk, or do they impose duties on the insured, and, in that case, what kind of duty? As we shall see later, many different opinions have been offered on this subject. Clauses in motor insurance regarding the use of the insured car have also caused difficulties. Another type of clause which has been much discussed is one that is common in burglary insurance. When money and securities are insured against burglary, the insurance generally covers only what is kept in a safe. Is this a way of establishing the risk covered by the insurance, or is it a duty imposed on the insured? Here also, there are different opinions which may lead to different practical results. These various clauses may be taken as typical examples of the problem to be discussed.

The Nature of the Distinction

1. As already mentioned, it is sometimes said that in principle there is a clear difference between exclusions of risk and duties imposed on the insured. If we look closer at the matter we find, however, that the difference is hardly clear even in principle.

There is, for instance, little to be gained by saying that by an exclusion of risk the insurer excludes in advance certain types of damage from the insurance cover, whereas by imposing a duty he can only in special cases be liberated from paying the insurance indemnity as a result of the conduct of the insured. Such a difference seems to depend chiefly on the choice of perspective. When looking at the exclusions of risk, one regards the matter from the time when the contract is made; when describing the duties, from the time when the loss occurs or the insured acts. If one chooses to view both exclusion of risk and duty from the time when the contract is made, the insurer in the one case as well as in the other excludes in advance, wholly or partially, his liability to pay the indemnity if certain circumstances occur, and the difference will lie chiefly in the type of the circumstances which exempt him from the liability. This is explained by the fact that—at least in Continental European insurance law—whole or partial loss of the insurance indemnity is the only practical sanction of the duties imposed on the insured. Liability to pay damages is for various reasons not a practical remedy in insurance law.

It is also not satisfactory to say that the difference between exclusions of risk and duties imposed on the insured lies in the type of circumstances which exempt the insurer from paying the insurance indemnity, in so far as duties but not exclusions of risk depend on the conduct of the insured. This, indeed, touches a very important side of the matter, as it seems impossible to speak of a duty without reference to the conduct of the one or the other person, and certainly the rules regarding

both increase of risk and safety regulations make the result dependent on the conduct of the insured. But it is important not to take for granted that an exclusion of risk cannot be dependent on the conduct of the insured. This is in fact—as we shall shortly see—one of the main issues of the discussion. We cannot start, therefore, by defining exclusion of risk as something which is not dependent on the conduct of the insured.

2. Although it seems difficult to find any simple test by which we can decide all doubtful cases, it seems possible to describe the difference between exclusions of risk and the various special duties by combining several details. There are in fact distinct legal patterns for exclusions of risk as well as for the two kinds of duties with which we are principally concerned, i.e. increase of risk and safety regulations. By fitting a special case to one such pattern, certain consequences will appear. Exclusion of risk is, however, nowhere defined or regulated in the Swedish Insurance Contract Act, and there are many possible variations. It is therefore not easy to state many common characteristics. Increase of risk and safety regulations are on the contrary regulated by statute, and the fact that the rules given are largely compulsory, i.e. cannot be changed by the contract, gives the patterns a certain stability. The comparison between increase of risk and safety regulations is somewhat difficult because, when regulating the increase of risk, the statute takes as its starting point the change in facts, whereas in the case of safety regulations the starting point is the clause in the contract, and also because the statute gives more detailed rules as regards increase of risk than as regards safety regulations.

Taking this into account, we find the following characteristic differences. It seems desirable to go into detail, although some points may be important only in exceptional cases.

(1) *The interrelations between the rules of law and the terms of the contract are different.*

Regarding the *determination of the risk*, the statute gives no general rules, common to all branches, and comparatively few special rules for the different branches of insurance. The special rules concern chiefly fire insurance and marine insurance.³ Mostly the insurer can, and must, determine the risk covered by the insurance by stating it

³ Insurance Contract Act, ss. 60—72 (marine insurance), ss. 79—82 (fire insurance).

in express terms in the contract. There are no requirements as to the form of provisions which exclude certain risks.

Increase of risk is regulated in detail by the statute (sections 45—50). For a change to have effect as increase of risk, the fact concerned must be mentioned in the insurance policy or have been stated by the insured to the insurer when entering into the contract.⁴ It is not necessary to state in the contract the legal effects of a change in such a fact, or even that a change may have unfavourable consequences to the insured. It is thus sufficient that the fact is mentioned.

Safety regulations must be given in the insurance contract to take effect. The consequences of not complying with such regulations are stated in the statute and need not be mentioned in the contract (section 51).

The rules now mentioned can be said to constitute requirements as to the form of different clauses. Although there are certain differences in these requirements, these differences will not help us much to distinguish between the three different types. Many clauses will meet the requirements of all three rules, unless, without clear support in the statute, we make further demands on the explicitness of the provisions.

(2) An increase of risk as well as non-compliance with a safety regulation will be *relevant* only under certain circumstances, as determined by compulsory rules to which there is no equivalent as regards exclusions of risk. (The insurer's right of terminating the contract by giving notice before the lapse of the insurance period is not subject to this test of relevance. This matter will be considered later.)

An *increase of risk* is irrelevant, i.e. the insurer's liability is not affected, in a number of cases: (a) if it may be assumed that the insurer has taken the change into account (section 45; cf. section 46); (b) if the change has taken place "without the will" of the insured and he has not had reasonable cause to give notice to the insurer of the change (section 46); (c) if the insurer learns of the change but does not without undue delay give notice to the insured of whether and to what extent

⁴ Under the Danish and Norwegian Acts, the fact must be mentioned in the insurance policy.—The rules regarding increase of risk in life insurance (s. 99) and in accident and sickness insurance (s. 121) differ somewhat from those regarding "damage insurance".

he exempts himself from liability (section 48); (d) if the fact in which the change occurs has been returned to its original condition or the increase of risk otherwise has ceased to be of importance (section 49); (e) if an act which has increased the risk has been done with the purpose of preventing damage to person or to property and under such circumstances that it must be considered reasonable (section 49). These rules are compulsory.

Non-compliance with a *safety regulation* is, according to section 51, irrelevant if it appears from the circumstances that this failure to comply cannot be put to the blame of the person on whom the duty of supervising the effect of the regulation falls. This is also a compulsory rule.

(3) According to a common opinion which has some support in the words of the statute, there is a difference between increase of risk and safety regulations as regards the *responsibility of the insured for the acts of others*.

It is doubtful whether and to what extent the insured is responsible for his employees when the risk is increased,⁵ whereas non-compliance with a safety regulation is relevant (according to section 51, Insurance Contract Act) whenever it can be put to the blame of the person responsible for the supervision.⁶ Whether any similar problem can arise concerning exclusions of risk depends on what clauses are accepted as such.

When the insurance is valid in favour of two or more parties, e.g. both vendor and purchaser, both mortgagor and mortgagee, a similar difference appears more clearly.

If certain *risks are excluded* from the insurance, such exclusions will normally operate against all parties concerned. Thus, if in fire insurance the insurer excludes, for instance, damage caused by lightning from the insurance cover, this must affect even a mortgagee. There is one exception to this principle. In compulsory motor liability insurance, the duties of the insurer towards the person suffering injury are determined by the rules of liability in tort, and no exclusion of risk can be effective against him. The only way in which the insurer can exclude

⁵ See A. D. Bentzon & K. Christensen, *Lov om forsikringsaftaler*, 2. udg., 1952—54, p. 287, with further references in note 1.

⁶ See A. D. Bentzon & K. Christensen, *op. cit.*, pp. 296 ff.

certain risks in compulsory motor liability insurance is by providing subrogation into the rights of the injured person.

If the *risk is increased* by the act of one party, the insurer's liability against other parties is not affected.⁷ An increase of risk caused by the act of a purchaser or a mortgagor thus does not affect the position of the vendor or the mortgagee. This rule is compulsory, with the exception that (according to section 50, Insurance Contract Act) the insurer can stipulate that an act of the person insuring, if he is in possession of the goods, shall have the same effect as an act of the person insured.

According to the prevailing view relevant non-compliance with a *safety regulation* liberates the insurer from liability to all parties concerned.⁸ There are, however, at least two exceptions. One concerns compulsory motor liability insurance and conforms with what has just been said about exclusions of risk. Another exception follows from a compulsory rule regarding fire insurance of buildings in section 87, Insurance Contract Act, according to which the insurer cannot exempt himself from liability towards a mortgagee except under certain conditions regarding notice of the termination of the contract and non-payment of the premium.⁹

(4) The most notable differences between the three patterns occur in the *legal consequences* of a damage. These consequences are to some extent characteristic of the Scandinavian systems of insurance law.

If a damage concerns a *risk which is excluded* from the insurance, this does not affect the insurer. He does not compensate the insured for this loss, but his liability for other possible damage covered by the insurance remains unchanged. The question whether the risk is included or not may turn on several different points. If the exclusion refers to *types of damage*, the most common method is by using a *causality* test.¹⁰ Losses caused in certain specified ways are then excluded. This is the method used when war hazards are excluded from an insurance. Another possible way is to use a connection in *time*.¹¹ The insurance cover may be suspended during such time as there is a war. It is also

⁷ See A. D. Bentzon & K. Christensen, *op. cit.*, pp. 286 ff., with further references.

⁸ See A. D. Bentzon & K. Christensen, *op. cit.*, p. 297.

⁹ Cf. Eklund & Hemberg, *Lagen om försäkringsavtal*, 2. uppl., 1946, p. 157.

¹⁰ Cf. Grundt, *Lærebok i norsk forsikringsrett*, 1939, pp. 89 ff. and F. Schmidt, *op. cit.*, pp. 198, 223.

¹¹ Cf. Grundt, *loc. cit.* and also (concerning accident insurance) Tammelin, in *Nordisk försäkringstidskrift*, 1950, pp. 106 ff.

possible to exclude certain *types of property*, for instance jewels or money, or *property not belonging to* certain persons, or certain *individualized* objects, from the insurance, and there may be other variations too. There is no doubt about the validity of such exclusions in the Swedish insurance law (with certain exceptions concerning change of ownership), unless a general rule appearing in section 34, Insurance Contract Act, about modifying severe and unreasonable clauses in insurance contracts, should apply.¹²

Regarding the consequences of a relevant *increase of risk*, the Swedish Insurance Contract Act gives a rather complicated pattern (section 45). In marine insurance, the insurer is liable according to the so-called causality rule, that is, he is liable only if the increase of risk has had no influence on the occurrence or extent of the loss. In other insurance, the insurer's liability is determined by the so-called *pro rata* rule. According to this rule, the insurer's liability depends on what he would have done if the circumstances effected by the change had existed when the contract was made. If he would not have granted insurance at all, he is free from liability.^{12a} If he would have demanded a higher premium, his liability is reduced to a sum corresponding to the premium agreed to. If he would have made any special condition in the insurance contract, he can apply this condition. If he would have made further reinsurance, his liability is diminished accordingly. As a result of this principle, the insurer's liability is affected by a relevant increase of risk, even if the increase has been of no consequence for the damage that has occurred. If in a fire insurance the risk is increased by introducing a steam engine into the insured premises, this affects the insurer's liability even if the fire is caused by lightning. The insurer is free to stipulate that the causality rule shall apply to non-marine insurance or the *pro rata* rule to marine insurance, either wholly or with regard to certain specified circumstances increasing the risk, but in other respects the rules are compulsory.¹³

When a *safety regulation* is not observed the insurer is liable

¹² Cf. *infra*, p. 31.

^{12a} This part of the *pro rata* rule applies to marine insurance also.

¹³ It is perhaps not wholly clear from the words of the statute that the insurer may apply the causality rule to certain circumstances and the *pro rata* rule to others, but this is the intended interpretation of the rule. See the report of the drafting committee, Statens offentliga utredningar 1925: 21, 1925, p. 138; cf. Eklund & Hemberg, *op. cit.*, p. 97; but see on the other hand Hult, *Föreläsningar över försäkringsavtalslagen*, 1936, pp. 129 f.

only if and to the extent that it can be assumed that the damage would have occurred even if the regulation had been followed. In other words, a test of causality is applied, and the insurer's liability for other damage is not affected. This rule is compulsory.

(5) Although there is considerable doubt as to the rules of *burden of proof* to be applied in insurance contract law,¹⁴ it seems probable that in this respect also there is some difference between the three patterns. The insurer is said to have the burden of proof that the damage falls under an excepted risk, and accordingly that it has been caused in a way which is excepted,¹⁵ whereas when a safety regulation has not been complied with, the insured has the burden of proving that the damage was not caused by the breach.¹⁶ If the risk has been increased and the causality rule applies, the insured has also the burden of proving that this increase has not had any influence on the damage.¹⁷

(6) The insurer's right of *terminating* the contract before the expiration of the insurance period is different in the three cases.

The fact that a *damage not covered* by the insurance occurs can give the insurer no right to terminate the contract before the insurance period expires.

If the *risk increases*, the insurer is allowed to terminate the contract after a fortnight's notice, whether or not the change has been affected with the will of the insured and whether or not he had reasonable cause to give notice to the insurer of the change.

Non-compliance with a *safety regulation* gives the insurer the right of terminating the contract after a fortnight's notice, if there is reason to assume that the regulation will not be followed in the future also. It is of no consequence that the breach cannot be put to the blame of the insured or anybody else.

3. Having made this survey, we can draw some conclusions.

First, some peculiarities of Swedish (and other Scandinavian) insurance law emerge.

It is to be noted that increase of risk and safety regulations differ from each other chiefly by the fact that the *pro rata* rule normally

¹⁴ See Bolding, *Har försäkringsfallet inträffat?* (Försäkringsjuridiska föreningens publikation nr 8), 1952.

¹⁵ See F. Schmidt, *op. cit.*, pp. 230 ff., A. D. Bentzon & K. Christensen, *op. cit.*, pp. 130 ff.

¹⁶ Insurance Contract Act, s. 51.

¹⁷ Insurance Contract Act, s. 45.

applies to increase of risk whereas the causality rule always applies to safety regulations. Since the *pro rata* rule—in this particular form¹⁸—is peculiar to Scandinavian insurance law, there is more reason in this system to distinguish between the two types than in those that apply the causality rule in both cases, such as German and Swiss insurance law.

We find nothing in Swedish insurance law comparable to the warranties common in Anglo-American insurance law.¹⁹ Non-compliance with a safety regulation is relevant only if the insured (or some other responsible person) is guilty of negligence (as defined in the appropriate section of the statute), and only if the breach is material to the damage that has actually occurred. On the other hand, exclusions of risk need not refer to the cause of a damage.²⁰ The difference between safety regulations and exclusions in Swedish law is therefore quite unlike the difference between warranties and exclusions of risk in Anglo-American law.²¹

Second, we find that it is often difficult to decide which pattern is most oppressive to the insured.

An exclusion of risk is certainly what exempts the insurer most completely from liability, since he is exempted in relation to all parties and without any test of relevance. On the other hand, an exclusion of risk will never affect the right of indemnity of the insured for damage wholly unconnected with the subject of the clause—as may be the case with increase of risk—and the contract cannot be terminated in advance because of such damage. As regards the burden of proof it may also be an advantage for the insured if the matter is treated as an exclusion of risk.

It is also rather difficult to compare a safety regulation with increase of risk. As will appear later, the effect largely depends on the subject matter involved. As for the *pro rata* rule and the causality rule, comparison between them is also difficult. Where the insurer would not

¹⁸ The *pro rata* rule occurring in the French *Code des Assurances*, s. 22, differs in the important respect that it only concerns the reduction of the insurance indemnity. Cf. *infra*, p. 21.

¹⁹ Cf. about warranties e.g. Preston & Colinvaux, *The Law of Insurance*, 1950, pp. 116 ff., MacGillivray, *Insurance Law*, 4th ed., 1953, §§ 880 ff., Patterson, in 34 Col. Law Rev. (1934) pp. 595 ff., Vance, *Handbook on the Law of Insurance*, 3rd ed., 1951, pp. 408 ff.

²⁰ Cf., however, *infra*, p. 60.

²¹ Cf. regarding exclusions of risk in Anglo-American law Preston & Colinvaux, *op. cit.*, p. 127, Vance, *op. cit.*, pp. 365 ff.

have granted insurance, the *pro rata* rule will give the insured nothing at all. In cases where the *pro rata* rule would give a reduced indemnity, the outcome depends on the circumstances of the particular case. If there is no lien of causality between the breach of duty and the damage, it is obviously more favourable to the insured to be able to plead the causality rule, whereas if there is such a connection, the *pro rata* rule will be more advantageous. But viewing the matter from the time before any damage has occurred, a rule of reduction, such as the *pro rata* rule, may be said to be better than the “all or nothing” principle of the causality rule.

Third, we can now realise what it means to say that a certain clause should be applied in accordance with the one or the other compulsory rule.

If the driving-licence and drunkenness clause in motor insurance is to be applied according to the rules either of increase of risk or of safety regulations, it follows that we must apply a test of negligence (in the broad sense of the term) which is not, however, the same in both cases. If there is no such negligence, the insurer's liability is not affected. Furthermore, if we decide that this is a safety regulation, we must apply a test of causality, whereas if we consider it an increase of risk, we shall apply the *pro rata* rule, that is, see what the insurer would have stipulated for such a contingency. If the clause expressly states that the causality rule should be applied, there does not, however, seem to be any objection to this, since the insurer is free to contract that the causality rule should apply even to increase of risk.

On the other hand, if this clause makes an exclusion of risk, we are not obliged to apply any test of negligence, and whether we ought to apply a causality test or not will depend on the interpretation of the clause.

We shall see later that these two questions, the one of the relevance of negligence and the one concerning the causality, are the two main problems arising here. But the burden of proof, terminating the contract in advance, and the responsibility for acts of employees or of other parties to the contract, may also in some cases be of importance. The practical problems will, obviously, depend to a great extent on the terms of the clause. Where the clause is within the limits of either or both patterns of compulsory rules, there will be no special difficulty.

The same questions, concerning the relevancy of negligence and of causality between a breach of duty and the actual damage, will prove to be of interest with regard to the clause, occurring in burglary insurance, about keeping insured money and securities in a safe. Here also, questions as to responsibility for the acts of others and as to burden of proof may occasionally appear.

A Survey of Earlier Discussion

1. Many writers on insurance law have touched on the question of how to distinguish between exclusions of risk and the duties of the insured. This question has then often been treated as a single problem. This is partly explained by the assumption that there exists a clear difference in principle, even if it may be difficult to establish it in practice. In *German* and *Swiss* law there is, moreover, a special reason for discussing this question in a general way. The Insurance Contract Acts of these countries give general rules regarding these duties, “*Obliegenheiten*”, and the problem is to determine the scope of these rules. According to the German Insurance Contract Act, section 6, a breach against an *Obliegenheit* imposed by the insurance contract is irrelevant if it has been made “*unverschuldet*” (which may perhaps here be translated as “without negligence”). According to the same section, failure to observe a duty imposed on the insured in order to diminish the risk or prevent increase of risk is irrelevant if this failure had no influence on the damage. The Swiss rules are substantially similar.²²

Some of the opinions bearing on this question appear, however, in the discussion of more special topics, such as the scope of the rules regarding misrepresentation and non-disclosure.

We can perceive two different trends in the opinions expressed in German and Swiss legal theory on these matters.

Some writers emphasize that compulsory rules about duties must not be eliminated by contract clauses that are formulated as exclusions of risk. This standpoint is represented by the Swiss commentator Roelli. When discussing the duty of informing the insurer of the

²² Swiss Insurance Contract Act, ss. 29, 45.

risk, he argues, for instance, that exclusions of risk referring to the individual qualities of the insured object and existant at the time of the formation of the contract should be relevant only as permitted by the compulsory rules regarding disclosure.²³

Among German writers, Kisch represents a similar view. The compulsory character of the rules of disclosure must prevail against clauses that are formulated as exclusions of risk. For instance, clauses that exclude liability on account of such qualities of the insured object as according to experience are relevant for the insurer's decision to grant insurance, are considered void.²⁴ As this, however, hardly agrees with some examples that Kisch himself mentions of clauses that are to be accepted as exclusions of risk, we are left in some doubt as to the real extent of the principle he suggests.²⁵

Other writers who stress the view that compulsory rules must be respected are Ehrenzweig and Möller.²⁶

Another tendency is represented by those who argue that the compulsory rules must not be carried too far. It is said that the insurance technique must not be forced on to a bed of Procrustes.²⁷ This opinion will therefore attach more importance to the words of the contract clauses, the context in which the clause appears, etc. Such views appear in the commentary by Gerhard and others,²⁸ in the handbook by Hagen²⁹ and in the commentary by Prölss.³⁰

The decisions of the *Reichsgericht* have been invoked in favour of both opinions. *RG JW 1922 p. 100* is a case quoted in support of a strict application of the compulsory rules, whereas *RGZ 160 p. 221* is quoted to show that the insurers are to be allowed considerable liberty.

The difference in opinion now outlined is not very clear, as it only concerns general tendencies, and it would often be hazardous to draw

²³ Roelli, *Kommentar zum Schweizerischen Bundesgesetze über den Versicherungsvertrag*, I, 1914, pp. 62 ff., 65; cf. *ibid.*, pp. 387 ff.

²⁴ Kisch, *Handbuch des Privatversicherungsrechts*, II, *Die Lehre von der Versicherungsgefahr*, 1920, pp. 405 ff., 412 ff., 586 ff.

²⁵ Cf. Hagen, in Ehrenberg, *Handbuch des gesamten Handelsrechts*, Bd 8: I, 1922, p. 398 note 1.

²⁶ A. Ehrenzweig, *Deutsches (Österreichisches) Versicherungsvertragsrecht*, 1952, pp. 174 ff., Bruck & Möller, *op. cit.*, Anm. 13—15 zu § 6.

²⁷ Prölss, *Versicherungsvertragsgesetz*, 8. Aufl., 1954, p. 55.

²⁸ *Kommentar zum Deutschen Reichsgesetz über den Versicherungsvertrag* von S. Gerhard . . ., 1908, Anm. 4 zu § 6, Anm. 2 zu § 49.

²⁹ Hagen, *op. cit.*, pp. 398 ff.; see also the same author in *Kernfragen der Versicherungsrechtsprechung*, 1938, pp. 31 ff.

³⁰ Prölss, *op. cit. supra* in note 27, Anm. 3 zu § 6.

from the general statements any definite conclusions for the treatment of special problems that have not been explicitly discussed.

Some more definite opinions have, however, been expressed regarding such clauses as apply to the acts or the conduct of the insurer without being expressly formulated as duties (*Obliegenheiten*). According to the stricter view, as represented most clearly by Möller, all such clauses must be submitted to the rules regarding *Obliegenheiten*, notwithstanding the words of the clause.³¹ The more lenient view, taken for instance by Prölss, is that it is possible to attach an exclusion of risk even to the conduct of the insured, provided that this is clearly stated in the clause.³²

The opinion of Möller seems to give a fairly clear indication of what clauses should be accepted as exclusions of risk. For those who do not accept this view, the problem remains where to draw the line. Two writers who have recently touched upon it, von Gierke and R. Schmidt, both seem to hold that there is no clear line except that offered by tradition and insurance practice.³³ Some clauses constitute according to an accepted opinion exclusions of risk, whereas others are traditionally treated as *Obliegenheiten*. This attitude is obviously not very helpful if we are in doubt as to a certain clause concerning which there is no firmly established opinion.

The difficulty of where to draw the line appears in the opinions expressed about the two types of clauses mentioned before as typical examples of the problem now discussed. The clause in motor insurance regarding the driver who has no driving licence was in an earlier version regarded by Prölss as an exclusion of risk, whereas the version now used is thought by him to constitute an *Obliegenheit*.³⁴ This seems also to be the prevalent view among other writers.³⁵ Von Gierke mentions this clause as one that is traditionally treated as an *Obliegenheit*. On the other hand, the clause regarding insurance of money and securities kept in a safe is mentioned by von Gierke as an example

³¹ Bruck & Möller, *op. cit.*, Anm. 15 zu § 6.

³² Prölss, *loc. cit.*

³³ v. Gierke, *Versicherungsrecht*, 2. Hälfte, 1947, pp. 158 f. and in *Zeitschrift für Handelsrecht*, Bd 116, 1953, pp. 100 ff.; R. Schmidt, *Die Obliegenheiten*, 1953, pp. 240 ff.

³⁴ Prölss, in *Juristische Rundschau für die Privatversicherung*, 1938, pp. 375 ff. and *Versicherungsvertragsgesetz*, 8. Aufl., 1954, pp. 464, 466 ff.

³⁵ See Stiefel & Wussow, *Kraftfahrversicherung*, 2. Aufl., 1953, pp. 43 ff., R. Schmidt, *op. cit.*, p. 242, with further references in note 1279.

of what is traditionally accepted as an exclusion of risk.³⁶ In both these cases, the practical implication of the classification seems to appear chiefly in the question whether a test of causality should be employed in applying the clause.

2. In French insurance law, the problem is treated in a somewhat different way. A distinction is made between increase of risk ("*aggravation du risque*") and exclusion of risk ("*exclusion du risque*").³⁷ The difference between these is said to consist in the fact that an increase of risk implies that the insurer has contemplated the possibility of covering the new risk, but only against an increased premium. When a risk is excluded, on the other hand, the insurer has from the beginning excluded the possibility of covering this risk.³⁸ It is stated, however, that the practical difference will appear in the legal consequences. When the risk is increased, the insured will be indemnified in proportion to the premium paid; if there is an exclusion of risk he will receive nothing. To decide whether the one or the other is the case is said to depend on the interpretation of the insurance contract.³⁹

It appears from this, first, that there is a considerable difference between the French and the Scandinavian ways of looking at these matters, since the Scandinavian view is that even an increase of risk may have the effect that the insurer is free from liability, and, second, that in French law the matter is left mostly to the insurer, as it depends on the interpretation of the contract.

Another distinction is the one made between "*déchéance*" and exclusion of risk.⁴⁰ A *déchéance* means that the insured, by failure to observe a regulation, forfeits the right to the insurance indemnity; an exclusion of risk means that the insurer has excluded in advance the liability for certain damage. Here, also, the difference is shown to appear in the practical details; there are differences in the burden of proof, in the insurer's right of terminating the contract before the time agreed on, and also to some extent in the requirement as to form. In this case too, the distinction is said to depend on an interpretation

³⁶ v. Gierke, *Versicherungsrecht*, 2. Hälfte, 1947, p. 324 and in *Zeitschrift für Handelsrecht*, Bd 116, 1953, p. 101.

³⁷ Picard & Besson, *Les assurances terrestres en droit français*, 1950, n:o 75.

³⁸ Picard & Besson, *op. cit.*, pp. 128 f.

³⁹ Picard & Besson, *op. cit.*, p. 128.

⁴⁰ Picard & Besson, *op. cit.*, n:o 123.

of the contract.⁴¹ There is apparently no necessity to apply a test of causality in French law, even in the case of a *déchéance*.⁴²

There are, however, some limitations in the insurer's right to make an exclusion of risk as well as to make a *déchéance*. The insurer cannot exempt himself from liability for damage caused by accident or negligence "*sauf exclusion formelle et limitée contenue dans la police*".⁴³ By means of this rule, the insurer is prevented, for instance, from exempting himself in motor insurance for all damage occurring when the insured breaks some traffic regulation.⁴⁴ In a similar way, a clause is void if it imposes *déchéance* "*en cas de violation des lois ou des règlements, à moins que cette violation ne constitue un crime ou un délit intentionnel*".⁴⁵ Although there is some difference in the two rules, their main effect is the same: the vague clause is void, whether it is formulated as exclusion of risk or as *déchéance*. On the other hand, there does not seem to be any objection to the insurer choosing the one type or the other by a sufficiently precise clause.

Clauses regarding the driver's lack of a driving licence appear in French insurance contracts also. These clauses are generally considered to constitute exclusions of risk.⁴⁶ The main practical importance attached to this view seems to lie in the consequences as to the burden of proof. Most other problems regarding the interpretation of these clauses do not seem to have any direct bearing on their classification.⁴⁷ The clause regarding the drunkenness of the driver, on the other hand, seems to be regarded by some as an exclusion of risk, by others as a *déchéance*.^{47a}

As has already appeared, the differences between the *Anglo-American*

⁴¹ Picard & Besson, *op. cit.*, pp. 199 ff.; Beudant, *Cours de droit civil français*, 2e éd., T. XII bis, 1951, n:os 608, 639 bis, 658, 738.

⁴² Cf. Picard & Besson, *op. cit.*, n:o 121.

⁴³ *Code des Assurances*, s. 12.

⁴⁴ Cf. Picard & Besson, *op. cit.*, p. 115, Godart & Perraud-Charmantier, *Code des Assurances*, 3e éd., 1947, n:o 257.

⁴⁵ *Code des Assurances*, s. 24.

⁴⁶ See Cass. Civ. 7 janvier 1936, *Dalloz Pér.*, 1936, I, 84 (note Besson); Perraud-Charmantier & Rauzy, *L'assurance automobile*, 1940, n:os 214—228, Picard & Besson, *Traité général des assurances terrestres*, T. I, 1938, pp. 300, 447; H. et L. Mazeaud, *Traité de la responsabilité civile*, 4e éd., T. III, 1950, n:o 2669, Savatier, in *Dalloz Hebdom.*, 1937, *Chronique*, pp. 29 ff. and *Traité de la responsabilité civile*, T. II, 1951, n:o 751.

⁴⁷ See Savatier, in *Dalloz Hebdom.*, 1937, *Chronique*, pp. 29 ff.; Picard & Besson, *op. cit. supra* in note 46, n:o 211.

^{47a} See Mazeaud, *loc. cit.*, who refers to the clause as an exclusion of risk, and Savatier, *Traité de la responsabilité civile*, T. II, 1951, no. 757, who refers to it under the heading of *déchéance*.

rules and the regulation common in Continental Europe are so great that it is hardly possible to make any detailed comparison.

3 In. *Scandinavian* legal theory, we can perceive the same tendencies as appear in the German discussion.

The stricter view is represented by F. Schmidt.⁴⁸ According to him, all clauses that apply to the conduct of the insured must be submitted to the compulsory rules. These rules would be empty words unless they were applied to all such clauses. Whether the conduct is openly prescribed or can only be inferred from the clause is irrelevant. Some of the force of this opinion is taken away, however, by Schmidt's concession that not all clauses prescribing certain conduct are subject to compulsory rules. He does not, however, elaborate this reservation.⁴⁹

An opinion more lenient towards clauses excluding risks is represented by Drachmann Bentzon and K. Christensen and by Grundt.⁵⁰ With some variations in the expressions used, these writers maintain that the Insurance Contract Acts of the Scandinavian countries do not intend to put any narrow limits to the power of the insurers to determine the risk to be covered by insurance. One must decide for every particular clause whether it should be accepted as an exclusion of risk or be interpreted in accordance with the compulsory rules. Too much importance must not be attached to the words employed. These general statements are given additional colour by the general tone of the different writers and by the examples used. The words of Grundt seem to indicate that he would be prepared to take a favourable view of most clauses which state clearly that they exclude risks. It is more difficult to grasp the view taken by Drachmann Bentzon and Christensen, as expressed in the second edition of the commentary on the Danish Insurance Contract Act. On the one hand, they point to the reasonable interpretation of the contract as the decisive principle.⁵¹ This would lead to the view that any clause that is sufficiently clear to admit of no doubt would have to be accepted. On the other hand, they seem to be rather strict in their opinion of some clauses discussed as examples, particularly the clauses in motor insurance of

⁴⁸ F. Schmidt, *op. cit.*, pp. 192 ff.

⁴⁹ *Op. cit.*, p. 197 note 31.

⁵⁰ A. D. Bentzon & K. Christensen, *op. cit.*, pp. 279 ff., Grundt, in *Tidsskrift for rettsvitenskap*, 1933, pp. 204 ff. and *Lærebok i norsk forsikringsrett*, 1939, pp. 156 ff.

⁵¹ A. D. Bentzon & K. Christensen, *op. cit.*, p. 282.

the type to which we have already referred on several occasions. These are considered to impose duties, although the words of the Danish version apparently indicate that they are exclusions of risk.⁵² We shall return to these clauses later.^{52a}

The view of Løken is somewhat difficult to put in a few words.⁵³ His main principle is that one should decide the validity of a doubtful clause by considering the interests of the two parties. Some interests of the insurer, such as individualizing the object insured, are vital to him and these interests must always be respected. If there are no vital interests involved one should weigh the conflicting interests of the two parties against each other.⁵⁴

4. The difference between the two kinds of duty discussed here, i.e. increase of risk and safety regulations, is so important in the Scandinavian systems of insurance law that some attention must also be given to the opinions expressed on this subject. The corresponding questions in French, German and Swiss law do not seem to have attracted any similar interest.⁵⁵

The question of determining which clauses should be accepted as regulating increase of risk and which as laying down safety regulations, is closely connected with another problem, that of deciding whether any matter can be subject to the rules both of increase of risk and of safety regulations at the same time. About this there is considerable disagreement.

Drachmann Bentzon, Christensen and Grundt (and, with some reservation, Hult) all hold that the insurer can apply both rules to the same matter.⁵⁶ If a certain change which would constitute an increase of risk is considered by the insurer to be of such importance that he inserts a safety regulation in the contract to prevent it, this cannot, according to this view, deprive the insurer of his right to apply the rules as to increase of risk.⁵⁷ As for the requirements of the clauses to be accepted as safety regulations, these writers have different views.

⁵² A. D. Bentzon & K. Christensen, *op. cit.*, pp. 124 ff., 282, 294 ff.

^{52a} *Infra*, pp. 55 ff.

⁵³ Løken, *Forsikringskravet*, 1952, pp. 59 ff.

⁵⁴ *Op. cit.*, pp. 66 ff.

⁵⁵ Cf. Prölss, *op. cit. supra* in note 27, Anm. 1 zu § 32.

⁵⁶ A. D. Bentzon & K. Christensen, *op. cit.*, pp. 292 f., Grundt, *Lærebok*, pp. 263 f., Hult, in *Nordisk försäkringstidskrift*, 1949, p. 313.

⁵⁷ Grundt, *loc. cit.*

According to Grundt, a safety regulation must not merely prohibit certain conduct but must impose a positive duty on the insured to act in a certain way. For example, a clause prohibiting smoking in the insured premises is not a safety regulation, whereas a provision requiring that there should be notices in the insured premises stating that smoking is prohibited is.⁵⁸ This principle seems difficult to apply in practice, but it has some support in the words of the Norwegian Insurance Contract Act (section 51), which in this matter differs from the other Scandinavian statutes. The general result of Grundt's view seems, however, to be that the same matter will not often be subject to the rules both of increase of risk and of safety regulations.

Drachmann Bentzon and Christensen, commenting on the Danish rule, do not support the view that a safety regulation must impose some positive duty to act.⁵⁹ They stress that safety regulations must be clear and precise. General provisions that the insured should comply with laws and bye-laws are not considered effective as safety regulations. Whether a certain clause should be applied as concerning increase of risk or as a safety regulation will probably depend on the character of the clause. This is in accordance with their general view that the reasonable interpretation of the clause is the decisive element.

On the other hand, F. Schmidt, followed by Sindballe, maintains that the insurer cannot apply the rules of increase of risk and safety regulations at the same time.⁶⁰ Schmidt points to the consequences of allowing such cumulation of remedies. The *pro rata* rule is normally applied to increase of risk, and accordingly the right of compensation for all damage covered by the insurance is affected, whether or not the increase of risk was material to the damage. Non-compliance with a safety regulation, on the other hand, is subject to the causality rule. If the same change would be relevant both as increase of risk and as breach against a safety regulation, the insurer could cumulate the *pro rata* rule with the causality rule, which would be very hard on the insured. Schmidt illustrates his opinion with the following example.

⁵⁸ Grundt, *op. cit.*, p. 260; cf. Løken, *op. cit.*, pp. 98 f. — Hult, in *Nordisk försäkringstidskrift*, 1932, p. 541 note 52, distinguishes between different effects of the safety regulations. As for the question now discussed, his opinion seems to be that the regulation can have effect even if it does not impose any positive behaviour.

⁵⁹ A. D. Bentzon & K. Christensen, *op. cit.*, pp. 293 ff.

⁶⁰ F. Schmidt, *op. cit.*, pp. 183 ff., Sindballe, *Dansk Forsikringsret*, I, 1949, p. 116; cf. Løken, *op. cit.*, pp. 120 ff.

Suppose that, according to the conditions of a burglary insurance, the windows of the insured premises must be protected by iron bars but that the insured fails to comply with this condition. If the insurer could apply both the rules as to increase of risk and the rules as to safety regulations, the consequence would be that, if a thief entered by the window, the insurer would rely on the causality rule and refuse any indemnity, since the insured cannot prove that the loss would have occurred even if there had been no breach of the regulation. On the other hand, if the thief had entered for instance by breaking the lock of the door, the insurer could, according to the *pro rata* rule, refuse indemnity or reduce it, depending on what he would have decided if he had known from the beginning that there would be no iron bars. To allow this result of a right to cumulate remedies would, according to Schmidt, be at variance with the aim of the statute and cannot be accepted.⁶¹

As for distinguishing between clauses referring to increase of risk and safety regulations, Schmidt contends that the form of the clause should be decisive. What appears in the individual text of the insurance policy, i.e., the typewritten description of the risk (or what has been stated to the insurer when concluding the contract), should be submitted to the rules as to increase of risk, whereas all other conditions that are subject to the compulsory rules should be treated as safety regulations. The principal reason given for this solution, apart from the need of a simple test, is the special risk for the insured embodied in the *pro rata* rule which, according to Schmidt, requires that he should be warned by the words of the individual text, which are more likely to be noticed than the printed text common to all insurance of the same kind. As to the form and contents of safety regulations, Schmidt also emphasizes that they must be precise and limited but need not impose a positive duty to act.⁶²

5. It will appear from the summary now given that Scandinavian legal theory, like other Continental theories, does not provide much help for the solution of the problem now under discussion. With the exception of F. Schmidt, no Scandinavian writer suggests any rules by which one could decide which clauses to accept as exclusions of

⁶¹ Schmidt, *loc. cit.*

⁶² Schmidt, *op. cit.*, pp. 176 ff., 182 ff.

risk, which to treat as safety regulations, and which to submit to the rules regarding increase of risk. What is offered is more like a method than a rule, as is the case when the reasonable interpretation of the clauses and the weighing of the interests of the different parties are recommended for solving the problems.

For reasons which will be given later, the present writer cannot accept the rules suggested by Schmidt.^{62a} It seems, then, impossible to find any simple criteria, and we must try some other way.

The solution, so far as there is one to be found, seems to lie in using some more comprehensive test, or rather, in taking the whole patterns, as described earlier, into account, in preference to focussing all attention on any single details. This possibility, and its consequences, will be investigated here.

Before doing this, we must consider the character and scope of the compulsory rules, as well as the inferences that can be made for their application from some special rules appearing in the Insurance Contract Act.

^{62a} *Infra*, p. 38 and pp. 40 f.

The Scope of the Compulsory Rules

1. The difference between determining the risk and laying down duties of the insured in insurance contract law resembles in many ways the difference appearing in the law of torts between strict liability and liability for negligence.

Clauses determining the risk, as well as the rules of strict liability in the law of torts, decide primarily what kinds of damage shall be borne by the one or the other party. The consequences as to the conduct that is necessary to avoid such damage appear less directly, and often have less practical importance.

The duties imposed on the insured according to insurance contract law, like liability for negligence in the law of torts, are characterized by the fact that a pattern of behaviour is fixed by the rule or clause, and the primary aim is that the party concerned should follow this pattern. The burden of suffering the economic loss, if this pattern is not followed, is only one side, and perhaps not the most important one, of the rule. If it was possible to apply some other suitable sanction to those cases where the pattern is not followed instead of transferring the loss to the guilty party, this other way might sometimes be employed.

This parallel between the law of insurance and the law of torts is certainly incomplete. The duties imposed in the law of torts are concerned with causing damage to others, the duties in the law of insurance with suffering damage. For this reason it is even somewhat doubtful whether we ought to employ the word "duty" in insurance law, though it is difficult to find a more suitable term.⁶³ Indeed, there seems to be a closer parallel between the rules of contributory negligence in the law of torts and the duties in the law of insurance.^{63a}

⁶³ Cf. *supra*, p. 6 n. 2.

^{63a} Cf. Grönfors, *Skadelidandes medverkan* (Försäkringsjuridiska föreningens publikation nr 11), 1954, pp. 108 ff.

Another, even more important, point where the parallel fails is that the distribution of risks in the law of insurance depends on the contract, whereas the reasons for shifting losses by the rules of the law of torts are mainly concerned with the hazards of the activity in which the losses are caused.

It is worth noting, however, that the practical implications of the problem studied here have much in common with some problems familiar from the law of torts. We are concerned here with the admissibility of clauses that make the right to the insurance indemnity dependent on the conduct of the insured, but without employing a test of negligence in the usual sense of the word. This corresponds fairly well to the question of admitting "negligence without fault"⁶⁴ or "fictitious negligence"⁶⁵ in the law of torts. Another practical problem with which we are confronted here concerns the use and consequences of a test of causality, also a problem wellknown from the law of torts.

The parallel between the law of torts and the law of insurance is also important because it illustrates that there is no clear difference in aim and function between the different technical methods employed.^{65a} Although strict liability may be said to be primarily concerned with the distribution of losses, it is also important for the prevention of damage; and liability for negligence may serve the purpose of distributing losses. In the same way, exclusions of risk in the law of insurance can be important by providing incentives for taking measures to prevent damage; and the duties imposed on the insured also decide to some extent which damage the insurer will compensate and which he will not.

2. If it is true that there is no clear difference in the function of exclusions of risk and of duties, we are faced by a question. Is there any strong reason why, in the Continental systems of insurance law, the determination of the risk is left to be decided by the contracting parties—in practice mostly by the insurer—whereas the duties of the insured are regulated by statutory rules that are largely compulsory in favour of the insured?

⁶⁴ Cf. A. A. Ehrenzweig, *Negligence Without Fault. Trends toward an Enterprise Liability for Insurable Loss*, 1951.

⁶⁵ "*Fingerad culpa*" is a concept which plays an important part in Karlgren, *Skadeståndsrätt*, 1952, see pp. 144 ff.

^{65a} Cf. Løken, *op. cit.*, pp. 50 ff.

One such reason would be that the technique of insurance demands that the insurers can decide freely what risks they shall cover, whereas there is no similar exigency regarding the duties of the insured. This reason does not seem, however, to hold much force. No doubt insurance technique demands a certain freedom for the insurer to decide the conditions of the insurance. But it cannot be assumed that this freedom demands that *all* exclusions of risk must be left outside the scope of compulsory rules, whereas in regulating the duties of the insured the statute can decide on every particular point whether the insurer should have freedom to contract or not. We cannot, for instance, believe that insurance technique would break down if the rule that fire insurance covers damage caused by lightning (section 81, Insurance Contract Act) was made compulsory.

Another possible explanation is that it is more important to the insured that his duties are regulated by compulsory rules than that exclusions of risk should be so regulated. It has been said that the decisive factor for the popularity of an insurance, apart from the size of the premium, is what risks it covers, whereas the person taking out an insurance is less interested in what will happen if he should break any duty stipulated by the insurer, since he hardly contemplates such a contingency.⁶⁶ The insurers could therefore be expected, in their own interests, to provide a suitable extension of the risk rather than not to impose too severe sanctions on the breach of a duty. The strength of this explanation does not, however, seem very great. Most people who own property feel obliged to have fire insurance and burglary insurance, and they have little opportunity to take the individual clauses of the insurance into account.

The most likely explanation of the occurrence of compulsory rules is simply that experience from the time when there was full freedom of contract has been important. The aim has been to protect the insured against such clauses, actually used earlier, as seemed too severe.⁶⁷ Another important factor is probably that the statute has only to some small extent regulated the extension of the risk, and any

⁶⁶ F. Schmidt, *op. cit.*, pp. 28 f.

⁶⁷ Cf. Prölss, *op. cit.*, pp. 1 f.: "Ein bestimmtes gesetzgeberisches Prinzip liegt den zwingenden Vorschriften nicht zugrunde; sie sind nur historisch zu verstehen: als Reaktion gegen die vielfach sehr harten allgemeinen Versicherungsbedingungen der vorgesetzlichen Zeit." Regarding Scandinavian law, cf., e.g., Stang, in *Nordiska Juriststämman* 1926, 1926, pp. 314 f.

detailed regulation of that kind would have increased the length of the statute considerably. In consequence, the question whether the rules should be compulsory does not arise. This is confirmed by the fact that section 34, Insurance Contract Act, undoubtedly applies even to exclusions of risk. According to this rule, if a clause in an insurance contract would entail clearly unreasonable consequences in a given case, the courts can modify it or set it aside where this would conform with good insurance practice. This rule has obviously the same purpose as the compulsory rules, although it is much less precise.

The fact that only duties are subject to the compulsory rules therefore gives little help for determining the scope of those rules. What we can infer seems to be chiefly that the Insurance Contract Act will not interfere with the insurer's general decisions of policy, which to a large extent are embodied in the exclusions of risk. This general inference is confirmed by certain features of the rules regarding duties.

The insurer is free to make what kind of safety regulations he likes. The only thing that he cannot do is to exempt himself from liability if no blame attaches to the person who should ensure the compliance with the regulation, or if the non-compliance was immaterial to the damage.

The protection afforded by the rules as to increase of risk is of a rather curious character. If the increase of risk is relevant, the insurer can apply the terms that he would have inserted into the contract if he had known from the beginning of the circumstances brought about by the change. The compulsory rules thus—provided the increase of risk is relevant—have no influence on the general policy of the insurer but only afford a relative protection: the insurer must apply the terms commonly used by him for this situation even if it occurs as the result of a change.

We can infer from this that the principal protection afforded by the compulsory rules must lie in the rules concerning relevancy, since these alone cannot be changed by the practice of the insurer. Of these latter rules, special importance attaches to the provision that increase of risk is relevant only if it took place with the will of the insured or if the insured did not give notice to the insurer of the change though he had reasonable cause to do so.

It is thus clear that "negligence without fault" is not accepted with

regard to either increase of risk or safety regulations. In this respect the Insurance Contract Act limits the insurer's freedom to decide his general policy.

3. For determining the scope left to the insurer's decisions of policy, as well as the possibility of using "negligence without fault", we must also consider some special rules of the Insurance Contract Act. These are the more important as, for various reasons, questions of insurance law rarely come before the courts in Sweden, and we therefore lack the guidance which published decisions would give.

The only rule in the Insurance Contract Act that applies directly to clauses appearing as exclusions of risk but actually touching on the subject of duties occurs in the second paragraph of section 10, and concerns the duty to inform the insurer of the risk. A clause prescribing that a misrepresentation made by some person other than the person insuring, or inserted into the insurance policy, shall affect the insurer's responsibility cannot permit the insurer to apply consequences other than those that would ensue if the misrepresentation had been made by the person insuring.

This rule seems to be absolutely necessary if the compulsory rules about misrepresentation are not to lose all force. It would be easy to eliminate these rules if the insurer might exempt himself from all liability in the case of any statement appearing in the policy being incorrect.⁶⁸ But it is therefore also impossible to draw any definite conclusions from this particular rule for the treatment of other more dubious clauses. The rule gives little help for the solution of the problem discussed here.

More guidance can be had from certain rules limited to special branches of insurance and touching on subjects which might be expected to fall under the compulsory rules. These special rules can conveniently be divided into two groups.

One group consists of sections 67, 68 and 83, Insurance Contract Act. Section 67, which applies to marine insurance, concerns the situation when a transport is carried out by a ship other than that specified in the insurance contract. Section 68, which also applies to marine insurance, refers to a transport that is carried out by a route

⁶⁸ For a similar problem regarding warranties in Anglo-American insurance law, cf. Patterson, in 34 Col. Law Rev. (1934), p. 607.

or in waters other than has been agreed in the insurance contract or must be implied from the circumstances. Section 83, which forms part of the rules relating to fire insurance, deals with the situation when goods insured are kept in a place other than that the person insuring had specified when taking out the insurance. In all three cases the insurer is liberated from his liability to a greater extent than according to the compulsory rules regarding increase of risk. A common feature of the three rules is that they do not indicate that increased probability of damage is a condition for the change to be relevant. In other respects they differ from each other. The rule in section 83 (and part of the rule in section 67) makes the issue independent of any negligence of the insured.

These rules have been much discussed in Scandinavian legal theory, not so much because of their practical importance as because of the conclusions to be drawn from them concerning the system of the Scandinavian Insurance Contract Acts.⁶⁹ In spite of all this attention, the significance of the rules is still uncertain. They are, however, so important for the subject now discussed that we cannot leave them aside.

One view of these rules can be summarized in the following way. The rules concern another matter than increase of risk, namely that the property insured has been exposed to a risk other than the one covered by the insurance. In such a case, the insurer would, but for these special rules, be free altogether from his liability. The special rules thus constitute exceptions from the general principle in favour of the insured. The rules are not compulsory, and in the cases regulated by them the insurer is accordingly free to return to what would be the general principle and so exclude liability altogether. In other cases where the insured property is exposed to a risk other than that agreed on, the insurer is released from his liability altogether. Those who hold this view generally speak of the special rules as well as of the other cases under the heading of "change of risk". This view is represented by Hult (although he has since stated that it does not wholly agree with his present ideas) and by Grundt.⁷⁰ It has some support in the

⁶⁹ See, in addition to works cited later, Rode, in *Nordisk försäkringstidskrift*, 1947, pp. 27 ff. and Tybjerg, *ibid.*, pp. 36 ff.

⁷⁰ See Hult, *op. cit.*, pp. 118 ff., but cf. *Nordisk försäkringstidskrift*, 1949, pp. 313 f.; Grundt, *op. cit.*, pp. 257 f.

reports of the committees that drafted the Norwegian and Swedish statutes.⁷¹

F. Schmidt looks at the matter in a somewhat different way.⁷² He has found an element common to the three rules in the fact that they all concern the limits of insurance in space. He points out that these limits are often important both for distinguishing the insured property from other property and for the insurer's decision whether to cover a certain risk and whether to reinsure. As the insurer often does not wish to cover more than a limited amount of value exposed to the same hazard, he may refuse an insurance altogether or decide to reinsure if the insured property is in the same place as some that he has already insured. The three rules recognize these special circumstances as well as the general importance of the spatial limits for "order and regularity" in insurance. In Schmidt's view, the rules are not compulsory, and in other cases where the extension of the insurance in space is concerned, the insurer is also free to exempt himself from liability altogether.⁷³

A more extreme view of the rules is the following. These rules really concern increase of risk, but because of the importance of the subject matter of the rules for reinsurance in connection with the general importance of international reinsurance for marine and fire underwriting, the insurer is given more liberty here than under the general rules. As these are exceptions from the compulsory rules in favour of the insurer, he cannot liberate himself further, and no analogy from these rules to other cases can be permitted. This view is most clearly represented by Sindballe, and it also has some support in the report of the Danish drafting committee.⁷⁴

In discussing these rules, it seems important not to take anything for granted concerning the principles which would have governed these and similar cases except for the rules. Our aim is instead to find what

⁷¹ See, regarding the Swedish statute, *Statens offentliga utredningar* 1925: 21, pp. 131 f., 167 ff., 182. Cf. Eklund & Hemberg, *op. cit.*, pp. 89, 132 f., 152. On the Norwegian statute, see Bugge, *Lov om Forsikringsaftaler*, 1930, pp. 124, 173 ff., 193 ff.

⁷² F. Schmidt, *op. cit.*, pp. 82 ff.

⁷³ The individualizing function of these circumstances is stressed by Løken, *op. cit.*, pp. 75 ff.

⁷⁴ Sindballe, *op. cit.*, pp. 212 ff.; cf. Hult, in *Nordisk försäkringstidskrift*, 1949, pp. 313 f. See also the Danish report *Udkast til Lov om Forsikringsaftaler*, 1925, pp. 112 f., 125 and *Nordisk försäkringstidskrift*, 1947, p. 215 f. Cf. A. D. Bentzon & K. Christensen, *op. cit.*, pp. 285, 383 ff., 423 ff., and Ussing, *Enkelte Kontrakter*, 2. udg., 1946, p. 275.

the rules indicate concerning the liberty left to the insurer in these and other cases.

The first thing to be noted about these rules is that they are not concerned with cases where the place of insurance serves the function of individualizing the subject of a certain insurance.⁷⁵ If the property insured is individualized as being the goods transported in a certain ship, or the goods kept in a certain warehouse, or if a ship is insured for a certain journey, the insurer will be wholly free from liability if damage occurs to goods transported in another ship or kept in another warehouse or if the ship meets with an accident on another journey. The special rules are not concerned with such cases. We can accordingly conclude that even if the subject-matters of these rules do not serve any individualizing function, they can still be relevant to a greater extent than would follow from the compulsory rules regarding increase of risk.

The main difference between the general rules concerning increase of risk and the special rules seems to consist in the fact that increase of risk is concerned with an increase in the probability of damage, whereas the special rules give relevance to other circumstances also that may be important to the insurer. Unfortunately, neither the rules themselves nor the reports of the drafting committees give any clear indication of what these other reasons are or why the circumstances referred to in the special rules are relevant in the way prescribed.

One such reason has already been mentioned, i.e. reinsurance. But there may be other reasons. The insurer may for instance wish to limit his business to places of whose general conditions he has sufficient knowledge or where he can check the statements of the insured regarding a damage. The special rules enable him to do this.

The rules are, moreover, so constructed that the insurer can rely on them whatever the reason why the change is of importance to him may be, and even if the only reason is the increased probability of damage. In this respect the rules are concerned with the same subject as increase of risk, and give the insurer certain advantages in comparison with the compulsory rules. They thus show an important limitation in the scope of these rules.

Relying on this, and on the general treatment of the subject in the

⁷⁵ Cf. Sindballe, *op. cit.*, p. 212, A. D. Bentzon & K. Christensen, *op. cit.*, p. 385.

statute and in the report of the Swedish drafting committee, the following conclusions seem justified.

First, as far as Swedish law is concerned, there is strong support for the view that in all three cases the insurer is free to exempt himself from liability altogether.⁷⁷ Although the legislator, for instance in the case of section 68, has found it suitable for the protection of the special interests of the insurer to impose a duty on the insured, he allows the insurer to make an exclusion of risk instead.

Second, since the insurer can take into account not only reinsurance but also other circumstances of importance to him, it would seem rather arbitrary to limit the scope of the analogy of these rules to cases where reinsurance is of special importance.

Third, both the reasons given for these rules and the general discussion of the scope of the compulsory rules in the Swedish committee's report clearly point to the conclusion that the three rules are not isolated exceptions.⁷⁸ It seems rather a matter of practical coincidence that these three cases have been picked out for special regulation. When discussing the scope of the compulsory rules the committee points to the "nature of the matter" and "good insurance practice" as important reasons for determining the application of these rules.⁷⁹ This indicates that there is no hard and fast rule.

The analogy of these rules therefore does not seem to be limited to any special branches of insurance or to the extension of the insurance in space. The principal requirement seems to be that there is some other important reason for the insurer to limit his liability, besides the one that the probability of damage is increased if the circumstances differ from those stated in the contract. If such is the case, the rules regarding increase of risk can be disregarded even if the matter has also a bearing on the probability of damage. How far this analogy can be carried is a matter that is left to be discussed later. At this point it is sufficient to notice that the special rules give the insurers considerable freedom of movement, especially if we may assume that these rules are not compulsory.

⁷⁷ Cf. Eklund & Hemberg, *op. cit.*, pp. 133, 135, 152.

⁷⁸ The report of the Swedish drafting committee also expressly mentions removing of goods insured against burglary as a case where the goods are exposed to a risk other than that contracted and where accordingly the compulsory rules do not apply; see *Statens offentliga utredningar* 1925: 21, pp. 131 f.

⁷⁹ See *Statens offentliga utredningar* 1925: 21, p. 139.

Whether we ought to use the term "change of risk" may seem doubtful. The term is so vague that it gives little indication of what it is meant to cover. But since it would seem preferable to express the distinction between cases subject to the compulsory rules regarding increase of risk and cases not subject to these, it is perhaps as well to keep the expression "change of risk" for the latter.

4. The three rules now discussed throw light principally on the scope of the compulsory rules regarding increase of risk. There are also rules that have some connection with the scope of the rules regarding safety regulations.

According to section 62, which forms part of the rules concerning marine insurance, the insurer is free from liability for damage caused to goods by, among other things, insufficient packing. Section 63 also applies to marine insurance. Where an insurance covers the interest of the shipowner, the insurer is free from liability for damage caused by the ship's not being seaworthy (and in other specified respects not fit to sail) at its departure from port, unless neither the shipowner nor the captain can be assumed to have been aware of, nor should have been aware of, the deficiency.

These rules are formulated as exclusions of risk. Section 63 resembles a safety regulation, prescribing that the ship should be seaworthy at the time of the departure, but the consequences of a breach differ somewhat from those prescribed in section 51. The rule quoted from section 62 is rather like a safety regulation, stating that the goods insured should be well packed. But the insurer is exempted from liability without regard to any negligence of the insured, or rather, "negligence without fault", the bare fact that the goods are not well packed, deprives the insured of his right to the indemnity.

The Swedish commentary says of both rules that they are not compulsory.⁸⁰ F. Schmidt considers the rule in section 63 a special rule for marine insurance, with no relevance for other situations or other branches of insurance.⁸¹ Apparently he does not regard the rule as compulsory. The view of Sindballe is that this rule contains a special safety regulation, embodied in the law. On this point, we can for once refer to decisions of the Swedish Supreme Court. A clause,

⁸⁰ Eklund & Hemberg, *op. cit.*, pp. 125, 127. Cf. A. D. Bentzon & K. Christensen, *op. cit.*, pp. 369 ff.

⁸¹ F. Schmidt, *op. cit.*, p. 95.

common in marine insurance, which is harder on the insured than section 63 in that it does not make the issue depend on the negligence of the insured or of the captain, has several times been accepted as valid by the court.⁸² Section 62 has not been subject to the same attention.

It seems thus fairly certain that the insurer is free to exempt himself from liability to the shipowner if an insured ship is not seaworthy, without regard to any negligence. It is more uncertain whether a clause which exempted the insurer even if the seaworthiness was not material to the damage would be accepted.

We can accordingly conclude that in at least two cases the insurer is free to exempt himself for "negligence without fault", i.e. as regards lack of seaworthiness in an insured ship and insufficient packing of insured goods. Is there any reason why these exceptions should be considered limited to marine insurance or to transport insurance? In the opinion of the present writer there is none, except what is indicated by good insurance practice and similar considerations. Here also, it seems probable that practical reasons alone account for the fact that the rules appear in the parts regarding marine insurance.

There is another conclusion to be drawn. The view that all clauses applying to the conduct of the insured must be submitted to the compulsory rules, is not borne out by the special rules of the Swedish statute. Apart from the problem regarding "change of risk", which is somewhat specialized, the two rules just discussed seem to imply that exclusions of risk can be made dependent also on the conduct of the insured, at least on his "negligence without fault". Accordingly, it does not seem possible to apply this simple test for deciding the admissibility of exclusions of risk.

⁸² See e.g. *Nytt juridiskt arkiv*, 1932, p. 235, and 1933, p. 691.

The General Method of Solving the Problems

1. One of the methods suggested for dealing with doubtful clauses is to interpret them reasonably, which includes the possibility of applying the compulsory rules even to a clause formulated as an exclusion of risk.⁸³ This method will in many cases give the same result as deciding to apply the compulsory rules without regard to the clause. A lawyer, familiar with the compulsory rules of insurance law, may often, when interpreting a clause, come to the conclusion that these rules should be applied, particularly if he is not supposed to pay great attention to the words of the clause. Such a method will also in many cases agree with the general principle for interpreting clauses in standard contracts. If the insurer invokes a clause which is ambiguous and unclear, the accepted method would be to interpret it in the way that is most favourable to the insured, and this would often be to apply the compulsory rules. And reasonable interpretation will often have the same result whether the clause is considered to apply to an exclusion of risk, an increase of risk, or to be a safety regulation.

Such a method of interpretation will, however, not always bring the same results as the method of applying the compulsory rules directly. A simple example will demonstrate this. If a clause contains no reference to the negligence of the insured, it may be possible to limit its force to cases where there is negligence, without leaving the principles of interpretation, as these are understood in the Scandinavian countries, and thus adjust it in conformance with the one or the other compulsory rule. But, if the clause should state explicitly that lack of negligence is of no relevance, there does not seem to be any possi-

⁸³ Cf. *supra*, p. 23.

bility of introducing such a requirement by the aid of the rules of interpretation. We cannot, therefore, confine ourselves to interpretation, since this means that the insurer can always enforce his wishes by choosing a sufficiently clear expression. In practice these considerations may be comparatively unimportant, since the insurers will perhaps refrain from using clauses which would clearly be severe and oppressive, and since the doubtful clauses will generally not be in clear contradiction to the compulsory rules. But there is yet a further reason for not relying on the general principles of interpretation. Interpretation is mostly an intuitive method of arriving at results, and here we are concerned with knowing when we should apply definite compulsory rules.

Within a narrower field, the test suggested by F. Schmidt for distinguishing between a clause concerning increase of risk and a safety regulation corresponds to the method of interpretation. A change in a fact mentioned in the individual description of the risk in the insurance policy is, according to his view (cf. *supra*, p. 26), an increase of risk; what is not mentioned in this way but falls within the compulsory rules should be treated as safety regulations. Accordingly, the insurer could apply the rules of increase of risk, including the *pro rata* rule, to any matter by inserting an appropriate expression in the description of the risk. It will be demonstrated later that this result is not desirable,^{83a} and Schmidt's test therefore seems to give too much liberty to the insurer.

This objection may also be considered rather unimportant as many safety regulations would look incongruous as part of the description of the risk and will therefore hardly be formulated in this way. We can imagine a description of the risk stating that there are notices prohibiting smoking in the insured premises, but it is hard to imagine as part of a description of the risk a clause providing that all oily rags must be kept in an iron container. But the rule suggested by Schmidt also goes too far in the other direction. If a certain change is mentioned in the standard text of the policy as an increase of risk, without reference to the individual text, there does not seem to be any reason why this clause must be treated as a safety regulation.

^{83a} Cf. *infra*, p. 49.

Such clauses are not uncommon when the change would be of an unusual kind.⁸⁴

This leads to the view that the appearance and interpretation of the clauses cannot be decisive. The contents of the clause must also be taken into account. Nevertheless, the words of the clause and their interpretation seem to be the best starting-point.

There are several reasons for this view. One is that the general tendency of the Insurance Contract Act is to let the insurer decide his general policy himself. He has a choice between several patterns. If he chooses one particular pattern, he will have to apply the consequences that are part of this pattern, and in this matter he has—in so far as the rules are compulsory—no choice. Because of this consequence, the insurer will have to consider his choice carefully. We can therefore assume that generally his choice, as appearing from the clause, should be respected. Another reason is that applying the compulsory rules against the natural interpretation of the clause may sometimes involve a disadvantage to the insured or even constitute a trap for him, as will be demonstrated later.⁸⁵ Finally, there is a risk that if the courts are very strict in the application of the compulsory rules, the insurer will only be induced to resort to other methods of protecting his interests, and these other methods may be even less favourable to the insured.⁸⁶

We shall accordingly start by discussing the typical expressions used in insurance contracts for the various purposes. Later we shall have to consider what circumstances lead to the application of the compulsory rules to ambiguous or unclear clauses or even against the clear words of a clause.

2. In German insurance, the correct way of establishing an *exclusion of risk* is said to be “the insurance does not cover” (“*der Versicherungsschutz erstreckt sich nicht auf*”) and similar expressions, whereas the correct expression of a duty (*Obliegenheit*) is “the insurer is free from his obligation” (“*der Versicherer ist von der Verpflichtung zur Leistung frei*”). The choice of expression is not decisive, but the expressions quoted are considered desirable.⁸⁷

⁸⁴ Cf. *infra*, p. 61.

⁸⁵ Cf. *infra*, pp. 46 f.

⁸⁶ Cf. *infra*, pp. 66 ff.

⁸⁷ v. Gierke, in *Zeitschrift für Handelsrecht*, Bd 116, 1953, p. 101.

There is no similar established practice in Swedish insurance contracts. The expressions corresponding to the German ones quoted (“*försäkringen omfattar icke*” and “*försäkringsgivaren är fri från ansvar*”) would both seem to indicate exclusions of risk. The words “without express agreement the insurance does not cover” (“*utan särskilt avtal ersättes icke*”) also indicate an exclusion of risk, though the insurer may be willing to extend the insurance to the kinds of damage generally excepted against an additional premium or an additional provision or both.

The Swedish word corresponding to “condition” (“*villkor*”) is nowadays not usual in insurance contracts. If a certain matter is laid down as a condition of liability, the common meaning according to general legal terminology would be that the insurer is wholly free from liability if the condition is not fulfilled, without regard to negligence (unless this was expressly mentioned) and to causality.⁸⁸ Accordingly, this word would seem to indicate an exclusion of risk, though the validity might be open to doubt if it referred to the acts of the insured.

That a change in a certain matter will be treated as *increase of risk* is generally indicated by mentioning the matter in the description of the risk. Often the relevant rule of the Insurance Contract Act is reproduced in the contract, or there may be some other reference, more easily understood by the layman, to the legal significance of the description of the risk.

Since the mentioning of, for instance, the place of insurance might also imply a limitation of the risk, the consequences of such a specification are not always clear. In fire insurance, the matter is regulated by section 83 (cf. *supra*, p. 33). Often, the standard part of the contract will state the intended significance of the place. According to some writers, the mention of the insurance place constitutes a limitation of the risk, unless there is any indication to the contrary. This is in accord with the view that keeping the insured property in another place than that agreed to is a “change of risk”.⁸⁹ Schmidt would apply the rule in

⁸⁸ See e.g. Almén, *Om köp och byte av lös egendom*, 3. uppl., 1934, I, p. 338, Malmström, *Till frågan om villkor vid fastighetsköp*, II, (Uppsala Universitets Årsskrift 1933: 3), 1933, pp. 7 ff. — Even if the word *villkor* was used in a Swedish insurance contract, it would in all probability not be interpreted as effecting the right of indemnity for losses that had occurred before the breach and were wholly independent of it.

⁸⁹ See references *supra* in note 70.

section 83 to other branches of insurance also.⁹⁰ Another possibility would be to apply the rules of increase of risk, unless there is any special indication to the contrary. Such a principle seems to be accepted for determining the significance of mentioning a certain person as the owner of the insured goods.⁹¹ The analogy is, however, not complete, as the special rules regarding insurance of “third party interests” in Scandinavian law admit little relevance to the ownership of the insured goods.⁹² It does not seem possible to give any definite rule, and the matter must then be decided for each special case.

There may also be provisions in the standard text of the insurance policy, stating that certain changes, such as bringing a steam engine into the insured premises, will be considered increase of risk. As has already been said, such clauses should also be accepted.

There may also be other ways of indicating that a certain change would be increase of risk. A clause stating that the insurer should be informed of the change,⁹³ as well as a clause indicating that the *pro rata* rule will be applied, both seem to imply that the matter shall be treated as increase of risk.⁹⁴

Safety regulations are generally indicated by appearing under the corresponding heading (“*säkerhetsföreskrifter*”) in the insurance policy. The effects of non-compliance with them are often not stated. Such safety regulations are common in the standard policies and also form the main part of the “special terms” inserted into insurance contracts regarding special enterprises (factories, rural farms, etc.) or special kinds of goods (inflammable goods, drawings and archivalia, etc.). Sometimes the character of the clause is indicated simply by the fact that it gives a definite rule of conduct. A common way of beginning a safety regulation is “for this insurance the following applies” (“*för denna försäkring gäller*”). This expression may, however, also introduce clauses that are not safety regulations.

3. We have next to consider what circumstances should lead to the application of the compulsory rules. In the great majority of cases,

⁹⁰ F. Schmidt, *op. cit.*, p. 96.

⁹¹ See *Nytt juridiskt arkiv*, 1929, p. 573, and 1932, p. 95. Cf. F. Schmidt, in *Svensk Juristtidning*, 1940, pp. 416 ff.

⁹² Insurance Contract Act, s. 54.

⁹³ Cf. A. D. Bentzon & K. Christensen, *op. cit.*, p. 296.

⁹⁴ Cf. *infra*, pp. 61 f.

the subject matter will correspond to the form of the clause, and no difficulties will arise. It is because of the ambiguous clauses and the possible discrepancies between form and contents that we must take the subject-matter into account. Only clauses that connect with some matter that lies within the influence of the actions of the insured need be considered, as only these can concern either increase of risk or safety regulations. The conduct of the insured is, however, only one of the circumstances to be considered, and not necessarily the decisive one.

The first principle seems to be that the insurer should not be allowed to make the same matter subject to more than one of these rules. As for increase of risk and safety regulations, the arguments stated by Schmidt have already been referred to.⁹⁵ They seem to have much force. The combining of an exclusion of risk with increase of risk, which would lead to the same result, might be thought to be excluded for logical reasons alone, since the same change could not both constitute an increased probability of insured loss and lie outside the scope of the insurance. In practice, however, it might happen that the insurer inserted both kinds of clauses in the contract. Such a combination should be excluded, not only because of the effects of cumulation, but also because of the general reasons for limiting the liberty of the insurer to make exclusions of risk, which will be stated later.

The relevant factors for applying a compulsory rule will appear from its pattern, as described above.⁹⁶ Of the various details mentioned there, those regarding the burden of proof and the liability of the insured for the acts and omissions of others will give little guidance, as they hardly express any characteristic differences in matter. The possibility that the insurer may terminate the contract by giving notice in advance can sometimes indicate whether a duty or an exclusion of risk is appropriate. The main indications will, however, be gathered from the remaining details.

The rules as to *increase of risk* are connected with the probability of damage, as determined by experience and statistical theory, and as connected with the assessment of the insurance premiums.⁹⁷ Typical

⁹⁵ *Supra*, pp. 25 f.

⁹⁶ *Supra*, pp. 9 ff.

⁹⁷ Cf. A. Ehrenzweig, in *Tidsskrift for rettsvitenskap*, 1924, pp. 100 ff.

examples are such wellknown changes as putting on an insured house a roof less resistant to fire than the original one, introducing inflammable materials in an insured house, etc. There are, however, certain risks that the insurer will not cover, and some of these lie outside the scope of increase of risk. If the change would imply such a conduct of the insured as the insurer would not consider protecting because of its impropriety or recklessness, we are outside the technical estimation of the risk, and the rules of increase of risk are not appropriate. A change which is not of some permanence also cannot be considered to fall within the scope of increase of risk.

These various features can be inferred from the rules of the statute.⁹⁸ The whole structure of the *pro rata* rule shows its intimate connection with the technical system of premium classes. That only matters not involving improper conduct of the insured are subject to the rules of increase of risk, is indicated by the rule that the insurer must inform the insured whether he will be exempted from liability or not. This suggests that the rules refer to situations where the insurer can at least contemplate the possibility of covering the risk. The details in the negligence test employed, i.e. that only changes which take place with the will of the insured or of which he has reasonable cause to inform the insurer are relevant, confirm this. That only matters of some permanence are covered is borne out by the same rules, in connection with the rule that the increase is irrelevant if the original condition has been restored. This cannot very well apply to changes that last only a minute or an hour, nor to acts that are undertaken from day to day.

Such matters as decide the premium of the insurance should be made subject to the rules regarding increase of risk, even if a clause concerning such a matter is clearly formulated as an exclusion of risk. This consideration seems to take care of some clauses discussed in legal theory as being of doubtful validity. There is, for instance, a certain (imaginary) clause that excludes liability for fire caused by inflammable or explosive materials that have been stored within a certain distance of a house insured against fire.⁹⁹ Since such matters

⁹⁸ Cf. Hult, *Föreläsningar över försäkringsavtalslagen*, 1936, pp. 122 ff., F. Schmidt, *Faran och försäkringsfallet*, 1943, pp. 62 ff. and Löken, in *Nordisk försäkringstidskrift*, 1946, pp. 23 ff.

⁹⁹ A. D. Bentzon & K. Christensen, *op. cit.*, p. 60.

are actually and traditionally treated as falling within the technical assessment of risks, the clauses (if they were to occur in reality) should, notwithstanding their formulation, be submitted to the rules regarding increase of risk (or as the case may be, misrepresentation). And if the equipment of a house with a lightning conductor is relevant for the premium of fire insurance, a clause excluding liability for damage caused by the lightning conductor's not being in good condition—to use another example often discussed in Scandinavian legal theory¹⁰⁰—should also be made subject to the rules regarding increase of risk.

This is the general principle. We must now consider the exceptions.

The same circumstance that decides the premium can be used also for other purposes, such as describing the kind of damage that the insurance covers or the kind of property that is insured. This is done by using the phrase “without special agreement the insurance does not cover”. We must accordingly ask whether such exceptions should always be accepted.

If the exception is not connected with increased probability of damage but with some other reason, for instance that this kind of damage or this kind of property are left to some other branch of insurance, we are clearly outside the scope of the rules of increase of risk. But even where the exception is connected with the probability of damage, it should generally be accepted if it serves an individualizing function. The reason for this is best given by using an example.

In the Swedish standard policy of insurance of goods against damage from water escaping from a waterpipe system, there occurs a clause stating that, without a special agreement, no indemnity is due for damage to goods stored in a cellar (described as premises whose floor is more than one yard below the level of the surrounding ground).¹⁰¹

We might regard this as a clause without any individualizing function. It must then be taken to concern increase of risk. The insured would then know that if he stored his goods in the cellar, he would have to make a special agreement with the insurer, or he would lose some of the insurance protection for all the goods insured, according to the *pro rata* rule. The goods would also be considered

¹⁰⁰ See Grundt, *op. cit.*, pp. 156 ff., Schmidt, *op. cit.*, pp. 192 ff., Løken, *Forsikringskravet*, 1952, pp. 62 ff.

¹⁰¹ Standard policy of waterpipe insurance of 1950, § 3 (b).

to be within the insurance cover for the purpose of deciding whether there is under-insurance.

If we regard the clause as a determination of the risk, involving an individualization of the insured goods, the insured would have to look at it in a different way. The goods kept within the cellar premises would be wholly outside the scope of the insurance, and its existence would have no effect on the right of indemnity for other goods. Unless the insured wanted to have these goods also protected by the insurance at the special cost, he would have no reason to inform the insurer. It would be of no concern to the insurer whether the insured kept goods in these premises without making a special insurance of them.

It follows from this that the interest of the insured does not necessarily demand that the compulsory rules should be applied but that it is also in his interest that the clause should be applied in such a way as seems a natural interpretation to him. The details of the legal rule as well as of the clause itself may be unknown to the insured, but if he interprets the general character of a clause correctly and acts accordingly, the intervention of the compulsory rules should not be made a disadvantage to him. In this particular case, the natural interpretation of the clause seems to be to regard it as individualizing the insured property.

Against this, we must consider that by making an exclusion of risk, the insurer makes it also irrelevant whether goods were stored in the cellar with or without the consent of the insured. This circumstance does not, however, seem a sufficient reason for applying the compulsory rules against the natural interpretation. Accordingly, the best way of treating the clause seems to be to apply it as an exclusion of risk, in spite of the fact that the same matter might just as well be the subject of increase of risk.

There may be some cases where we should apply the compulsory rules, although the clause might have an individualizing function. But the case would have to be rather strong in order to justify an application against the natural interpretation of the clause.

Where there is no individualizing function at all, these considerations cannot prevent the application of the compulsory rules. Neither the presence of a lightning conductor on the insured house nor the

absence of inflammable materials in the vicinity of the house can have any importance for individualizing the insured property.

As for the clauses regarding the limits of insurance in space, where these have no individualizing function, the general principle must be that these clauses also must be accepted as exclusions of risk if they are clear enough. The analogy of the special rules regarding "change of risk" seems to be sufficient for this. If the insurance is limited to certain countries or to the premises used by the insured in his business, it cannot be relevant whether it is brought outside these with the consent of the insured or not. The reason of the insurer for making this exclusion would hardly have any influence. But here also there might be cases where the insurers would be considered to have overstepped good insurance practice.

Apart from individualizing the property insured and determining the limits of insurance in space, there may be certain kinds of damage which the insurer may wish to exclude from the insurance generally, although he would be willing to cover the damage against an additional premium in special cases. This may be the case with damage occurring during certain use of the insured property. The insurer may, for instance, wish to leave the use for racing of cars insured only for use in general traffic to a special insurance. With clauses of such types, it seems necessary to decide whether there is just an increased probability of damage, which would not bring the matter outside the compulsory rules of increase of risk, or whether there is some additional circumstance which would justify an exclusion of risk. In the case just mentioned as an example, the use of cars for racing, it would seem justified to accept a clause making an exclusion of risk, although the insurer might also include such use in the premium system of the usual insurance, thus making an increase of risk.¹⁰² The decision whether a certain matter belongs to the ordinary system of premium classes or to a special insurance is also one where the courts will have to rely on insurance practice and on their own discretion.¹⁰³

¹⁰² Cf. e.g. Prölss, *op. cit. supra* in note 27, pp. 464 ff., Stiefel & Wussow, *Kraftfahrversicherung*, 2. Aufl., 1953, pp. 52 ff. — What has been said in the text implies no opinion of the treatment of any actually occurring Swedish clause. See *infra*, pp. 61 f.

¹⁰³ It is worth noting, however, that even in this case the application of the clause as an exclusion of risk would give it a certain individualizing function. With such an application, it would be of no concern to the insurer how the insured used the car, which would on the other hand be the case if the clause was taken to concern increase of risk.

The same considerations will apply to cases where a change would bring the matter wholly outside the range of the premium classes and where there is accordingly no possibility of having the damage covered even with a special agreement. Clauses with an individualizing function or concerning the limits of insurance in space should generally be accepted. For other clauses, the principal test should be whether the reason for excluding liability lies in the high probability of damage, as statistically computed, or in other considerations. In the former case, the rules as to increase of risk, including the relevancy test which is here the important part, would apply. If other considerations, such as the particular difficulty of estimating this kind of risk and managing such insurance, or the wish to make a clear and easily perceived limit of the insurance cover, are the compelling reasons, the insurer might have the possibility of making an exclusion of risk. Of the two reasons just mentioned, the first is obviously the more important, and should generally be respected. If the change would bring the matter outside the kind of business generally included in this branch, or undertaken by this particular insurer, he should accordingly be free to make the matter the subject of an exclusion of risk. The second reason, the wish to draw a clear line, is obviously less compelling and would have to be rather strong to be respected.¹⁰⁴

The subject-matter of *safety regulations* differs somewhat from that of increase of risk. The only conduct prescribed by the rules regarding increase of risk is that of informing the insurer of the change. The insured is under no obligation to avoid the increase of risk as such. With safety regulations, the conduct of the insured is the main thing. He should comply with certain specific patterns of behaviour, laid down by the insurer. The *pro rata* rule would very often not be suitable for non-compliance with such regulations, either because of the type of the acts prescribed, e.g. daily measures of precaution, or because the insurer would not grant any insurance to someone who did not comply with these regulations.¹⁰⁵ The conduct would often appear improper in itself, and the very fact that it had been prohibited by the insurer would make it seem more improper to him. None of the rules as to increase of risk, calculated to protect the insured, would

¹⁰⁴ Cf. *infra*, pp. 58 ff.

¹⁰⁵ Cf. e.g. Hult, *op. cit.*, pp. 131 ff.

have any influence in such cases. The protection given by the rules regarding safety regulations, though not great, is better fitted for such cases.

It thus seems important that such matters as should be subject to safety regulations should not be treated according to the rules regarding increase of risk. Since the latter rules are more favourable to the insured as concerns negligence, we should also not allow a situation which should be treated as increase of risk to be submitted to the rules regarding safety regulations. But since the causality rule may be used for increase of risk too, this aspect is of less importance.

To decide what clauses must be treated as safety regulations and not as exclusions of risk is more difficult and probably more practically important. The special rules mentioned earlier, though they show that not all clauses applying to the conduct of the insured are subject to the compulsory rules, tend to make the matter rather uncertain. In discussing these questions, we can follow the same course as was used regarding increase of risk.

Conduct prescribed because of its influence on the risk of damage should in general be submitted to the rules regarding safety regulations. Where the clause also serves the purpose of individualizing the property insured, it should, however, generally be accepted as an exclusion of risk, although the reasons for this are not so strong as in the case of increase of risk, where the *pro rata* rule applies. It will rarely be a disadvantage to the insured if the rules regarding safety regulations are applied to a clause which can be naturally interpreted as an exclusion of risk. Yet, if the property is not completely individualized by some other means, it seems proper to accept the clause as an individualizing clause, since otherwise when damage has actually occurred doubt might arise whether the property is included in the insurance or not. But if the property is individualized in some other way, e.g. by individual description of the objects insured, the form of the clause cannot bring the matter outside the compulsory rules.¹⁰⁶

If a clause bearing on conduct prescribed to diminish the risk of

¹⁰⁶ Cf. A. D. Bentzon & K. Christensen, *op. cit.*, pp. 58 ff. — F. Schmidt discusses, *op. cit.*, pp. 190 f., a clause according to which the insurance does not cover jewels, money and other valuables unless these are kept in a safe. It is rather difficult to say whether such a clause should be naturally interpreted in such a way as to individualize the insured property. The two negations seem to disagree with such an interpretation. Without these negations there would be more reason to interpret it as an individualizing clause.

damage serves in addition the function of limiting the insurance in space, it should also be accepted as an exclusion of risk.

As for other reasons which might make a clause acceptable as an exclusion of risk although it is concerned with conduct bearing on the risk of damage, it is hardly possible to give any substantial guidance. Much will depend on established insurance practice.¹⁰⁷ Here also it seems proper to ask whether the conduct is prescribed only for its influence on the risk of damage or whether there is some other reason for enforcing the clause. In the latter case, it should be accepted as an exclusion of risk. If the conduct to be inferred from the clause is relatively independent of the insurance relation, we might also be justified in going beyond the compulsory rules regarding safety regulations. This is brought out by the rules regarding the seaworthiness of an insured ship and the packing of insured goods.¹⁰⁸ Both these matters are important for other reasons apart from the insurance and the loss covered by it, and the conduct to be inferred is therefore not typical of a safety regulation. In such cases the compulsory rules are scarcely suitable, and there is more reason for giving the insurer liberty to make an exclusion of risk.

A clause prescribing conduct for some reason not connected with the risk of loss should not be made subject to the rules regarding safety regulations. Thus, a clause occurring in business interruption insurance, stating that the insurer is not liable if the accounts of the insured are not kept in good order,¹⁰⁹ cannot be submitted to the rules regarding safety regulations, since this has no influence on the risk of damage. The clause serves the purpose of enabling the insurer to compute the insurance indemnity. Accordingly, the insurer is not bound to apply any test of negligence.

4. The problem which we are discussing here turns out to be intimately connected with another question, i.e. whether the rules of the Swedish Insurance Contract Act should be taken to cover all the duties that can be imposed on the insured, or whether there might be other duties, not regulated by the statute. This question has hardly been discussed openly, although there seems to be a general tendency to assume that all, or at least all important, duties are subject to rules

¹⁰⁷ Cf. *infra*, pp. 64 f.

¹⁰⁸ See *supra*, pp. 37 f.

¹⁰⁹ Cf. standard policy of business interruption insurance of 1938, § 23.

given in the statute. Even such a clause as one giving the insurer the right of inspecting the insured premises is sometimes said to be a safety regulation and subject to the compulsory rules regarding such.¹¹⁰

It is somewhat surprising that the Scandinavian Insurance Contract Acts give no general rules regarding duties, only the comparatively specialized rules regarding "safety regulations". In this respect they differ from the German and the Swiss statutes.¹¹¹ This leaves us with a dilemma. There will be difficulties if we try to force all duties into the one or the other characteristic and detailed pattern. On the other hand, there does not seem to be sufficient reason for giving the insurer complete freedom regarding all such matters as are not regulated by the statute.

We have seen already that there may be other reasons for letting the insurer modify or exclude liability than those connected with the rules regarding increase of risk or safety regulations. Some such cases are regulated by the statute for special branches of insurance.¹¹² In these cases, although it might have been sufficient for the protection of the insurers to construct appropriate duties of the insured, the insurer is also free to make exclusions of risk.

We cannot, however, exclude the possibility that there are other matters where the insurer should not have the same liberty. That the Swedish Insurance Contract Act has regulated only certain duties does not seem to justify full liberty of contract for all such matters as cannot very well be submitted to the one or the other pattern of compulsory rules. Whether we should express this as a particularly strong reason for applying section 34, Insurance Contract Act, or invoke an analogy to the other rules regarding duties, does not seem very important.¹¹³ For some cases, it might seem appropriate to construct duties where a test of negligence (in the "strong" sense) is used but where causality is irrelevant. In other cases we might accept "negligence without fault" but only in connection with a test of causality. These possibilities will appear from the following discussion of special clauses.

¹¹⁰ See e.g. A. D. Bentzon & K. Christensen, *op. cit.*, p. 293 note 2.

¹¹¹ Cf. *supra*, p. 18.

¹¹² See concerning "change of risk" *supra*, pp. 32 ff.

¹¹³ A. D. Bentzon & K. Christensen, *op. cit.*, pp. 295 f., prefer using the compulsory rules to applying the general principle in s. 34. The compulsory rules are, however, much less flexible and accordingly may lead to more unpractical results, *infra*, p. 60.

5. We can now summarize the view on the impact of the compulsory rules that has been advanced in the preceding part of this study.

From the rules which contain compulsory rules we can infer what kind of circumstances each such rule is intended to cover. If the minimum requirements of contractual form are fulfilled, such circumstances will take effect according to the rules given in the statute. If there is some further indication in the contract regarding a matter which might have fallen under any compulsory rule, the effect of such a clause will depend on its contents. Each compulsory rule has a core of circumstances to which it will always apply, if these circumstances are to have any relevance at all. Regarding these, the compulsory rules must prevail over the words of the clause. There are other matters which belong less definitely to the subject-matter of any compulsory rule, and regarding such matters the insurer is free to choose which pattern he likes, provided he uses sufficiently clear expressions. As for this latter group the choice of expression is accordingly important, in spite of the fact that if the insurer had not made any explicit choice, the matter would have been governed by one or other compulsory rule. Generally speaking, the insurer has more freedom to choose between the different patterns of compulsory rules than to make an exclusion of risk. As for deciding what belongs to the core of a compulsory rule, there are some matters as to which there is very little doubt but there is also a large area where the decision must be influenced by the personal judgement of the judges. Finally, there are some matters that, even when only the minimum requirements of contractual form are fulfilled, will be treated as exclusions of risk.

The reason for not applying the compulsory rules to matters lying on the outskirts of the areas of such rules is not only that the policy governing the compulsory rules must be supposed to apply less strongly to such matters, but also that it might be a disadvantage to the insured to apply the compulsory rules against the natural interpretation of the contract. The interests of the insured are not always best served by applying the compulsory rules.

The suggestions given here for deciding to what cases the compulsory rules must always apply, i.e. for determining the core of the compulsory rules, will be relevant chiefly for the typical cases, where the

subject matter naturally or traditionally requires one certain form of the clause, and where an exclusion of risk would already appear somewhat suspicious because it would seem a rather queer way of expressing the matter.

For more doubtful cases, we must consider the analogy of special rules, established insurance practice and the consequences of the choice. To lay down any definite rules is hardly possible. It is regrettable that so little guidance can be given, but most suggestions that could be made would be rather arbitrary, and there is no advantage in making a matter seem more certain than it is.

Insurance practice must often be decisive. If there is a long tradition that a certain type of clause is accepted, this is often a valid argument for permitting it in the future too. The special character of marine insurance will also justify greater liberty of contract there than in other branches.

To a large extent, the matter must be decided according to the discretion of the courts. The reasons for such decisions cannot be discussed when stating the general principles but must be left to the treatment of the special clauses.

Some Special Clauses

1. We shall now return to the clauses mentioned at the beginning as typical examples of the problem studied. They will bring out some of the main points of the argument. We will begin with the motor insurance clauses.

The *Danish* clause states that the insurer is free from liability for damage occurring while the car is driven by a person who is under the influence of alcohol or who has no driving licence.¹¹⁴ This clause contains no reference to negligence, and the words would seem to indicate that causality is of no relevance either. But the general opinion is that this circumstance is not decisive.

According to one writer the matter falls within the rules regarding negligent causing of the insured loss.¹¹⁵ Another writer suggests that the clause might be submitted to the rules regarding increase of risk.¹¹⁶ The most authoritative opinion found in legal theory is that they are safety regulations, but even so there is no agreement. According to Sindballe, the person responsible for the compliance with the regulation is the driver himself.¹¹⁷ According to Drachmann Bentzon and Christensen, the person responsible is the owner of the car, and if no blame attaches to him, the breach against the clause is irrelevant.¹¹⁸

There is one reported case in which the insurer was exempted from liability when the driver was drunk but no blame attached to the owner.¹¹⁹ This case accordingly can be made to agree with a close

¹¹⁴ This clause is quoted e.g. in *Ugeskrift for Retsvæsen*, 1951, p. 766.

¹¹⁵ Thorning Hansen, in *Nordisk försäkringstidskrift*, 1951, pp. 340 ff.

¹¹⁶ Rode, in *Assurandøren*, 1952, pp. 557, 558.

¹¹⁷ Sindballe, *op. cit. supra* in note 60, pp. 104 ff., pp. 110 ff.

¹¹⁸ A. D. Bentzon & K. Christensen, *op. cit.*, pp. 124 ff., 282 and 294 ff.

¹¹⁹ *Ugeskrift for Retsvæsen*, 1937, p. 410. Cf. Frost, in *Tidsskrift for rettsvitenskap*, 1952, p. 331.

observance of the words of the clause and also with the view of Sindballe, but not with that of Drachmann Bentzon and Christensen. There are, however, other cases in which the insurer was held liable when no blame attached to the owner.^{119a} There are also two recent cases where the insurer was held liable when the fact that the driver had no driving licence was considered in the one case not to have involved any increased risk for the insurer and in the other not to have had any bearing on the accident.¹²⁰ These cases seem to agree with the view of Drachmann Bentzon and Christensen.

These opinions and cases illustrate both the various practical possibilities and the different methods of solution. The opinion of Drachmann Bentzon and Christensen is stated by them as the result of reasonable interpretation of the clause. The lack of detail in the clause makes it possible to add further requirements to those expressly stated. But obviously we could arrive at the same result by applying the compulsory rules directly.

It does not appear from the published judgements what method or rule the judges have intended to apply, and still less what their reasons for doing so have been. We find some more information regarding the reasons in the discussions of legal writers. Often, some special consequence seems to have been decisive. Since it would seem rather preposterous if the insured would lose his insurance protection in the event of a wholly unauthorized person taking possession of the car and driving it while drunk or without a licence, it seems reasonable that a test of negligence must be added to the words of the clause.¹²¹ It would also be rather hard if the insured would lose his protection if the car was struck by lightning and burned while being driven by a driver without a licence.¹²² Accordingly a test of causality seems called for. To obtain these results, it seems necessary to rely on the rules as to safety regulations. The next step will then be to apply all consequences connected with safety regulations, though here also

^{119a} Ugeskrift for Retsvæsen, 1941, p. 589 and other cases quoted by A. D. Bentzon & K. Christensen, *op. cit.*, p. 294 note 3. Cf. also Ugeskrift for Retsvæsen, 1948, p. 682 and the note on this case by A. D. Bentzon, in Tidsskrift for rettsvitenskap, 1949, pp. 187 f.

¹²⁰ Ugeskrift for Retsvæsen, 1951, p. 765 (cf. Frost, in Tidsskrift for rettsvitenskap, 1952, p. 332) and Ugeskrift for Retsvæsen, 1953, p. 849.

¹²¹ Cf. A. D. Bentzon & K. Christensen, *loc. cit. supra* in note 118 and Frost, *loc. cit. supra* in note 120.

¹²² Cf. Løken, *op. cit.*, pp. 69 and 99, and Sindballe, *op. cit.*, p. 111.

there is scope for a choice, since it is not entirely clear whether the owner or the driver is the person responsible for the supervision.

There is, however, another possibility if we start from the consequences.¹²³ If we do not wish to accept the causality test, the clause can be considered to refer to increase of risk. If we ask whether the insurer would have accepted insurance liability if the car was driven by a driver who was drunk or who had no licence, the answer will obviously be that he would not. On the other hand, a consequence of applying the rules regarding increase of risk will be that the breach would be relevant only if the owner himself acted or gave his consent.

The corresponding *Swedish* clause^{123a} causes less difficulty, since the loss of the insurance protection of the owner is explicitly confined to cases where the car was driven by the owner himself, or by some other person with his consent, in a state of drunkenness or without a driving licence.¹²⁴ The problem of the relevance of causality remains, however. The Swedish clause has not been the subject of so much attention as the Danish one, and the few opinions expressed regarding the importance of causality differ.¹²⁵

The practical issue in Swedish law is thus the same as in German law, whereas the burden of proof, which has been discussed in French law, does not seem to present any special problem in Swedish law.^{125a}

If we look at these clauses of motor insurance in the light of the

¹²³ Cf. Rode, *loc. cit. supra* in note 116.

^{123a} Concerning the Norwegian driving licence clause, see Norsk Retstidende, 1939, p. 704; cf. the report of the Norwegian drafting committee (Bugge, *Lov om forsikringsavtaler*, 1930, p. 57), and Løken, *loc. cit. supra* in note 122. The drunkenness of the driver has been considered subject to Insurance Contract Act, s. 20 (where the Norwegian statute differs from the other Scandinavian statutes), see Norsk Retstidende, 1948, p. 261 ff. — In Finnish law, the matter is left to be decided by the insurance conditions under s. 19, Motor Traffic Liability Act of 10th December 1937 (Finlands författningssamling, 1937, nr 408).

¹²⁴ Standard policy of motor insurance of 1939, § 3 (b).

¹²⁵ An earlier version of the Swedish driving licence clause was applied in a case reported in Nytt juridiskt arkiv, 1938, p. 97. Only the vote of the minority in the Supreme Court is of interest here. It is possible that the minority has considered the lien of causality irrelevant, but the shortness of the expressions used does not permit any safe conclusions. F. Schmidt, *op. cit.*, p. 188 note 18, suggests that the compulsory rules should be applied to this clause and accordingly a test of causality be introduced. "Skadeförsäkringens villkorsnämnd" has pronounced causality to be irrelevant as regards the drunkenness clause now used, 42/1951. The present writer has suggested earlier that the clause should be interpreted as an exclusion of risk, since causality should be irrelevant, see *Försäkringsgivarens regressrätt (The Insurer's Right of Subrogation)* (Uppsala universitets årsskrift 1953: 3), 1953, p. 97 n. 7 and in Nordisk försäkringstidskrift, 1953, pp. 202 ff. In December 1953 the Swedish Association of Motor Traffic Insurers recommended their members not to enforce the clause regarding the drunkenness of the driver unless he is proved to have been negligent and also not to enforce it if it is obvious that there is no connection between the consumption of alcohol and the damage. Cf. also Statens offentliga utredningar 1953: 20, pp. 205 ff.

^{125a} Cf. *supra*, pp. 18 ff.

earlier discussion in this study, it seems fairly clear that neither the pattern of increase of risk nor that of safety regulations is clearly indicated. They do not occur under any of these headings in the policy forms, nor does the linguistic expression give any indication for putting them in either of these pigeon-holes.

The rules as to increase of risk are hardly suitable to these clauses. The driving of a car by a driver who is drunk or who has no driving licence is not a matter which the insurer would include in the premium classes or which he would consider covering in special cases or subject to special conditions. Most of the protection given by the rules as to increase of risk is of little help to the insured here, because it has no application in such matters. The protection that would have some practical importance here, i.e. that regarding negligence, goes farther than is called for. Invoking the rules as to increase of risk seems therefore rather arbitrary, since it is just a way of arriving at one desired result.

There is more reason for applying the rules as to safety regulations. Complying with the clause will no doubt tend to prevent and restrict damage, as is stated in the legal definition of such regulations. But this is not a typical specimen. The conduct to be inferred is important for other reasons as well as that of preventing the loss covered by the insurance. The present Swedish clause has a clear connection with the statutory duties imposed on the driver. The conduct is not prescribed by the insurer; it is prescribed by the legislator for many reasons though the insurer will also attach consequences to it.

From another point of view the provision differs from typical safety regulations by the fact that it is often difficult to apply any test of causality in the cases referred to. The influence of a driver's being drunk may often be difficult to establish in a special case. The fact that the driver has a driving licence has not in itself any influence on the risk of accident in each particular case. What is important is his skill, judgement and such qualities, and only to the extent that having a licence indicates the possession of these qualities has it any bearing on the risk of damage. But particularly as the recalling of a licence is in fact used as an extra punishment for certain offences, there must be many cases where a person has no valid licence but where his driving ability is neither better nor worse than during the period

when he had such a licence. Not only will it be difficult to say what causality between the breach of the provision and the damage should be taken to mean here, but application of most possible tests of causality will often be hard.

There seem to be two possible opinions on the admissibility of clauses of the character now outlined. One is that they are not to be permitted; the very fact that they are not typical safety regulations only means that their force is restricted to the effect allowed for such. We must then, in spite of the difficulties just mentioned, apply the same kind of causality test as is usual for safety regulations. The other view is that since they are not safety regulations, their validity cannot be judged according to the rules regarding these and must be decided in some other way.

There is much to be said in favour of the first view. The protection given by the compulsory rules might seem rather poor if the insurers were free to construct new kinds of duties not subject to the rules. But some consequences, especially such as follow when the driver has no driving licence, seem hard to accept. The more a person drives without a licence, the surer he can be that the insurance will protect him, or in other words, the more a person breaks the provision, the less justification is there for applying the sanction of the breach. It would also seem rather pointless to force the insurer to adopt a regulation which will give great difficulties of proof. It is also of interest to note that in accident insurance—which is not subject to the rules regarding safety regulations in damage insurance but to a somewhat similar rule in Insurance Contract Act, section 124—the insurer is free to make an exclusion of risk for the case that the insured is drunk.¹²⁶

The Insurance Contract Act seems hardly to call for strict application of the compulsory rules in such a case, particularly if we have in mind the effects of insufficient seaworthiness of a ship, another matter where the usual rules regarding safety regulations would seem unsuitable.

A reasonable application of the clause in the form in which it occurs in the Swedish motor insurance seems to be that the insurer is free from liability in all such situations where the skill and judgement of the driver can have some influence on the damage. Ordinary

¹²⁶ See Tammelin, in *Nordisk försäkringstidskrift*, 1950, pp. 106 ff.

accidents in traffic will then fall outside the insurance protection, without necessitating the comparison with any other driver or the same driver in another state. But if the car is struck by lightning or catches fire in some way not connected with the driving, or if another car drives into the insured car while it is standing in a public parking place, the insurer should be liable without regard to the driver's drunkenness or lack of a driving licence.

We might call this an application of the causality test, modified in accordance with the special character of the clause, or we might call it an application of the general principles underlying the several rules regarding the duties of the insured. Even if we regarded the clause as constituting an exclusion of risk, we should apply it in the same way.^{126a} We should not, however, even if we accept this application, allow the insurer full freedom to exempt himself where there is not even the causal connection described here, or no negligence of the insured. For arriving at this result we might rely on section 34, Insurance Contract Act. But the main reason why this rule can be invoked here lies in the tendency appearing in the various compulsory rules.

Whether we should call the clause now discussed an exclusion of risk, which is dependent on the conduct of the insured, or a special duty, seems doubtful but rather unimportant. There is, however, one more aspect of the matter to be mentioned. As was said earlier, an exclusion of risk as well as a safety regulation generally operates towards all parties to the insurance, whereas increase of risk only influences the right of indemnity of the party who is responsible for it.¹²⁷ What about the clauses in motor insurance now under discussion? Do they operate against all parties or only against the owner? This question will appear chiefly in motor fire, collision and theft insurance when the car has been sold on an instalment plan and the insurance covers also the interest of the vendor, which in Swedish insurance practice requires an additional premium. It seems clear that in this case the vendor is protected also if the purchaser should lose his right to the insurance indemnity, since the special premium must be due largely for such protection. This result does not agree with the general

^{126a} Cf. Tammelin, *op. cit.*, p. 109, regarding accident insurance.

¹²⁷ See *supra*, pp. 11 f.

principle either for exclusion of risk or for safety regulations. But this matter, also, does not seem to be decisive for the classification.

2. With this we can leave the clauses regarding the driver's drunkenness and driving licence. There is another clause, common in Swedish motor insurance, which also seems worth discussing since it illustrates the view advanced here. This clause concerns the use of the insured car.¹²⁸

If the car is used for a race or competition, the insurer exempts himself, unless he has given his consent. If the car is let out professionally with a right for the hirer to employ a driver (or if the car is used in some other specified ways), the insurer exempts himself. If the car is used for another purpose than is stated in the insurance policy, or if a trailer is attached, and a higher premium or other conditions than have been agreed should have been applied, the insurer exempts himself. In the cases mentioned in the last two sentences, however, the exemption is limited to what corresponds to the missing part of the premium.

There is nothing that clearly indicates with which pattern these terms are intended to connect. The view of Drachmann Bentzon and Christensen, as regards the Danish condition referring to the use of the car, is that it should be accepted as an exclusion of risk.¹²⁹

The view of the present writer is, however, that this clause should be treated as concerning increase of risk. The latter part of the clause shows that the *pro rata* rule applies, and there is thus a sufficient connection with the rule regarding increase of risk. The first part is so strongly connected with the rest of the clause that it is natural to apply the same rule to it, unless there is some special reason against this. As for the first part of the clause—concerning participation in a race or competition—it appears that the insurer is to be free from liability unless he gives his consent. The insurer thus does not refrain in principle from covering such damage, though he wishes to decide the matter depending on the special circumstances in a given case. The general conditions for applying the rules regarding increase of risk are thus fulfilled.¹³⁰ According to these rules, the result would

¹²⁸ Standard policy of motor insurance of 1939, § 3 (c).

¹²⁹ A. D. Bentzon & K. Christensen, *op. cit.*, pp. 126, 283. Cf. also Løken, *Forsikringskravet*, 1952, p. 45. Regarding German law, cf. *supra*, note 102.

¹³⁰ Cf. *supra*, pp. 46 ff.

be that the insured, even if he does not ask the consent of the insurer, should still be entitled to the same treatment as if he did, i.e. he is entitled to protection or not according to what the decision of the insurer would have been. It may seem rather lenient to the insured that he is none the worse for not informing the insurer, but this is the result which always follows from the *pro rata* rule.

The clause does not state that the relevancy of the change in the use of the car depends on whether it was made with the consent of the insured or not. A comparison with other clauses in the same policy seems to indicate that the consent is intended to be irrelevant. But if the rules as to increase of risk apply, we must employ the test of relevance given in these.

What has now been said does not dispose of the question whether the insurer might make a complete exclusion of risk, for which the negligence of the insured has no relevance, concerning some ways of employing the insured car. It seems reasonable that he should be allowed to do so, by using a clear expression.¹³¹

3. We are next concerned with the clause in burglary insurance regarding money and valuables kept in a safe.¹³² Generally, such a clause serves to individualize the insured property, as well as to prescribe a way of keeping it which will tend to prevent the insured loss. Particularly if the insurance also (to some small amount) covers money not kept in this way, the individualizing function is clear.

As long as the keeping in a safe actually serves the function of individualizing the insured property, the clause should be accepted as an exclusion of risk.¹³³ Accordingly, negligence is not relevant, and the insurer is not liable even if the insured could prove that the money would have been stolen even if it had been kept in the safe (for instance by showing that the safe also was burgled). The fact that in a certain case the property was earmarked for being kept in the safe and the individualizing therefore offers no practical difficulty seems to be irrelevant. This agrees with the traditional view that such clauses constitute exclusions of risk.^{133a} But if, for instance, certain specified museum pieces are insured as being kept in a safe but yet are not kept

¹³¹ Cf. *supra*, p. 48.

¹³² Such clauses are discussed by Løken, *op. cit.*, pp. 35 ff., 45 ff., 58 ff., 69 ff.

¹³³ Cf. *supra*, pp. 46 ff., 50.

^{133a} Cf. *supra*, pp. 20 f.

there, the matter may be open to doubt. If the insured property is sufficiently individualized and the place of insurance is also determined by other means, the keeping in a safe does not seem to be required for limiting the risk. Another consideration might enter here. The insurance of valuables not kept in a safe might lie outside the scope of business undertaken by the insurer. In such a case the clause should be accepted as an exclusion of risk. In other cases the compulsory rules should, in the opinion of the present writer, be applied. Whether it should then be treated as a safety regulation or as concerning increase of risk is also doubtful. If the increased risk could be covered by an additional premium, the rules regarding increase of risk seem indicated; if not, the rules regarding safety regulations.

Another situation, which may seem only slightly different from the one just discussed, is that arising when money and valuables are kept in a safe but the safe is left unlocked. According to what seems to be the prevalent view in German law, negligence and causality are irrelevant in this case too.¹³⁴ The risk is limited to property kept within a *locked* safe. One writer has suggested, however, that as far as the clause concerns the locking of the safe, it should be regarded as an *Obliegenheit*, and accordingly be subject to the compulsory rules.¹³⁵ In objection to this it has been pointed out that, as a consequence, the relevance of negligence and causality would depend on whether the money was left in or outside an unlocked safe.

In Swedish burglary insurance the pertinent clause generally states, "The insurer does not compensate the insured for losses occurring while the safe is unlocked".¹³⁵ This fairly clearly indicates an exclusion of risk, though it would seem to have the same sense as a clause prescribing that the safe must be locked, unless the insured shall lose the right of indemnity. It is hard to form any definite opinion on this clause. Since the individualization in case of damage would seem rather doubtful if it depended on whether the property was kept in the unlocked safe or not, and as there may be other reasons for limiting insurance to what is kept in a locked safe, the slightly better

¹³⁴ See Prölss, *op. cit. supra* in note 27, pp. 307 ff.

¹³⁵ Leibkutsch, as quoted by R. Schmidt, *op. cit. supra* in note 33, p. 238 note 1253 a.

^{135a} A special so-called safe clause ("*kassaskåpsvillkor*") is inserted into the policy when money and other valuables are insured.

view seems to be that the clause should be accepted as an exclusion of risk. Causality and negligence should then not be relevant.

A clause implying that the keys of the safe must be carefully guarded should, however, be considered a safety regulation, and the compulsory rules should be applied even if the clause is formulated as an exclusion of risk.¹³⁶

The difficulties which face us here appear to support the contention that no simple formula will give us sufficient guidance for deciding the doubtful cases.

The limitations of the compulsory rules are demonstrated by the fact that without any doubt the insurer is free to limit his liability for theft to such stealing as has been committed by burglary, and whether there is burglary or not may often depend on the conduct of the insured. According to the standard policy of burglary insurance, the insurer is liable only when a thief has entered the insured premises by burglary and has committed theft there.¹³⁷ This clause has accordingly largely the same sense as one prescribing that the doors and windows of the insured premises should be kept locked, since it would not be burglary if the thief entered by an unlocked door. But in spite of this, we should not apply the compulsory rules and make the insurer's liability depend on negligence and causality as regards the locking. This clause is accordingly valid as an exclusion of risk.

In several branches of insurance, we find clauses attaching direct importance to the insured property being kept locked. There are different expressions in use. Some are clear safety regulations, prescribing that the goods insured should be kept locked.¹³⁸ One clause, appearing in insurance against bicycle theft, runs, "The insurance does not cover damage occurring when the bicycle has been left unlocked in a place other than a locked storing-place". This clause has been considered by a board appointed by the insurance companies to deal with doubtful questions of interpretation, in a case where the insured had left his bicycle in a storing place which was locked, but to which other

¹³⁶ Cf. a case from Svea Hovrätt, reported in *Försäkringsjuridiska föreningens rättsfallssamling*, 1949, p. 293. The courts applied a test of negligence. Cf. *Nytt juridiskt arkiv*, 1941, A nr 93 (*Försäkringsjuridiska föreningens rättsfallssamling*, 1941, p. 92), concerning the question whether a safe had been opened by the proper key or not.

¹³⁷ Standard policy of burglary insurance of goods of 1950, § 1 (a).

¹³⁸ E.g. standard policies of luggage insurance of 1954, § 4.

people living in the same house also had keys. The bicycle was stolen, and it was assumed that some other person having access to the storing-place had left it unlocked before the theft. The board found that the insurer was liable for the theft, and emphasized that the insured had no particular reason to take any special precautions.¹³⁹ In fact, the board applied a test of negligence. It does not appear whether the board considered this a reasonable interpretation of the clause, or whether they had the compulsory rules as to safety regulations in mind. There is, however, another version of exactly the same clause, stating that the insurance does not cover the theft of an unlocked bicycle, being (*"befintlig"*) in a place other than a locked storing-place.¹⁴⁰ It seems hard to interpret this clause in such a way that anything but the very fact that the storing-place is locked at the time of the theft is relevant. Shall we accept this interpretation, or shall we, on account of the compulsory rules, apply it in the same way as the other version? The present writer is inclined to accept the interpretation in accordance with the words of the clause. The fact that it concerns the locking of the storing-place seems, because of the analogy with burglary clauses, to justify our accepting it as an exclusion of risk.

4. A fairly common type of clause is one that excludes liability for damage to which the poor condition of the property insured or similar deficiencies have contributed. An example of such a rule is found, as already stated, in the Insurance Contract Act, and concerns the packing of insured goods in marine insurance.¹⁴¹ Of the same kind is a clause in motor vehicle insurance, exempting the insurer from liability for damage to parts of the insured vehicle that have been overstrained or that have not been properly maintained.¹⁴² Another example is a clause, occurring in so called waterpipe insurance, stating that the insurance does not cover damage caused by escaping water to floor and walls that were defective even before the accident.¹⁴³

Some such clauses have been mentioned by F. Schmidt as examples of "disguised conduct clauses" which should be submitted to the

¹³⁹ Skadeförsäkringens villkorsnämnd, nr 18/1954.

¹⁴⁰ Standard policy of bicycle theft insurance of 1950, § 1.

¹⁴¹ See *supra*, pp. 37 f.

¹⁴² Standard policy of motor insurance of 1939, § 24 (a) (1).

¹⁴³ Standard policy of waterpipe insurance of 1950, § 2 (b).

compulsory rules.¹⁴⁴ This probably means that the negligence test prescribed for safety regulations should be applied to these clauses.

It is submitted, however, that the compulsory rules regarding safety regulations do not concern these clauses. They seem to be of a different type. As in the case of the driving licence clause in motor insurance, we are faced with the question whether we should admit this special type or only apply the clauses as far as they coincide with safety regulations. The fact that the Insurance Contract Act in one case prescribes a rule of this character, without suggesting that it is in any way remarkable, seems to be decisive. We should accordingly be free to apply these clauses in accordance with their words. This does not mean that we should be free to accept even a clause that exempted the insurer as soon as there was some deficiency in the insured property, even if this deficiency had not contributed to the damage. Such clauses would seem to lie outside the scope of what the Swedish Insurance Contract Act allows.

5. Finally we shall discuss some variations of a clause, occurring in so-called tractor insurance, which illustrates both the difference in contents and the resemblance in function between duties and exclusions of risk.¹⁴⁵

In certain standard conditions for tractor insurance used formerly, the insurance was said to cover damage to a tractor caused by wind and frost. There was also a provision according to which the cooling water of the engine should be let out after the day's work. This provision was obviously aimed at preventing damage by frost to the engine if the cooling water froze. Non-compliance with this safety regulation clearly was irrelevant, unless there was negligence. Later the clause describing the damage covered by the insurance was changed by the addition of the words "excepting damage by frost caused by cooling water not let out after the day's work". The safety regulation remained. It seems likely that the added words were intended to relieve the insurer of liability if the engine was damaged by freezing water but it was not quite clear whether any negligence could be ascribed to the person responsible because, for instance, he had believed that all the water had run out though in fact it had not. As the addition

¹⁴⁴ F. Schmidt, *op. cit.*, p. 191.

¹⁴⁵ Cf. Skadeförsäkringens villkorsnämnd, nr 40/1950.

has practically the same content as the safety regulation, it seems doubtful whether it should be applied differently from this. There is, however, still another version of the clause, according to which the insurance does not cover “damage by frost to a motor engine or to the cooling system belonging to such”.¹⁴⁶ In this case, there is no safety regulation touching on this kind of damage.

The exclusion of risk, as formulated in the version last mentioned, has no connection with the acts of any person but only applies to certain kinds of damage to certain kinds of goods, and it is clearly valid. Negligence can have no relevance under this clause. But it has undoubtedly the same general purpose as the safety regulation in the other versions, and the result of the exclusion is that the insured must be very careful when letting out the cooling water. If the engine does freeze in spite of all his care, the insurance gives him no protection. This last version is not more favourable to the insured than a safety regulation applied without regard to negligence. It might be said that it gives a clearer indication to the insured of the extent of his insurance protection than the second version mentioned here, but the greater clarity has been won by depriving the insured of part of the insurance protection.

¹⁴⁶ Standard policy of tractor insurance of 1952, § 2 (h).

Conclusion

The last example discussed in the previous section confirms the view that there is no clear difference in function between duties and exclusions of risk in insurance relations. A system which gives full liberty to the insurer to regulate exclusions of risk but imposes compulsory rules as regards duties might—but need not necessarily—have the general effect that exclusions of risk, more unfavourable to the insured than the duties would be, are incorporated in the insurance conditions. The example mentioned here touches on the connection between safety regulations and exclusions of risk. But the same thing might easily arrive as to increase of risk and exclusion of risk. If the rules regarding the relevancy of an increase of risk seemed unsuitable to the insurer in a certain case, he might prefer to exclude such risks altogether from the insurance. The protection given by the compulsory rules is therefore limited.

On the other hand, it can hardly be said that in practice we find any general tendency to change duties into exclusions of risk of doubtless validity, and the problem cannot therefore be considered to be of great practical importance for the protection of the insured. The practical problem rather concerns the borderline cases, whose treatment causes the difficulties which have been studied here. It must also be realized that introducing compulsory rules regarding the determination of the risk would not remove all real or apparent hardships to the insured. No application of compulsory rules, and no other control of insurance conditions, can prevent there being a line between damage that is covered by the insurance and damage that is not. Rules such as the *pro rata* rule in the French and Scandinavian insurance statutes serve to make the borderline less sharp. We can

also imagine a system of reduced indemnities for certain damages which would provide a smoother transition. But still the difference between damage fully covered and damage not covered at all will be the main and important line. It is hard to imagine such a line being drawn without leaving any cases where the exception from cover would seem hard and arbitrary.

It has appeared from the preceding pages that the difficulties here discussed are largely caused by the *pro rata* rule of the Scandinavian Insurance Contract Acts. This rule is unsuitable for non-compliance with typical safety regulations. There are also other objections to the *pro rata* rule. In cases where the insured is deprived of all indemnity, because the insurer would not have granted insurance or because he would have reinsured the whole loss, the rule may seem hard on the insured.¹⁴⁷ On the other hand, it may in some cases be considered unduly favourable to the insured, since he gets the full value of his premium although he has omitted to inform the insurer of the increase of risk.

A preferable solution would therefore seem to be a system which both would function better for some cases now treated as increase of risk and could also be applied to non-compliance with safety regulations. Such a system would lessen the necessity of distinguishing between increase of risk and breach of safety regulations. And since it seems desirable to have, for breach of safety regulations also, a rule that will not give the insured either all or nothing, as the present rule does, such a solution would in itself have great advantages.

It does not seem impossible to construct such rules. The *pro rata* rule is rather a consistent application of the idea that the conditions after a change (and in the case of misrepresentation or non-disclosure) shall be the same as would have been agreed if the contract from the beginning would have conformed to the actual circumstances. The Swedish Insurance Contract Act admits the reduction of the insurance indemnity only where it can be done by this rather mechanical method. In other cases, where the reduction cannot be computed in such a simple way, the Swedish Act (but not the Danish and Norwegian ones) is most reluctant to use reduction of the insurance indemnity as a sanction against the insured. A system which maintains the general

¹⁴⁷ Cf. F. Schmidt, *op. cit.*, pp. 154 ff., Løken, *op. cit.*, pp. 137 ff.

idea of the *pro rata* rule—that in cases where the change concerns a matter relevant for the size of the premium, the indemnity should be adjusted to the premium agreed on—but offers the possibility of giving a reduced indemnity in other cases also, would seem to fulfil the general requirements. Such a system would probably have to give wider scope to the discretion of the courts than the present system, and therefore might lead to more uncertainty and more litigation, but these disadvantages seem less important than those of the present system.

There also seems to be a need for express recognition of types of duties (or exclusions of risk approaching duties) other than those that are at present regulated in the Scandinavian Insurance Contract Acts. The present statute makes it uncertain whether we should regard the silence as an argument for admitting such duties or not.

Another conclusion to be drawn from this study is that the formal requirements of clauses in insurance contracts call for more attention. At present, there are comparatively few rules promoting the clarity of such clauses as might be either doubtful or oppressive. Where it is hard to protect the insured by material requirements of insurance contracts, strict formal requirements seem the best way to warn the insured of sanctions for the breach of duties and of the limits of the insurance cover.

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