Rechtsleer
Doctrine
Articles

Causation in Transport Insurance

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Abstracts

De oorzakelijkheidsproblematiek is welbekend in het aansprakelijkheidsrecht. In het verzekeringscontractenrecht daarentegen is hij in sommige rechtsstelsels, zoals als het Belgische, omzeggens onbekend. Nochtans vindt hij zijn oorsprong in het zeeverzekeringsrecht.

Conceptueel dient de oorzakelijkheid onderscheiden te worden van andere verbanden, zoals de omstandigheid.

Het vraagstuk beperkt zich tot de dekkingsafbakening in tegenstelling tot het dekkingsverval en tot de gevallen van ondeelbare schade, waarvan de posten niet aan een eigen oorzaak kunnen toegerekend worden.

De bijdrage onderzoekt of bij gebreke van een uitdrukkelijke wettelijke of conventionele causaliteitsregel, de equivalentieleer ook toepassing kan vinden in het transportverzekeringscontractenrecht en zoja met welke eventuele correcties voor onwezenlijke gevolgen van de ongenuanceerde sine qua non regel, zoals zijn "alles of niets" effect, de oorzakelijkheidsopheffende reserve-oorzaak, enz.

Daartoe worden de scenario's van complexe causaliteit, zoals samenwerkende en uiteenvolgende oorzaken, in combinatie met dekkingsuitsluiting en -insluiting onderzocht.

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La problématique de la causalité est bien connue en droit de la responsabilité. En droit des contrats d'assurance par contre elle est quasi inconnue en certains systèmes juridiques, comme le droit belge.

Pourtant ses racines sont dans le droit des assurances maritimes.

Conceptuellement la causalité est à distinguer d'autres corrélations, comme les rapports de circonstance.

Le problème est limité à la définition de la couverture contrairement à la décheance de la couverture et aux cas de dommage indivisible, dont les postes ne peuvent être imputés à leur propre cause.
Cette contribution examine si à défaut de norme de causalité explicite dans la loi ou dans le contrat, la théorie de l'équivalence s'applique également au droit des contrats d'assurance transport et dans l'affirmative avec quelles corrections éventuelles des suites irréelles de la règle sine qua non pure, comme son effet "tout-ou-rien", la cause de réserve supprimant la causalité, etc.
A cette fin sont examinés les scénarios de causalité complexe, comme les causes co-opérantes et consécutives en combinaison avec les exclusions et inclusions de couverture.

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Causation is a well-known aspect of the law of civil liability.
In insurance contract law however the subject of causation is almost a blind spot in some legal systems, like the Belgian. Yet its origin is to be found in marine insurance.
From a conceptual point of view causation must be distinguished from other types of correlation, like the circumstantial link.
The issue is limited to the definition of the cover as opposed to the forfeiture of the cover and to the indivisible loss, the components of which cannot be attributed to their own cause.
This paper examines whether for lack of an express statutory or contractual causation rule, the equivalence doctrine can be applied to transport insurance contract law and if so subject to which possible adjustments to correct the unreal results of the pure sine qua non rule, like its "all or nothing" effect, the causation lifting reserve cause, etc.
For that purpose the complex causation scenarios are examined, like co-operating and consecutive causes, combined with exclusion and inclusion of cover.

1. Introduction

1.1. Causation in other contexts

1. The issue of causation is particularly well-known in tort liability, where it relates to the link between the fault and the damage in order to render the perpetrator liable (to pay compensation)[1]. To some extent, it is also acknowledged in criminal liability[2].

[1] M. VAN QUICKENBORNE, *De Oorzakelijkheid in het recht van de burgerlijke aansprakelijkheid* (Brussels: Elsevier, 1972), 1; H. HART and T. HONORE, *Causation in the law* (Oxford: Clarendon, 2nd edition 1985), 84.
[2] C. VAN DEN WYNGAERT, *Strafrecht & strafprocesrecht in hoofdlijnen* (Antwerpen: Maklu, 2011), 297-303.

1.2. Causation in the insurance cover

2. The causation issue may however also arise in contract law with respect to the insurer's primary performance duty. It is indeed characteristic for the insurance contract that the insurer's duty to perform (to pay the compensation) depends on the causation of a covered type of damage by a covered type of peril.

An oversimplified example may illustrate this proposition.

If a covered type of damage (e.g. material loss) occurs and a covered type of peril (e.g. fire) materialises, but if another (non covered) peril than the fire caused the damage, the insurer will not be under a duty to perform.

1.3. Postulate: indivisible loss

3. The causation issue arises when the loss suffered is indivisible, i.e. when the loss cannot be split up into components that may be linked to differential factors.

When it is possible to distinguish component parts of the loss, that relate to specific perils, there is no selection problem and hence no causation issue. If multiple factors have caused, independently of each other, their own distinguishable loss items, there is no causal link between one factor and the loss item that can be attributed to another factor[3]. In that case apportionment of the loss is possible.

Whether the loss is divisible is a factual assessment. The inclination to qualify a loss as divisible may be inspired by the wish to circumvent the equivalence doctrine (*cf. infra* section 4.1.1.5.) in order to apportion the loss.

The resorting to attribution of flat-rate fractions or percentages of loss to the respective concurrent causes is rather an indication of indivisibility of the loss. Only the correlation between a nominal amount of loss in absolute figures and a certain type of materialised risk, points to divisibility of the loss.

1.4. Definition of the problem

4. In order for a loss to be covered, it has to correspond to the precise characteristics of the risk as defined in the law and/or in the contract in various

[3] T. Dorhout Mees, *Het nieuwe verzekeringsrecht* (1974), 103, nr. 7.159; *Het nieuwe verzekeringsrecht* (1980), 162, nr. 7.163; and *Het nieuwe verzekeringsrecht*, 81, nr. 199.

respects. Those parameters are referred to as the so-called "dimensions" of the cover (*cf. infra* section 2).

But in addition, those dimensions must be interlinked by the required correlation, c.q. causal nexus.

Save the instances where the causal nexus is characterised by statute or by contract (*cf. infra* section 4.1.2.1.), the causation rule in insurance contracts is a blank norm[4], that needs to be filled in.

Then the question also arises whether for lack of an express definition in the statute or in the contract, the same causation regime and/or the same adjustments and corrections to the basic "*conditio sine qua non*" test as in tort liability apply to the primary insurer performance duty.

Even qualified causation regimes raise interpretation questions.

Finally the concrete effect of the causation rule requires illustration (*cf.* the scenarios *infra* section 6).

1.5. Doctrines

5. In Common Law the causation in insurance contract law is a commonplace and the subject of a mature doctrine[5]. This legal order has even codified the causation rule in article 55 of the Marine Insurance Act (MIA) 1906, which illustrates the importance that this legal order attaches to the issue.

In other (Civil Law) legal systems, like the Belgian and French (save in marine insurance[6], but even there case-law is scarce[7]), it is often a blind spot or at best

[4] M. REINECKE, S. VAN DER MERWE, J. VAN NIEKERK and P. HAVENGA, *General Principles of Insurance Law* (Durban: Lexis Nexis, 2002), 200, nr. 277; P. SWISHER, "Causation Requirements in Torts and Insurance Law Practice: Demystifying some Legal Causation Riddles", 43 *Tort Trial & Ins. L.J.* 2007, 1; H. BOCKEN and I. BOONE, "Causaliteit in het Belgisch Recht", *TPR* 2002, 1673; L. SCHUERMANS, *Grondslagen van het Belgisch Verzekeringsrecht* (Antwerp: Intersentia, 2nd edition 2008), 660, nr. 892 refers to the equivalence theory without further explanation.

[5] M. SONG, *Causation in insurance contract law*, Contemparty Commercial Law series, London, Informa Law from Routledge, 2014, 188 p.

[6] C. DIERYCK, *Zeeverzekering en averijvordering* (Brussels: Larcier, 2005), 128, nr. 199; R. DE SMET, *Traité théorique et pratique des assurances maritimes*, (Paris: L.G.D.J., 1959), 249, nr. 230 et seq.; H. LIBERT, "Zeeverzekeringen" in I. DE WEERDT, (ed.), *Zeerecht, Grondbeginselen van het Belgisch Privaatrechtelijk Zeerecht* (Antwerp: ETL), I, 339-340, nr. 460; M. HUYBRECHTS, "Comparative marine insurance law: Highlighting the significant features of marine insurance in Belgium and other selected European legal systems" in D. THOMAS, (ed.) *Marine Insurance: the law in transition* (London: Informa, 2006), Chapter 8, 167.

[7] C. DIERYCK, *o.c.*, l.c. refers to one (French) case only.

only sporadically and fragmentarily addressed. In this respect Holland[8] and Germany[9] form the exception.

1.6. Origin

6. Interestingly in all legal orders, the doctrine of insurance causation was first developed in marine insurance and more specifically with respect to the war peril, where it addressed the effect on the cover of the war peril as a concurrent or consecutive cause or circumstance of the loss[10].

Only later on it was also applied on other perils and in non-marine (land) insurance.

1.7. Approach

7. The causation issue is not specific for transport insurance, as it is also relevant in other insurance classes. But apart from its origin in transport insurance[11] and the express codification of the causation rule in the British Marine Insurance Act[12], the causation question may be more prominent in transport insurance, because of the more dynamic nature of the risk in this insurance class as opposed to the more static nature of the risk in other insurance classes.

Therefore this paper will focus on the subject matter specifically in transport insurance.

For better understanding, the practical implications of the line of thought are illustrated with examples from a transport insurance perspective.

[8] J. OFFERHAUS, "Het oorzakelijk verband bij schadeverzekering", *RMT* (*Rechtsgeleerd Magazijn Themis)* 1944, 113; H. VOETELINK, *Samenwerkende oorzaken in de schadeverzekering* (Amsterdam: Diligentia, 1952); T. DORHOUT MEES, *Nederlands handels- en failissementsrecht*, III* *Het nieuwe verzekeringsrecht* (Arnhem: Gouda Quint, 1987), 79 v.; A. BLOM, *Causaliteit in het Verzekeringsrecht* (Deventer: Kluwer, 2006); T. DORHOUT MEES, "Causaliteit en verzekering" in *Verzekering en Dorhout Mees, Preadvies 1998*, Vereniging voor Verzekeringswetenschap (Zwolle: Tjeenk Willink, 1999), 39.

[9] H.-U. BÜHLER, *Die Auslegung privater Versicherungsverträge bei Vorliegen mehrerer Schadensursachen*, (Munich: Reuther, 1967); K. KURTZ-ECKHARDT, *Causa proxima und wesentliche Bedingung* (Hamburg: Difo, 1977); A. HERDT, Die mehrfache Kausalität im Versicherungsrecht (Karlsruhe: Verlag Versicherungswirtschaft, 1978).

[10] T. DORHOUT MEES, "Causaliteit en verzekering" in *Verzekering en Dorhout Mees, Preadvies 1998*, Vereniging voor Verzekeringswetenschap, Zwolle, Tjeenk Willink,1999, 30; A. BESSON, *Les assurances terrestres en droit français – Le contrat d'assurance* (Paris, L.G.D.J., 4th edition 1975), 328, nr. 195. G. RIPERT, *Droit Maritime* (Paris: Rousseau, 4th edition, 1953) III, nr. 2683.

[11] *Cf. supra* section 1.6.

[12] *Cf. supra* section 1.5.

The issue will be examined from a civil law and more precisely from a Belgian law perspective, but where relevant, reference will be made to the situation in other legal orders, including Common Law.

2. The dimensions of insurance cover

2.1. Perils, types of damage and other dimensions of the cover

8. In (transport) insurance the causation issue is usually addressed in terms of the correlation nexus between on the one hand the covered type of damage (material, immaterial, physical, consequential[13], etc.) and on the other hand the covered type of peril (fire, theft, storm, war, barratry, collision, etc.).

The famous "theory of the three dimensions"[14] was invented for transport insurance and includes the nature, the time and the place of the risk.

However the delimitation of the insurance cover is normally expressed also in other dimensions: besides the nature of the peril and the type of the loss, there are many more dimensions of the delimitation of the cover, where the causation issue is also relevant.

2.2. Other dimensions

9. Such other dimensions and combinations of dimensions are:

- **The time dimension (temporal):**

  In order for a loss to be insured, it must have occurred during the time frame of the cover period (see e.g. art. 195 Belgian Maritime Code). A causation issue arises when the indivisible loss was caused by the co-operative materialisation of two perils, one of which is situated within and the other outside of the window of the cover period or when a non-covered peril within the cover period generates a covered peril outside the cover period (e.g. storm leads to fire on board).

  There is also an issue when a factor arises during the cover period and continues after the cover period or starts before the cover period and continues during the cover period, in other words when it was effective partly during and partly outside of the cover period.

[13] E.g. a war risk insurance traditionally only covers physical loss, as expressed by the "frustration clause".

[14] F. SOHR and G. VAN DOOSSELAERE, *Les Assurances-Transport* (Brussels: Puvrez, 1932), nr. 528 et seq.

- **The location dimension (spatial):**

  The causation issue arises when co-operative factors of a loss are respectively situated within and outside the geographic scope of the cover or when a factor operated partly in and partly outside the cover area.

- **The identity of the stakeholder:**

  The causation issue may also arise with respect to the identity of the insured, the liable person, the beneficiary entitled to compensation, etc. In third party liability insurance the cover will in principle be excluded if the loss was not caused by the (fault of the) insured, his servants or by (the defect of) his property.
  In case the loss was however caused by the joint error of both a third person and the insured or his servants themselves, the causation issue arises.
  The third party liability insurer will not be held to perform in case of damage caused by the insured to his own property. In marine insurance in that case the insured may be considered as a third person via the contract fiction of the "sistership" clause. A clause of "cross-liability" may also guarantee the cover for losses caused by one insured to another insured.

- **The capacity of the insured:**

  The loss may only be covered if the insured acted in a specific capacity: as contractual carrier, as actual carrier, as vessel owner, as operator, as charterer, etc.
  E.g. the operator of a motor vessel or aircraft is not covered under his private life third party liability insurance[15].

- **The activity, use, situation, condition, etc.:**

  E.g. motor third party liability insurance only covers the characteristic traffic risk, i.e. the liability that flows from participation in road traffic (*cf. infra* section 3.1.).
  The movement of an excavator along the public road from one construction site to another qualifies as a traffic risk, whereas the operation of the excavator *on* the construction yard amounts to an entrepreneurial risk.

- **The object or the thing insured**

- **Etc.**

[15] Art. 6, 14° and 15° Royal Decree 12 January 1984 on the private life third party liability insurance.

2.3. The peril

The peril as an insurance cover dimension warrants some more comments.

2.3.1. Sometimes: irrelevance of the peril

10. The definition of the cover may be very broad, when the insurer's duty to perform is subject to very few conditions. When the insurance cover is not subject to a particular cause of loss, also the causation issue does not arise.

To a certain extent an "*all risks*" insurance cover illustrates such a case, since the peril that caused the loss is in principle irrelevant: the mere occurrence of the loss triggers the insurer's duty to perform. This example must be nuanced, as even an all risks insurance cover generally still contains some exclusions from the cover.

2.3.2. Terminological confusion

11. The risk is the (future) uncertain event as defined in all its dimensions: type of peril, type of damage, time, place, etc.

The loss is the materialisation of the defined risk in all its dimensions.

The term "risk" is often and especially in colloquial language misused to refer only to the concept of "peril" or to the object insured[16].

3. Correlation other than causal

12. The required correlation between the components of the cover, viz. the respective dimensions as defined in the delimitation of the cover (*cf. supra* section 2), may be expressed as a causal nexus.

Although this correlation is often of a causal nature, it however is not necessarily of a causal nature. It may also consist of a looser type of correlation[17].

Causation expresses a rather strict relationship between the damage and the peril or the other dimensions of the delimitation of the cover, based on the cause and effect correlation: "caused by" (expressed retrospectively) or "effecting" (expressed prospectively).

[16] P. VANDERGETEN, "Les assurances dégâts matériels (incendie, périls connexes et autres périls)" in X., *Les entreprises et leurs assurances* (Mechelen, Kluwer, 2006), 189.
[17] H. VOETELINK, *Samenwerkende oorzaken in de schadeverzekering*, 117.

Correlations other than causal correlations to define the insurance cover are more circumstantial. They are expressed in the following terms: "in the course of", "on the occasion of", "pursuant to", "in connection with", "concerning", "in the context of", "involved in" and even "made possible by" and "facilitated by", etc.

A circumstantial or involvement correlation between the loss and the fact, does not equate to a causal correlation between the loss and the circumstance or situation. A loss may be linked causally to a circumstance[18] (*cf. infra* section 6.3.).

The occasion refers more to the passive environment in which the event occurs, whereas the cause is a more self-acting factor.

Depending on whether it relates to an inclusion or an exclusion of cover (*cf. infra* section 4.3.), the broader circumstantial relationship will respectively extend or restrict, i.e. broaden or narrow the insurance cover.

The motive for a looser than a causal correlation may be inspired by the intention to alleviate the onus of proof in favour of one of the contract partners, when the positive proof of a causal nexus is (too) difficult to bring. The correlation of involvement, circumstance, context, etc. has the implied effect of a non-rebuttable presumption of causation.

In transport insurance there are ample examples of circumstantial correlation.

The Institute Cargo Clauses (ICC) for the MAR policy in some instances define the cover by expressing the correlation in terms of "reasonably attributable to"[19] in stead of "caused by".

The correlation may also be based on a mere temporal or spatial criterion: "during" or "in" or "in a radius or perimeter of" etc.[20] without any causative nature[21].

A few more illustrations of such other correlations than causation in transport insurance follow.

[18] H. VOETELINK, *Samenwerkende oorzaken in de schadeverzekering*, 17.
[19] H. BENNETT, *The Law of Marine Insurance* (Oxford:University Press, 2nd edition, 2006), 327.
[20] See e.g. Western Cape High Court Cape Town (WCC) 25 October 2010, *Witbooi vs Leandra Transport CC & Another*, case nr. 4280/2007, Juta's Insurance Law Bulletin 2010, 233.
[21] This correlation must not be confused with the causation by a factor in the temporal or spatial dimension (*cf. supra* section 2.2.).

3.1. In motor third party liability insurance

- **Drivers license and age**

  Driving a motor vehicle without holding the required drivers license or before having reached the required minimum age entails the loss of the third party motor liability insurance cover in case of a road traffic accident.
  The loss of cover however does not require a causal nexus between the accident and the lack of holding a drivers license or the too young age (art. 25,3°b model policy motor third party liability insurance, Royal Decree of 14 December 1992). The correlation is purely temporal as opposed to causal.

- **Characteristic road traffic risk:**

  Also in order for the motor third party liability insurance to cover the liable motor vehicle driver, the vehicle must have been used in road traffic[22,23].
  The participation in road traffic is not a causal requirement but only a circumstantial condition.
  The participation in the road traffic must not have caused the traffic accident: the traffic accident must only have occurred on the occasion of the participation of the motor vehicle in the road traffic.
  There must be a causal nexus between the wrongful use of the motor vehicle and the damage, but not between the damage and the participation in the road traffic.

- **Involvement in a motor car accident:**

  In motor third party liability insurance, the "involvement" in an accident of a motor vehicle triggers its motor third party liability insurer's no-fault compensation duty vis-à-vis the vulnerable (non-motorised) victim(s) (art. 29*bis* Belgian Compulsory Motor Third Party Liability Insurance Act of 21 November 1989). It is not required that the motor vehicle has caused the accident.
  Of course the claim for compensation of damages against the motor third party liability insurer will only be well founded if the loss was caused by the event (c.q. collision) in which the motor vehicle was involved[24].

22 *Cf. supra* the example of the excavator moving along the road as opposed to operating on the contruction yard.

23 See C. VAN SCHOUBROECK, G. JOCQUE, A. VANDERSPIKKEN and H. COUSY, "Overzicht van rechtspraak verzekering motorrijtuigen 1980-1997", *TPR* 1998, 102, et seq.

24 J. FAGNART, *La causalité*, 47 and his comment on Cass. 2 September 2005, *T.Verz.*, 2006, 338.

3.2. In marine insurance

- **Perils at sea:**

  Also the concept "peril of the sea" as a cause of loss refers to perils *at* sea and not necessarily *of* the sea.
  According to article 201 of the Belgian Maritime Code, as adopted by article 1 of the Antwerp Marine Insurance Policy 1859, the insurer bears the losses and damage from a series of named perils, followed by the *ejusdem generis* provision "... and in general by any other peril of the sea".
  This concept of "peril of the sea" was interpreted as meaning not only "caused *by* the sea" but also as "occurred *at* sea"[25]. This interpretation was explained as follows[26]:

  > *"Pour qu'il y ait fortune de mer, il n'est pas nécessaire que le sinistre soit directement causé par la mer ou par une cause maritime; il suffit que la mer soit le théâtre du sinistre pour que l'assureur soit responsable envers l'assuré".*

  Article 6.1. of the Antwerp Cargo Insurance Policy 2004 applied this interpretation by covering the loss from a series of named perils, followed by the clause: "*… and, in general, from all accidents and perils at sea*".
  The provision of article 201 Belgian Maritime Code adopts the wording of article 350 of the French Commercial Code, according to which the perils of the sea comprise not only the perils caused by the sea but also the events that occur at sea. Perils are perils *of* the sea because they take place on the occasion of the maritime voyage. In order to be covered, it suffices that the loss took place at sea, in other words that the sea was the theatre of the loss. When in order to be covered it is only required that the loss causing event and consequently the loss occur at sea or on the occasion of the maritime voyage, the causation requirement is watered down to a circumstantial correlation, that is much looser than the strict causal nexus with a specific threat that is qualified as a maritime peril. In a cover that is defined in a positive manner (*cf. infra* section 4.3.), such a loose correlation benefits the insured, because it extends the cover.

- **Deviation:**

  The former article 31 Insurance Act 1874 (present art. 255 Belgian Insurance Act 2014) exonerates the insurer of his duty to perform in case the risk is

[25] R. De Smet, *Traité théorique et pratique des assurances maritimes*, 249, nr. 230 et seq.
[26] C. Smeesters and G. Winkelmolen, *Droit maritime et droit fluvial*, III, nr. 906.

modified by the change of an essential circumstance at the hands of the insured. This rule was adopted in marine insurance, where the insurer is exonerated pursuant to the voluntary "change of journey, course or vessel" (deviation) by the insured (art. 205 and 218 Belgian Maritime Code). Unless it is qualified as a gross negligence that entails forfeiture of cover (*cf. infra* section 5.1.) as opposed to non-cover (exclusion), because it is beyond the delimitation of the cover, the exoneration of the insurer in case of deviation does not require any causal nexus between the loss and the altered circumstance. The insurer is not under a duty to perform, even if the loss would have happened equally without the deviation.

For the sake of comparison: in the British marine insurance law deviation lifts the insurance cover totally (art. 46 MIA).

- **War:**

  The ordinary insurance law distinguishes the normal perils from the war peril for the purpose of excluding from the cover by virtue of the law the losses caused by war[27].

  In land insurance only the loss caused by the war is in principle excluded from the cover.

  Consequently in land insurance the loss that occurred during the war, but that was not caused by the war, is not excluded from the cover.

  Marine insurance distinguishes between the act of war ("*fait de guerre*") and the state of war ("*état de guerre*")[28]. The two concepts do not coincide. During the war a loss may also be caused by an event different from war.

  Apart from the exclusion from the cover of the loss caused by an act of war (art. 19 former Insurance Act 1874, present art. 243 Insurance Act 2014), article 202 of the Belgian Maritime Code by virtue of the law terminates the marine insurance cover in war circumstances[29]. The termination of the cover exceeds the mere exclusion from the cover. From that moment on the insurance contract no longer provides any cover at all, not against perils of war and not against the normal perils of the sea either.

  In war circumstances the cover, both against ordinary perils of the sea and against war perils, is to be provided by a war insurance cover (art. 204 Belgian Maritime Code), if any.

[27] The war peril may be covered by an express stipulation (art. 19 former Insurance Act 1874, present art. 243 Insurance Act 2014 and former art. 9 Land Insurance Contract Act 1992, present art. 63 Insurance Act 2014).

[28] G. Ripert, *Droit Maritime* III, 662, nrs. 2683 and 2685; R. De Smet, *Droit maritime et droit fluvial belges* (Brussels: Larcier, 1971), 897, nr. 783.

[29] C. Dieryck, *Zeeverzekering en averijvordering*, 131, nr. 201.

In that case, the effect of co-operative causes (*cf. infra* section 4.2.2.), of which one consists of a war peril and the other of a covered peril, is not an issue any more, because the correlation is not of a causative but of a circumstantial nature. The insurer's exoneration does not require that the loss is caused by a war peril, but merely that the loss occurred in a war situation. The factor of exclusion as a means of defining the cover is purely circumstantial and not causative.

In this negative definition of the cover, the looser correlation benefits the insurer. The motive for this arrangement lies in the general increase of the risk[30] that distorts the contract equilibrium pursuant to the war situation, without the possibility for the insurer to bring the positive proof that the loss was effectively caused by the war.

In this respect the conceptual distinction between "act of war" and "state of war" is a relevant issue, that however cannot be elaborated on in this paper.

4. Causation

13. Besides the dimensions of the insurance cover (*cf. supra* section 2) also their mutual correlation, expressed in terms of a causal nexus, determines the insurer's duty to perform. The outcome of the causation test depends on three elements:

- the applicable causation rule;
- the modality of concurrence of the factors (the causation tree);
- the positive or negative formulation of the definition of the insurance cover.

4.1. The causation rule

14. A distinction is to be made between the factual causality rule ("cause-in-fact") and the legal causation rule ("legal cause").

For that purpose some digression on causation in general beforehand may prove useful.

4.1.1. Factual causation: "conditio sine qua non" test

15. The factual causality is established by applying the "*conditio sine qua non*" or "*causa sine qua non*" test, also referred to as the "*but-for*" test. This rule to

[30] Due to the war situation vessels may steam at higher speed, without navigation lights, via other unusual routes, etc.

establish factual (as opposed to legal: *cf. infra* section 4.1.2.) causation is generally accepted in most legal systems[31].

The causal relationship is characterised by necessity: it means that without the causal factor the damage would not have occurred or would not have occurred in the same manner. Conversely there is no causality if the damage would equally have happened and in the same manner without the considered factor. The lack of causation means that (an)other factor(s), different from the considered factor, were available that would have been sufficient to cause the same damage and thus rendering the considered factor irrelevant. The test consists of the check whether the same damage would have occurred by imagining the absence of the considered factor. If this is the case, it means that there is another parallel, reserve cause (*cf. infra* section 4.2.1.).

4.1.1.1. Incidence of the degree of abstraction or concreteness

16. As the causality is determined by the fact that the damage would not have been the same without the factor considered, the causation test consists of the comparison between the reality and the imaginary absence of the considered factor.

The causation depends on the degree of abstraction or concreteness of the loss and the cause.

Concreteness of the loss and abstraction of the cause extend the causal nexus. Vice-versa abstraction of the loss and concreteness of the cause restrict the causal nexus.

The more abstract (i.e. the more general or the vaguer) the loss is defined, the easier it is to conclude that another cause would have caused the same loss, which implies the absence of a causal nexus with the considered factor on the basis of the "*conditio sine qua non*" test.

The more concrete (i.e. in terms of the dimensions of time, place, nature, etc.) the loss is defined, the more difficult it is to conclude that exactly the same damage (identical in all its characteristics) would have occurred pursuant to another factor than the considered factor. The more concrete or precise the causing factor is defined, the easier it will be to identify a different cause that would

[31] H. Hart and T. Honore, *Causation in the law*, i.a. 90, 109 and 128; M. Van Quickenborne, *De Oorzakelijkheid*, 187.

have caused the same damage, which implies the absence of causal nexus with the considered factor according to the "*conditio sine qua non*" test.

4.1.1.2. Effective, not hypothetical reserve factor

17. In order to lift the causality with the considered factor, the other sufficient factor(s) must however be real and effective and not just hypothetical.

The reality cannot be rewritten. A mere hypothetical parallel (reserve) cause could not lift the causality with the considered factor[32].

4.1.1.3. Causal factor indispensible, reserve factor sufficient

18. In order for it to be causal, the considered factor must be indispensible to bring about the loss. It means that without that factor the damage would not have occurred (in the same manner) (*cf. supra*).

The causal factor must however not necessarily be sufficient to cause the effect. It may be insufficient by itself and require the co-operation of another factor. A factor does not lose its causal capacity because the loss requires the combination of that factor with another factor. The causal factor must not necessarily be the sole factor to cause the loss. The damage does not need to be a necessary consequence of the causal factor all by itself.

The reserve factor that lifts the causal nexus between the considered factor and the loss on the contrary must be a sufficient factor to cause the loss all by itself[33].

4.1.1.4. Transitivity

19. This "*conditio sine qua non*" system is characterised by transitivity: the cause of the cause is the cause of the consequence: "*causa causae est causa causati*".

In a chain of causes, even the original, first, most remote (*causa remota*) cause is causative for the damage. The causal nexus is not lifted because there are intermediate links[34].

[32] M. Van Quickenborne, *Oorzakelijk verband tussen onrechtmatige daad en schade*, (Mechelen: Kluwer, 2007), 47.
[33] M. Van Quickenborne, *Oorzakelijk verband tussen onrechtmatige daad en schade*, 150.
[34] H. Hart, and T. Honore, *Causation in the Law*, 354.

The causal link between the initial cause and the ultimate loss only requires that upon each intermediate transition the "but for" test is met, i.e. that the preceding factor was indispensible to trigger the ensuing subsequent factor.

4.1.1.5. Equivalence

20. As they are each held fully causative for the consequences, all concurrent indispensible causes are considered equivalent.

The equivalence of indispensible causes entails two consequences:
- there is no prevalence;
- there is no apportionment.

4.1.1.5.1. No gradation as to intensity

21. Contrary to some other (qualified) causation regimes (*cf. infra* section 4.1.2.1.), the pure causation rule based on the "but for" test, does not probe the intensity or the relative effect or impact of the cause(s): it does not look for the "original" or "primary" or 'first" ("causa remota") or "last" or "closest" or "proximate" ("causa proxima") or "immediate" or "main" or "effective" ("causa causans") etc. cause.

Other causation systems may thus select e.g. the dominant cause as the legally relevant factor (thereby disregarding all other causes with lesser effect, even if they are indispensable).

As the term "equivalence" indicates, all factors are considered equally causative, provided they are indispensible. Since all co-operative causes are equally causative, there is no gradation as to their intensity[35].

4.1.1.5.2. No Apportionment

22. On the basis of the postulate of equivalence of all indispensible causes, causation is a matter of all or nothing: there is a causal nexus with a factor or there is none[36].

Partial causation is inconceivable[37] and hence the apportionment of the causation is not possible. Every causal factor is considered to be a full blown cause.

[35] M. Van Quickenborne, *De Oorzakelijkheid*, 207, nr. 361; *Oorzakelijk verband tussen onrechtmatige daad en schade*, 15, nr. 17.
[36] M. Storme, *T.Verz* 1990, 444 = *Verkeersrecht* 1990, nr. 2.
[37] J. Fagnart, *La causalité,* (Waterloo: Kluwer, 2009), 15, nr. 29.

Contrary to some other causation systems, this doctrine of equivalence does not allow commensurate imputation of a loss to the respective co-operative causative factors.

4.1.1.6. No simultaneity required

23. The concurring causes must in principle not necessarily occur simultaneously in order to qualify as causal factors to the loss. They may be spread in the time order.

4.1.2. Legal causation

24. The legal causation regime may adjust and correct the factual causality rules for motives of fairness and public policy, in order to achieve effects that are societally more acceptable or ideologically more in line with the legal order, than the pure factual causation rule expressed by the "but for" test.

This adjustment or correction may flow from express statutory or contractual provisions (*cf. infra* on the characterised (qualified) causation rules) (*cf. infra* section 4.1.2.1.) or from a generally accepted regime by jurisprudence and doctrine (*cf. infra* section 5.2.: the equivalence, preponderance, proportional approaches).

4.1.2.1. Qualified causation regime

25. The enacted law and/or the insurance contract may qualify the required causal nexus.

The instances where this occurs, are however rather scarce.

The general causation system may apply a characterised nexus, such as the dominant or proximate cause.

Article 55 of the British Marine Insurance Act (MIA) 1906 specifies the causal nexus as the "proximate cause". In its ruling of 31 January 1918 in the Ikaria case[38] the House of Lords refined this correlation by substituting the "proximate cause in efficiency" for the "proximate cause in time".

[38] The Ikaria, House of Lords, 31 January 1918, Leyland Shipping Co Ltd. vs Norwich Union Fire Insurance Society Ltd., (1918) A.C. 350, p. 369.

The changes introduced by the Insurance 2015 to amend the Marine Insurance Act 1906, do not affect the issue of causation in the primary performance duty of the insurer. They are only relevant in the forfeiture of cover as a sanction for a breach of a contractual duty of disclosure or for a non compliance with a warranty[39].

When the legal precept is not mandatory, party autonomy allows the contract partners to freely stipulate the type of causal nexus of their preference. Contract terms in model policies or standard insurance conditions sometimes diverge from the legal causation rule.

E.g. the German DTV[40]-Kaskoclauseln (Clause 27) and the Norwegian Insurance Plan (NIP) (paragraph 2-13) stipulate the apportionment of a loss amongst co-operative causes.

26. Other traditional examples of express statutory or contractual qualification of the causation rule are as follows. Even their exact meaning may also require interpretation.

- **Directly-Indirectly caused by:**

  In transport insurance, the wording "directly caused by act of war" is traditionally stipulated[41].

  In its normal sense, the term "directly" means that there are no intermediate factors between the considered cause and the loss, i.e. without any other intervening factors.

  In another context it was ruled[42] that the term "direct" loss implies a link between the triggering event and the loss without any other intervening fact, such as the own fault of the victim, the act of a third person or force majeure. The latter interpretation of the term "direct" seems more sensible than its twisted meaning of mere indispensability in the context of contractual liability (art. 1151 Civil Code)[43], which still allows other intervening factors.

[39] How it used to be: "A breach of warranty is operative even though not causative of the loss": see R. MERKIN, *Colinvaux's Law of Insurance* (London: Sweet & Maxwell, 1990), 129, nr. 6-27. How it is now: art. 33 (3) MIA 1906, expressing the immateriality of the warranty to the risk, was abolished.

[40] Deutsche Transport-Versicherer (German Transport Insurers).

[41] J. OFFERHAUS, *RMT* 1944, 134.

[42] Cass. 5 October 2006, *RW* 2009-2010, 359.

[43] Cass. 9 May 1986, *Arr.Cass.* 1985-86, nr. 555, 1223 = *RW* 1986-87, 2699 = *TBH*, 1987, 413, note D. DEVOS = *JT* 1987, 162; P. VAN OMMESLAGHE, "Examen de Jurisprudence: les obligations", *RCJB* 1986, 219-220, discussing Cass. 24 June 1977, *Pas.* I, 1087. Cass. 14 October 1985, *Arr.Cass.* 1985-86, nr. 88, 179 = *RCJB* 1988, 341, note M. VAN QUICKENBORNE.

A contrario the term "indirectly" means that there are one or more intermediate factors between the considered cause and the loss. It is recalled that pursuant to the indispensability requirement (the "but for" test), the intervening other factors do not lift the causal nexus.

Also in aviation insurance the clause "caused directly or indirectly by" is encountered.

In the regime of the "*conditio sine qua non*" test, the stipulation in transport insurance that the loss must result from both "the direct or indirect effect of" ("*résultant des effets directs ou indirects de…*")[44] does not add anything to the definition of the causal nexus.

Article 11.2.6. of the Antwerp Cargo Insurance Policy 2004 translates "indirect" losses, damages and costs in the Dutch text by "consequential" losses, damage, and expenses in the English text[45].

It is questionable whether the terms of "indirect" damage and "consequential" damage are interchangeable, as in terms of causation consequential loss may result directly, i.e. without any intervening other factors, from the mishap.

In the context of insurance contract law (as opposed to tort liability) the question arises whether by this other factor is meant an expressly named factor (defined in the contract or the law) or any other factor (*cf. infra* section 4.1.2.2.).

- **Mediate-immediate cause of:**

To the extent that "mediate" is to be understood as a synonym for "indirect", it does not add anything to the causation issue in the equivalence system, where also an indirect cause is a relevant cause, provided it is indispensible (*cf. supra*).

According to some opinions the nuance between "directly" and "immediately" lies in the distinction between the causation and the time orders[46].

The wording of article 18 former Insurance Act 1874 (presently art. 242 Insurance Act 2014) uses the terms: "*immediately resulting from*" (in French: "*résultant immédiatement de*") for the purpose of excluding from the cover the inherent defect of the thing insured.

This term "immediately" was interpreted as "exclusively" in the sense that a loss caused by the combined effect of the inherent defect and another (cov-

44 P. BRUNAT, *Lamy Transport*, I, 4ième partie, Assurance-transport, nr. 664.
45 *Cf.* F. PONET, *De goederenverzekeringspolis van Antwerpen* (Mechelen: Kluwer, 2008), 94.
46 Brussels 14 February 2000, *RGAR* 2001, nr. 13423 and nr. 13464; Brussels 8 March 2000, *TBH* 2001, 192.

ered) peril, is to be borne by the insurer[47]. The drafting history of the law clarifies that the term "immediately" was used in the sense of "not merely indirectly", viz. that the inherent defect has caused the loss all by itself[48]. Consequently this provision of article 18 former Insurance Act 1874 does not allow to apportion the loss amongst the co-operating factors (inherent defect and other peril).

- **Exclusively-partly caused by:**

  The concept of "exclusive" in the sense of "sole/unique" cause as opposed to the "conjoint" cause in principle does not require much further clarification.
  The difference between the exclusive or sole cause on the one hand and the direct cause on the other hand is clear from a linguistic point of view.
  The term "exclusive" (factor) is the opposite of co-operative (factor) (impact of another indispensible factor). The term "exclusive" refers to the absence of the co-operation of another cause.
  The term "direct" is the opposite of consequential causes, (chain causation through metamorphosis into another type of cause under the influence of external factors) (*cf. infra* section 4.2.3.). It refers to the absence of chain causation with transformation of a cause into another appearance.
  This view is in line with the ruling of the Supreme Court that the concept of direct damage means that between the causing factor and the damage, there is no other intervening fact, but that this does not imply that the damage was caused by only one single fact[49].

- **Wholly or partly caused by:**

  The terminology "wholly or partly caused by" is to be understood as referring to a scenario of multiple causation, more precisely as a case of co-operative causes (*cf. infra* section 4.2.2.).
  Article 11 of the Antwerp Cargo Insurance Policy 2004 defines the exclusions from the cover in terms of "*directly or indirectly, wholly or partly caused by or arising from...*"

47 F. Monette, A. De Ville and R. Andre, *Traité des Assurances Terrestres*, 414, nr. 302.
48 Rapport des Commissions réunies de la Justice et des Finances, chargées d'examiner le Projet de Loi contenant les titres X et XI, Livre 1er du Code de Commerce, Senate, session of 6 March 1873, nr. 43, art. 18.
49 Cass. 18 January 2007, nr. C.06.0110.F/6.

- **Combinations of causal correlations.**

  As illustrated by the excerpts from policy wordings quoted above, sometimes those characterised causal correlations are combined.

4.1.2.2. Open or closed category of causes

27. Factors causing the loss may be expressly named in the enacted law or in the policy, either as covered or as excluded; they may also not be mentioned in the policy and are therefore in an implied manner not covered, nor excluded.

Whereas tort liability takes into account all possible wrongful acts, conducts, behaviours, attitudes, omissions, etc. and c.q. defects and vices that may have effected the loss, insurance law works with a closed category of a limited number of "named" (defined) causative factors, that are expressly referred to in the enacted law and/or in the contract. At least this is true in an equivalence causation regime (*cf. infra* section 6.4.) context and save the case of the parallel (reserve) cause, that all by itself was also sufficient to cause the loss.

A regime based on the characterised (e.g. dominant) nature of the cause, also takes into consideration causes of the loss, that are not expressly mentioned in the statutory insurance law and/or the contract.

4.2. Modality of concourse of causes: the causation tree

28. In the situation where only one single ("unique") factor caused the loss (singular causation) directly without intermediate links, this factor is both necessary but also sufficient.

This situation does not create any causation issues because it does not raise any selection question. This theoretical case is rather exceptional, not to say inexistent.

Usually causality is plural, complex, composite: multiple concurring causes trigger the loss.

29. Different modalities of multiple causality can be distinguished: they may be (i) parallel, (ii) consecutive, (iii) co-operative or (iv) combinations of the latter.

The relevance of the multiple causation is clear for some of those causes may be covered under the insurance contract and others may be excluded. The question then arises what will be the effect of concurrence of causes on the insurer's duty to perform.

The causation rule (*cf. supra* section 4.1.) will offer the selection criterion to determine which of the concurring causes are relevant and thus must be taken into account for the coverage test.

4.2.1. Parallel causes

30. Concurrent causes may be parallel: in that case each one of the concurring causes independently all by itself is sufficient to bring about the loss, so that the concurrent causes mutually render each other superfluous. As the "but for" test (*cf. supra* section 4.1.1.) requires indispensability of the factor, the parallel causes are reciprocally reserve causes.

In the absence of one cause, the same loss would have happened any way, due to the other (parallel) cause.

Consequently the considered parallel cause is not indispensible and for that reason not causative.

A special case of parallel causation arises when the loss requires the co-operation of any 2 out of 3 effective factors. The considered factor is insufficient because the bringing about of the loss requires the co-operation between at least 2 factors. The considered factor is also dispensable, because the co-operation between the 2 other of the 3 effective factors suffices to cause the loss. In that situation the same reasoning applies for each of the 3 factors separately. The dispensability of the considered factor entails its lack of causal nexus with the loss.

It is a special case of cumulative causation.

The straightforward application of the "but for test" to parallel causes may generate an unrealistic result and call for adjustment of the system (e.g. apportionment: *cf. infra* section 5.3.3.).

In the time order this parallel causation can be either simultaneous or sequential: the reserve cause may occur at the same moment as the cause considered or subsequently one after the other (the "superseding cause" or "intervening cause", the "*novus actus interveniens*")[50].

Parallel causation can either be cumulative (the causes have physically impacted on the loss) or potential (if one cause would not have existed, the other would

[50] R. MERKIN, *Colinvaux's Law of Insurance*, (London, Sweet & Maxwell, 1990), 91.

have impacted on the loss, but could not impact because the first cause already did so).

4.2.1.1. Cumulative causality

31. The parallel causes may materialise effectively. This situation is referred to with the term of "cumulative causality".

E.g. an (either or not simultaneous) fire and bombing without mutual relationship were each sufficient to cause the total destruction of the thing insured.

The relevance of the situation is clear when one of those perils is included in the cover and the other excluded from the insurance cover, or even when they are both covered in case the regime of the cover differs according to the causing peril.

4.2.1.2. Potential causality

32. The reserve cause may also be caught up by the considered cause: although it existed in the bud ("*in semine*") and would have equally caused the damage, it could not have any impact any more, because its effect in the time order was overtaken by the considered cause, that had already brought about the loss. This situation is referred to with the term of "potential causality"[51].

Examples in transport insurance are legion: e.g. in case of deviation (of voyage, route, vessel), when the loss of the vessel and/or the cargo would have occurred any way, regardless the deviation, at the respective geographic locations or moments in time; the same reasoning applies when the later confiscation would have caused the loss of a damaged or destroyed consignment of goods any way; another example is the case where the stolen goods would have been destroyed any way by fire later that day or the day after[52].

4.2.2. Co-operative causes

33. Co-operative causes are concurring causes, the effect of which was indispensible for the occurrence of the loss. Both (all) co-operating factors were necessary in order to bring about the loss. Separately the co-operative causes would

[51] M. Van Quickenborne, *Oorzakelijk verband tussen onrechtmatige daad en schade*, 150.
[52] *Cf.* T. Dorhout Mees, *Nederlands handels- en failissementsrecht*, III* *Het nieuwe verzekeringsrecht* (Arnhem: Gouda Quint, 7th edition 1980), 163.

not have had this effect. Without one of them, the loss would not have happened (in the same manner).

E.g. a storm in combination with the vessel's technical defect may cause the loss, it being understood that either one of the two factors all by itself would have been insufficient to cause the loss.

This term also covers the situation where causes reciprocally have a catalysing effect on each other or where they constitute the factor of marginal excess of threshold or critical values (of pollution, stress, concentration, temperature, weight, humidity, pressure, speed, etc.): the co-operative cause may be the proverbial "*straw that breaks the camel's back*".

Again the situation of co-operative causes is relevant when one (or some) of the collaborating factors are included in and others are excluded from the insurance cover.

4.2.3. Consequential causes (chain causation)

34. Chain causation is a linear (unbranched) causation.

Consecutive or consequential causes[53] are causes that undergo a metamorphosis: a cause of one type gives rise to or transforms into a cause of another type.

E.g. the Master's navigation error may cause the vessel to enter into a storm area, where the brutal movements cause fire on board, affecting the control of the vessel, due to which the ship becomes adrift, causing delay in its arrival, thereby damaging the perishable cargo carried.

Other examples are: an insured peril causes delay, that leads to loss (*cf.* art. 11.2.4. Antwerp Cargo Insurance Policy 2004); or a fire or traffic accident (e.g. a collision) cause delay or increase the temperature or humidity of the cargo, that leads to damage to or delay of the goods (art. 5.2. CMR Policy); or a navigation error causes the vessel to enter a storm area, due to which there is machinery break down, which leads to collision, causing in its turn fire on board and finally the loss; an act of war may cause fire, that destroys the thing insured; the vehicle's own defect causes a collision that causes a fire or an explosion, etc.

Again the relevance is clear when some of those causes in the chain of events are included in or excluded from the insurance cover.

[53] Probably the term "consequential causes" would express even more accurately the concept.

4.2.4. Network or web causation

35. Chain causation and co-operative causation may also be combined.

In this scenario the transformation of a factor of one type into a factor of another type does not occur in a linear manner, as it requires the lateral impact of another co-operative factor.

In that case causation is not a chain, but a "web" or "net", as there are also factors that impact laterally on the transformation of one type of cause into another type of cause.

That is why this situation is referred to with the term "web" or "network" causation[54].

4.3. The positive or negative definition of the cover

36. The delimitation of an insurance cover may be expressed in a positive or negative manner.

This distinctive approach is very well known from the contrast between e.g. "all risks" as opposed to "named perils" covers.

The former contains a negative list of excluded (i.e. non covered) perils. The latter only contains an exhaustive positive list of included (i.e. covered) perils.

Besides its effect on the distribution (c.q. reversal) of the burden of proof, the relevance of the positive or negative cover delimitation lies in the field of causation.

The positively or negatively formulated delimitation of the cover combined with a characterised causation link or other correlation (either relaxing or tightening the correlation) has a major impact on the extent of the insurance cover.

If there is a causal nexus between the loss and the excluded peril, the insurer will be exonerated, even if there is also a causal nexus between the loss and an included peril (*cf.* section 5.4.).

A relaxation or tightening of the correlation between the peril and the loss will benefit the insured or the insurer depending on whether the insurance cover respectively is defined in a positive or negative manner.

[54] See Lord SHAW OF DUNFERMINE in The Ikaria, House of Lords, 31 January 1918, *Leyland Shipping Co vs Norwich Union Fire Insurance Society Ltd*., (1918) A.C. 350, 369: "Causation is not a chain, but a net".

5. Tentative submissions

5.1. The primary and secondary insurance contract duties: the summa divisio

37. A fundamental distinction ("*summa divisio*") must be made between on the one hand the issue of inclusion or exclusion on the basis of the delimitation of the insurance cover and on the other hand the forfeiture of the cover pursuant to a breach of a contract duty committed by the insured/policy holder (e.g. a gross negligence).

The distinction between the exclusion from the insurance cover and the forfeiture of the insurance cover is however not always clear-cut: see the dispute on the qualification of the intentional loss either as an exclusion or a forfeiture of insurance cover[55]; deviation (see *supra* section 3.1.) and inherent defect (*cf. infra* section 6.7) may also give rise to forfeiture in stead of exclusion, if qualified as a case of gross negligence; finally an artificial qualification of a cause of loss as an exclusion in the insurance contract may be re-qualified as a case of forfeiture by the court, if it feels that this qualification corresponds better with its genuine nature[56].

The delimitation of the cover is of another order than the insured's liability for breach of contract pursuant to his shortcoming.

Pursuant to exclusion of cover no claim for cover can arise.

Forfeiture of cover implies that a virtually acquired cover is lost.

Consequently the delimitation test is in principle to precede the forfeiture test.

Due to the wrongful breach of his duties, the insured is in principle liable to compensate the prejudice caused to his contract partner, the insurer (art. 1142 Civil Code).

As the insurer's prejudice consists of paying out the insurance indemnity, the insured's characterised shortcoming that caused the loss, justifies the forfeiture of the cover.

[55] P. Henry and J. Tinant, "Déchéance ou exclusion: de charybde en scylla" in B. Dubuisson and P. Jadoul (eds.), La loi du 25 juin 1992 sur le contrat d'assurance terrestre, dix années d'application (Louvain-la-Neuve, Bruylant-Academia, 2003), 92; C. Van Schoubroeck, G. Jocque, A. De Graeve and M. De Graeve, "Overzicht van rechtspraak, Wet op de landverzekeringsovereenkomst (1992-2003)", *TPR* 2003, 1864 et seq.

[56] See e.g. Gent 15 February 2007, *NJW* 2007, 415, note G. Jocque.

The chronology of the implementation of this forfeiture may differ according to the case at hand: either the insurer refuses to pay out the insurance indemnity or he claims the reimbursement of a compensation already paid out before.

E.g. in the context of a third party liability insurance, the chronology is often inverted: the insured's claim for cover may be replaced by the third party liability insurer's recourse action against the insured (who had committed a characterised shortcoming), after compensation of the victim pursuant to a direct action combined with non-opposable defences.

It is stressed that the insured's breach of a contract duty, that causes the forfeiture of the cover, in principle is a characterised (a qualified) shortcoming, as insurance normally intends to cover also the harmful effect of the insured's own errors[57]. This is especially true in third party liability insurance, that covers the financial impact of the insured's mistakes.

The legal consequences of exclusion and forfeiture may be different, e.g. on the level of the onus of proof[58] and also with respect to the causation regime.

As mentioned, a breach of contract (e.g. a characterised fault, such as a gross negligence) by a contract partner (*in casu* the insured) gives rise to contractual liability as defined by the enacted law and/or by the contract in the form of the total or partial forfeiture of the cover.

In principle the causation regime for contractual liability is the same as for extra-contractual liability[59]. For that reason this aspect will not be studied in further detail here.

Whether the causation regime for the nexus between the peril and the damage in the insurer's primary performance duty, is the same as for tort liability, is a query that will be addressed below (section 5.2.).

[57] Except e.g. art. 206 Belgian Maritime Code, that also sanctions the insured's minor fault with forfeiture of the cover.

[58] M. FONTAINE, "Déchéances, exclusions, définition du risque et charge de la preuve en droit des assurances", *RCJB* 2003, 60; M. FONTAINE, Verzekeringsrecht (Brussels: Larcier, 2011), 284, nr. 352.

[59] On the basis of articles 1150 and 1151 Civil Code; Cass. 9 May 1986, *Arr.Cass.* 1985-86, nr. 555, 1223 = *RW* 1986-87, 2699 = *TBH*, 1987, 413, note D. DEVOS = *JT* 1987, 162; P. VAN OMMESLAGHE, "Examen de Jurisprudence: les obligations", *RCJB* 1986, 219-220, discussing Cass. 24 June 1977, *Pas.* I, 1087; H. BOCKEN and I. BOONE, *TPR* 2002, 1633; M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade*, 25.

5.2. Filling in the blank causation norm

38. The tort liability causation systems in the respective legal orders differ: e.g. in Belgium it is the equivalence system; in France the dominant or preponderant cause ("*Théorie de la cause déterminante*")[60]; in Germany the adequate cause system ("*Adäquanz*")(taking into account the degree of probability or forseeability of the loss)[61]; in Holland the reasonable attribution or imputation ("toerekening naar redelijkheid")[62], etc.

When the enacted insurance contract law and/or the contract do not expressly formulate the causation rule, the question however is whether the tort liability causation rule also applies in the insurance contract law context.

There are ample conflicting arguments for and against. It is a dilemma.

An argument in favour of the analogous[63] application is provided by the maxim "*Ubi lex non distinguit*, *nec nos distinguere debemus*".

Brewer[64] stated:

> *"… it is generally taken to be beyond dispute that proximate cause is proximate cause, wherever it may be found, and the court is content with a brief definition in the traditional [tort] manner. The rule in insurance cases appears to be that the definition of proximate cause, which should be applied, is the same or substantially the same as in negligence cases."*

Reinecke and Van der Merwe[65] observed:

> *"if no other intention appears from the contract, it must be assumed that the reference to causation was intended prima facie to bear the meaning which is attached to the concept in other areas of law"*

An argument against is provided by the specificity of legal branches: although tort law and insurance contract law share the objective of restoration of the loss for the prejudiced party, their context and inspiration are different.

60 J. Offerhaus, *RMT* 1944, 134 and G. Ripert, *Droit Maritime*, III, 660, nr. 2682.
61 T. Dorhout Mees, *Het nieuwe verzekeringsrecht* (1987), 77.
62 J. Wansink, N. Van Tiggele, and F. Salomons, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands Burgerlijk Recht*, 7. Bijzondere overeenkomsten. Deel IX, Verzekering (Deventer: Kluwer, 2012), 445.
63 E. Schlemmer, "Oorsaaklikheid in die verzekeringsreg", *TSAR* 1997 (3), 537-538; See the opinion of P. Swisher, 43 *Tort Trial & Ins. L.J.* 2007, (1) 18.
64 W. Brewer, "Concurrent Causation in Insurance Contracts", 59. *Mich. L. Rev.* 1961, 1167.
65 M. Reinbecke, S. Van der Merwe, J. Van Niekerk and P. Havenga, *General Principles of Insurance Law*, (Durban: Lexis Nexis, 2002), 200, nr. 277.

Insurance cover is the result of a contractual relationship, that – except for mandatory contract law – is to a large extent freely shaped by the contract partners. It is not based on the idea of sanctioning the insurer. The common intent of the insurance contract partners is the risk transfer in accordance with the agreed modalities. An insurance contract is an aleatory contract, where the insurer's performance reflects the consideration paid via the premium, the calculation of which is set on the basis of the actuarial insurance technique, taking into account the risk profile, the statistically expected probability of loss.

Tort liability on the contrary flows from an extra-contractual purely legal relationship, that in addition to compensation also pursues a goal of sanction, dissuasion or prevention vis-à-vis reprehensible behaviour, misconduct or wrongdoing.

Justice Felix Frankfurter considered[66]:

> *"Unlike obligations flowing from duties imposed upon people willy-nilly, an insurance policy is a voluntary undertaking by which obligations are voluntarily assumed. Therefore the subtleties and sophistries of tort liability for negligence are not to be applied in construing the covenants [of an insurance policy]. It is one thing for the law to impose liability by its own terms of responsibility [as in a tort law context] and quite another to construe the scope of engagements bought and paid for [as in an insurance law context]".*

Some Belgian case law seems incompatible with the equivalence system. It correctly observed that the loss is excluded from cover if one of the co-operative causes is (the excluded peril of) war. However the assertion that the war peril must be the *direct* cause of the loss in order to entail the non-coverage, is not compatible with the equivalence regime, as it does not contain any such qualification of the causal nexus. The assertion is only plausible if the insurance contract terms and conditions contained such a qualification or if the loss would have occurred equally pursuant to another cause, in the absence of the act of war[67].

In France transport insurance was held to be governed by the effective and initial cause rule "*la cause effective et première*"[68], a criterion that may result in a

[66] In *Standard Oil Co. of N.J. vs. United States*, 340 U.S. 54 (1950), 66.
[67] See: R. De Smet, *Traité théorique et pratique des assurances maritimes*, 324, nr. 313 and 330, nr. 306.
[68] P. Brunat, *Lamy Transport* (Paris: Lamy, 1995), I, 4ième partie, *Assurance-transport*, nr. 664, referring to Dijon 15 December 1982 in the case *GAN vs Docks de Bourgogne*.

contradictory conclusion as the initial cause is not necessarily the effective one and vice-versa.

In German law[69], the "*conditio sine qua non*" test applies in criminal law, but the *Adäquanztheorie* governs civil and insurance law and the British inspired doctrine, expressed by the maxim "*causa proxima, remota non spectatur*" is adopted in marine insurance.

Also in Holland after a contrary opinion[70] and despite differing views[71], the question whether the tort liability causation rule is applicable in insurance contract law was answered negatively by the Dutch Supreme Court[72].

For lack of an indication in the law or in the contract, in Holland generally both the adequate cause and the dominant cause theories are put forward, but also the theory of the reasonable imputation or attribution is defended in third party liability insurance and cover of motorcar passengers[73], and in addition the English "*causa proxima*" theory is argued in property insurance[74].

Even in Common Law the application of the famous marine insurance causation rule of "*causa proxima non remota spectatur*" as codified in article 55 of the British Marine Insurance Act 1906, is disputed in other insurance branches and in tort liability[75]. The importance of the intention of the insurance contract partners was stressed in this respect.

It is submitted that the application in principle of the equivalence causation system to (Belgian) insurance contract law with some corrections and adjustments for specific problems would offer a viable and balanced approach.

5.3. Application of the tort liability causation adjustments and corrections?

39. The blind and straightforward application of the "*conditio sine qua non*" test may in some cases give rise to unfair effects and may therefore require adjustments and corrections (exceptions, deviations, tempering, mitigation).

69 A. HERDT, *Die mehrfache Kausalität im Versicherungsrecht*, 81.
70 T. DORHOUT MEES, *Schadeverzekeringsrecht* (1967), 303.
71 For an overview, see P. VAN HUIZEN, J. WEZEMAN and J. ZEVENBERGEN, *Grondslagen Verzekeringsrecht*, 136, nr. 53.
72 Hoge Raad 8 July 1993, in the case *Hogenboom vs Unigarant*, *NJ* 1994, 210.
73 H. BROUWER, "Eigen gebrek en causaliteit in het verzekeringsrecht" in M. HENDRIKSE, P. VAN HUIZEN and J. RINKES (eds.), *Verzekeringsrecht praktisch belicht*, Reeks Recht en Praktijk (Deventer: Kluwer, 2nd edition 2008), 323 et seq.
74 T. DORHOUT MEES, *Preadvies 1998*, 45-46.
75 R. MERKIN, *Colinvaux's Law of Insurance* (1990), 88 and 90; A. MCGEE, *The Modern Law of Insurance* (London: Butterworths, 2001), 246.

If one were to accept that according to Belgian law the tort liability causation equivalence rule applies to (transport) insurance contract law, the next question is whether also the same corrections to this rule can be transposed into insurance contract law, or whether transport insurance cover requires its own specific adjustments.

The problem areas are i.a. the reserve causes, the alternative causes, the apportionment, etc.

5.3.1. Apportionment

40. One of the questions that arise is whether a distribution, a *pro rata*[76] imputation of the loss to the various concurring causes, is conceivable.

The answer is negative in the pure equivalence system, where causation is a matter of all or nothing: there is no partial causality (*cf. supra* section 4.1.1.5.2.).

For the sake of comparison, in a preponderance (dominant cause) regime, the answer is also negative, save the exceptional case of the totally equivalent effect of more than one cause on the loss.

In combination with the prevalence of an express exclusion from the cover (*cf. infra* section 5.4.), a dominant cause regime may give rise to extreme unfairness, as is illustrated by the following example. A loss is caused by the combined effect of 2 causes, viz. e.g. fire and storm with totally equal impact. The insured had concluded two separate insurance covers that are each other's mirror image in the sense that the fire insurance cover excludes storm and the storm insurance cover excludes fire. The practical consequence will be that the insured will be deprived of cover under both his contracts, as one of the co-operating causal factors is expressly excluded in either contract[77].

Also in Common law a certain tendency is inclined to apportionment in case more than one (a covered one and an excluded one) "proximate cause", equally contributed to the loss.

In the United Kingdom, the argument of "*reasonable expectation*" was advanced in favour of apportionment.

[76] Proportional or commensurate.
[77] R. MERKIN, *Colinvaux's Law of Insurance* (2010), 183.

However in the tort liability equivalence regime the apportionment is excluded only in the *obligatio* relationship between the wrongdoers and the victim. In the *contributio* relationship between co-tort-feasors or between the tort-feasor and the victim that committed contributory negligence, this rigorous regime is corrected[78] by allowing an apportionment. Whereas the factual causation rule leads to joint and several liability of the co-tort feasors in the *obligatio* relationship, the distribution rule is applied in the *contributio* relationship between and amongst the co-tort feasors and also in the relationship between the wrongdoer and the victim, that committed a contributory negligence.

The legal position of an insurer of one of the co-operative causes of the loss is however not comparable to the position in tort liability of a victim who committed contributory negligence and for that reason has to bear part of the loss himself or to the position of a co-tortfeasor, who has to bear part of the liability debt (*cf. supra* section 5.2.).

In other regimes, direct *pro rata* distribution of the loss amongst the insurers of the concurring causal factors is conceivable: e.g. the ruling of the Dutch Supreme Court in the Hogenboom vs Unigarant case[79].

Those examples may nevertheless provide an argument for a corrective adjustment towards apportionment of loss amongst the concurring factors also in (transport) insurance contract law under the equivalence causation regime.

5.3.2. Alternative causation

41. Also the alternative causation is a situation where correction could be justified.

Alternative causation refers to the case where the loss is without any doubt caused by one of a group, e.g. a vehicle from a fleet, but where it is not possible to ascertain which vehicle exactly.

The law addresses such a situation e.g. in the case of road traffic multiple collision (pile-up), where it is not possible to reconstruct the course of the accident and to determine liabilities. It imposes the duty to compensate the victim(s) on the motor third party liability insurers of all motor vehicles involved (art. 19*bis*-11 § 1, 7° and § 2 Belgian Motor Third Liability Insurance Act of 21 November 1989).

[78] See M. VAN QUICKENBORNE, *De Oorzakelijkheid,* 366 et seq.
[79] Hoge Raad 8 July 1993, *NJ* 1994, 210.

5.3.3. Parallel causation

42. As explained above, parallel causation means that several causes were all independently by themselves sufficient to cause the loss in exactly the same manner. According to the pure factual causation rule, the respective causes would mutually lift their causal nexus with the loss, as they are reciprocally not indispensible to cause the loss, since the other cause is sufficient to cause the same loss. The reserve cause renders the considered factor dispensable and for that reason on the basis of the "*conditio sine qua non*" test non causative (*cf. supra* section 4.2.1.).

As parallel causation belongs to the essence of the causation theory, a corrective adjustment (such as e.g. apportionment) is not self-evident (*cf. supra* section 4.1.1.5.2.).

However fairness dictates a solution for this problem.

Although not fully comparable, the deadlock situation created by contractual "subsidiarity" clauses ("to the extent not covered elsewhere") in the typical situation of multiple insurance, is addressed by mandatory enacted law and by case law.

The situation of double or multiple cover indeed is not totally similar to parallel causation, as it may either flow from the same peril being covered under both insurance contracts, or from parallel causes being covered under both contracts.

It illustrates however that enacted law and case law are sensitive to provide for a solution that lifts the extreme unfairness of deprivation of *all* insurance cover for the unreal reason of *double* insurance.

Mandatory enacted law[80] may forbid the application of the subsidiarity clauses and case law may rule that such clauses cancel each other out[81].

Besides the application of the chronology rule in marine insurance[82], the solution advanced in land insurance in such a case consists of proportional apportionment of the onus of the loss[83].

[80] See e.g. art. 99 Belgian Insurance Act 2014.
[81] M. FONTAINE, *Verzekeringsrecht*, Brussel, Larcier, 2017, p. 512, nr. 607.
[82] See art. 12 former Insurance Act 1874, present art. 236 Belgian Insurance Act 2014.
[83] See e.g. art. 99 Belgian Insurance Act 2014.

5.4. Prevalence of the exclusion over the inclusion of cover

43. According to the maxim "*specialia generalibus derogant*", a specific exclusion from the cover prevails over the general statutory or contractual definition of the cover.

Despite the precept of restrictive interpretation of exclusions[84], the express exclusion from the cover of a specifically defined cause of the loss, is considered to reflect the will of the lawmaker and/or the common intention of the contract partners to relieve the insurer of his performance duty, even if the excluded cause co-operated with (an)other covered cause(s) to bring about the loss[85].

It is submitted that in order to prevail, an express exclusion from the cover does not require a qualified causation rule (such as "directly caused by" or "exclusively caused by"). It will also be operative under a non qualified equivalence regime.

For lack of an express provision or clause to the contrary, there is no indication that the enacted law or the contract reserve the exclusion of the loss from coverage to the cases where such qualified regime of direct or exclusive causation was enacted in the law or stipulated in the contract.

Of course mandatory law could restrain the effect of this rule when it imposes the inclusion in the cover of certain perils and leaves the coverage of other perils to party autonomy.

In case of an indivisible loss, caused by the co-operation of a mandatorily covered peril and a peril excluded by contract, the insurer will be under a duty to perform, as contract stipulation cannot infringe the mandatory law.

6. Scenarios

6.1. Effect of the concurrence modality of the loss causing factors

6.1.1. Parallel (reserve causes)

Negative conflict

44. It is recalled that a reserve cause is another factor that is sufficient to create the same loss as the considered cause (*cf. supra* section 4.2.1.).

[84] M. Fontaine, *Verzekeringsrecht*, 371, nr. 483.
[85] See Court of Appeal in *Midland Mainline Ltd. vs. Eagle Star Insurance Co Ltd.*, *Lloyd's Rep.* 2004, 2, 604.

When the reserve cause is an expressly excluded named peril, arguably the reserve cause loses its excluding effect for lack of a causal connexion with the loss, as the considered covered cause is also sufficient to cause the loss.

But in its capacity of reserve cause and irrespective whether named in the policy or not, it lifts the causal nexus between the loss and the considered covered cause, which leads to non-coverage.

This effect raises the question whether a correction to the equivalence causation regime would be appropriate (*cf. supra* section 5.3.3.).

As opposed to an equivalence system, a causation system that selects a cause on the basis of its qualified and not merely indispensable nature (dominant, proximate, direct, last, first, etc) does not give rise to such an outcome.

Positive conflict

45. Two named perils that are both sufficient to cause the same damage, may be subject to different terms and conditions (e.g. with respect to the deductible, the cover cap, the type of loss covered, etc.) under the same insurance contract. The question then arises which regime will prevail to govern the compensation. The most beneficial policy construction in favour of the insured will flow either from an express insurance contract stipulation (the "equivalence clause") or else from the "*contra proferentem*" interpretation rule.

If the reserve cause is covered under another insurance contract with another insurer, the multiple insurance cover regime may apply (*cf. supra* section 5.3.3.).

6.1.2. Co-operative and consequential causes

46. It is recalled that co-operative causes are indispensible factors that need to impact together in order to cause the indivisible loss (*cf. supra* section 4.2.2.).

Consequential causes flow one from another, thereby transforming into another type of peril (*cf. supra* section 4.2.3.).

Those co-operative or consequential causes may either be named (defined) (as covered or as excluded) or not named in the enacted law or the contract (*cf. supra* section 4.1.2.2. on the closed categories of causes).

Co-operative causes

47. Several scenarios of co-operating causes are conceivable.

Two (or more) covered (and therefore named in the contract or in the enacted law) factors may have co-operated to cause the loss.

Two (or more) excluded (and therefore defined in the contract or in the enacted law) factors may have co-operated to cause the loss.

Two (or more) undefined (and therefore not covered) factors may have co-operated to cause the loss.

A covered (and therefore defined) factor may have co-operated with an undefined (and therefore not covered) factor may have co-operated to cause the loss.

A covered (and therefore defined) factor may have co-operated with an (expressly) excluded factor to cause the loss.

An undefined (and therefore not covered) factor may have co-operated with an (expressly) excluded factor to cause the loss.

Consequential causes

48. Also in the case of consequential causes, several scenarios are conceivable.

A covered factor may generate another covered factor.

A covered factor may generate another undefined (and therefore not covered) factor.

A covered factor may generate and excluded factor.

An undefined (and therefore not covered) factor may generate another covered factor.

An undefined (and therefore not covered) factor may generate another undefined (and therefore not covered) factor.

An undefined (and therefore not covered) factor may generate another excluded factor.

An excluded factor may generate another covered factor.

An excluded factor may generate another undefined (and therefore not covered) factor.

An excluded factor may generate another excluded factor.

In some instances the enacted law and/or the contract may regulate the effects of chain causation, as illustrated by the following examples.

In transport insurance the contract may stipulate that the damage caused under the influence of temperature or delay is excluded, unless the temperature or delay in turn were caused by another covered factor[86].

Also delay as a cause of loss is excluded from the cover of the cargo insurance, unless the delay is caused by an insured peril (*cf.* art. 11.2.3. Cargo Insurance Policy of Antwerp 2004).

Article 5.2. of the CMR insurance conditions[87] developed by the Belgian Association of Transport Insurers (ABAM-BVT) excludes from the cover: "*the liability for loss, damage or delay in the delivery of the goods, arising from the influence of heath, cold, temperature fluctuations or humidity of the air, unless they flow from a characterised road traffic accident of the vehicle in question or from fire befallen to its cargo*". For lack of such specification, the exclusion would apply if in the chain of causation a temperature factor intervened, regardless the cause of this temperature factor.

6.2. Effect of positive or negative cover definition

49. A argued above, exclusions from the cover prevail over included factors (*cf. supra* section 5.4.).

Loss causing factors may be expressly named in the policy, either as covered or as excluded; When they are not mentioned in the policy, they are in an implied manner not covered, but also not expressly excluded.

A factor causing the loss, that is outside (i.e. not included in) the cover in an implied manner, because it is not mentioned in the definition of the cover, does not entail non-coverage under the equivalence regime, save in the special case it amounts to a reserve cause (*cf. supra* sections 4.2.1. and 5.3.3.).

6.3. Effect of the causation rule

50. A relaxed, respectively tightened, causal nexus will have a restrictive or extensive effect on the insurance cover, according to whether the cover is defined in a positive or negative manner.

A looser correlation requirement between the loss and the negatively formulated (exclusion) cover restricts the insurance cover.

[86] P. Brunat, *Lamy Transport*, I, 4ième partie, Assurance-transport, nr. 664 and 679.
[87] Road cargo carrier contractual liability insurance cover.

Vice-versa a relaxed nexus requirement between the loss and the positively formulated (inclusion) cover, broadens the insurance cover.

In other words, a stricter nexus in a positively formulated cover will restrict the cover and a tighter nexus in a negatively formulated cover will extend the cover.

By way of example reference can be made to the exclusion from the cover of the loss *directly* caused by inherent defect (art. 18 former Insurance Act 1874, present art. 242 Insurance Act 2014): consequently an indivisible loss, caused by the co-operation of the excluded inherent defect with another covered cause, is covered (*cf. supra* section 4.1.2.1.).

E.g. the effect of a *non qualified* correlation between the loss and an *act of war* differs from the effect of a *causal link* between the loss and the *war situation* (*cf. supra* section 3.2.). In the latter case the loss would not have occurred without (i.e. for lack of) the war situation. In the former case the loss could also have happened without the acts of war.

6.4. The matrix of scenarios under the equivalence system

51. The following matrix shows the possible scenarios of combinations of concurrence of co-operative or consequential factors and their impact on the insurer's duty to perform, depending on their defined/undefined and covered/excluded character.

	Undefined	**Covered**	**Excluded**
Undefined	O	X	O
Covered	X	X	O
Excluded	O	O	O

Legend: X: cover; O: no cover

This matrix indicates that if a cause of loss (in one of its various dimensions, such as nature, place, time, etc.) is stipulated expressly as excluded by enacted law or by contract and if it concurs (co-operates with or succeeds) with (an)other covered cause(s), it will give rise to non-coverage in the equivalence system, because there is a causal nexus between the loss and the express ground of exclusion from cover.

If a cause of loss is not expressly included in the cover but also not expressly excluded from the cover (and hence not named) and if it co-operates with (an)other covered cause(s), the loss will be covered, because there is a causal

nexus between the loss and the named covered cause(s) of the loss (save maybe the special case where the unnamed cause amounted to a reserve cause because it was sufficient all by itself to also generate the same loss).

If e.g. a navigation error had led the vessel into a storm, that caused machinery breakdown, causing in turn a collision, creating fire on board and if the definition of the insurance cover does not acknowledge the factors of navigation error and machinery breakdown, the latter do not negatively affect the cover.

Apportionment?

52. As mentioned before, the all or nothing principle in the equivalence theory (causation is total and cannot be partial) opposes a *pro rata* apportionment of the onus of the compensation amongst the respective co-operating causes of the loss.

The assertion that in the case of concurrence of on the one hand a covered peril of the sea and on the other hand a characterised fault of the insured, the insurer is to compensate only the part of the loss that was caused by the peril of the sea, i.e. for lack of the insured's fault[88], is correct if the loss can be split up in divers items, that can be attributed respectively to the peril of the sea on the one hand and to the characterised fault on the other hand. In that case the causal link with the other cause is lacking. This opinion may create the wrong impression of a basis for apportionment. When the loss is indivisible, the equivalence theory exonerates the insurer because the indivisible loss would not have occurred in the same manner without the insured's shortcoming. The insured is to bear the prejudice of the entire loss via forfeiture of cover[89].

The attribution of the causation of the loss to the respective factors cannot provide the basis for an apportionment of the coverage of the loss when some co-operative factors are covered and others are not.

There may be case for correction/adjustment of the pure equivalence rule so as to accommodate an apportionment for co-operative causes of the loss[90] (*cf. supra* section 5.3.1.).

88 X., "De Zeeverzekeringswet: Belgische Wet van 1879" in J. ANDRE DUMONT, C. DEVOET and others (eds.), *Kluwer's Verzekeringshandboek* (Berchem: Kluwer, 2008), I-16.2-11; R. DE SMET, *Traité théorique et pratique des assurances maritimes*, 288, nr. 272.

89 This is also Ripert's opinion: see G. RIPERT, *Droit Maritime* III, 661, nr. 2683.

90 Cf. M. HUYBRECHTS, in D. Thomas (ed.), *Marine Insurance: the law in transition*, Chapter 8, 173; M. HUYBRECHTS, "A San Andreas fault between the Common Law and the Civil Law", in E. VAN HOOYDONK, (ed.), *English and Continental Maritime Law* (Antwerp: Maklu, 2003, 138).

6.5. In qualified causation systems

Dominant cause systems

53. In the Common Law *causa proxima* and other dominant cause ("causa causans") systems, when the causal tree of a loss comprises both a covered cause and a non-covered cause, the loss will be covered or not depending on whether the proximate cause is the covered cause or the non-covered cause.

If the proximate cause is not mentioned as covered in the policy, the loss will not be covered.

If the proximate cause is mentioned as covered in the policy, the loss will be covered.

It is the logical result of a causation system that takes into account the dominant cause, based on a gradation of causality as opposed to the precept of equivalence of causes in the equivalence theory.

This proximate cause rule is general and applies to all modalities of concurrence of causes in Common Law insurance law.

The special situation where all (2 or more) causes are absolutely equivalent because they all have exactly to the same extent contributed to the loss, is addressed hereinafter (see below on apportionment). In that case the loss will be covered if one of the causes is included in the cover and the other causes are not expressly excluded from the cover[91].

Apportionment?

54. Also in dominant cause regimes the apportionment between co-operative causes is considered problematic, because it implies a degree of equivalence of the causes, which is incompatible with the rationale of the system that selects the preponderant cause.

Another motive for the reluctance to apply an apportionment is the difficulty to assess the degree of proportional contribution of the respective causes to the loss.

[91] See M. CLARKE, *The Law of Insurance Contracts* (London: LLP, 1997), nr. 25-6A and MACGILLIVRAY & COLINVAUX, *On Insurance Law* (London, Sweet & Maxwell, 9th edition 1997), nr. 19-5; R. MERKING, *Colinvaux's Law of Insurance*, 89; S. HODGES, *Law of Marine Insurance*, 152.

Exceptionally the Common Law "*causa proxima*" doctrine admits the possibility that multiple co-operative (referred to as "concurrent") causes may be proximate and thus be causative of the loss.

This possibility is exceptional as multiple "proximate causes" of a loss is in principle a "*contradictio in terminis*", since by definition only one dominant cause is conceivable.

Multiple "proximate causes" are only conceivable when they are absolutely equivalent because they all (2 or more) have exactly to the same extent contributed to the loss[92].

Other causation systems

55. In other causation systems: e.g. in Holland there is a controversy with respect to the effect of co-operative causes[93]. According to one opinion only the dominant cause (the most effective or the main cause) can be taken into account and only exceptionally an apportionment and only in equal parts can be applied, viz. only in the case the respective causes contributed equally to the loss.

According to another view an apportionment must be applied commensurately with the exact contribution of the respective co-operative causes to the loss.

The Dutch Supreme Court ruled in favour of the apportionment (*cf. supra* section 5.3.1.).

6.6. The interaction between definition and forfeiture of cover

56. Although in the normal order the coverage test precedes the forfeiture test (*cf. supra* section 5.1.), in some instances a concurrence of on the one hand an exclusion of cover and on the other hand a ground for forfeiture of cover, is conceivable.

Parallel cause

57. In case of a covered cause, that is sufficient to effect the loss, concurring with a ground for forfeiture of cover, the same reasoning applies as for the delimita-

[92] S. HODGES, *Law of Marine Insurance*, 152; see the comments of P. VAN HUIZEN, *Het transportverzekeringsbedrijf* (Apeldoorn, Maklu, 1988), 158; contra: H. BROUWER in M. HENDRIKSE, P. VAN HUIZEN and J. RINKES (eds.), *Verzekeringsrecht praktisch belicht*, 327-328.

[93] See T. DORHOUT MEES, *Preadvies 1998*, 47; T. DORHOUT MEES, *Het nieuwe verzekeringsrecht* (1987), 83, nr. 202.

tion of the cover (inclusion-exclusion) (*cf. supra* section 6.1.1.). It will lift the causal nexus between the loss and the ground for forfeiture.

On the other hand if the breach of contract duty was sufficient to cause the loss, in its capacity of parallel reserve cause, it will lift the causal nexus between the loss and the covered cause, resulting in non-coverage.

Consequential cause

58. In case the original breach of an insurance contract duty that qualifies as a ground for forfeiture of the insurance cover, generates another covered event, the consequential cause will be irrelevant, as the original cause does not lose its causal character. E.g. in motor third party liability insurance drunken driving (ground for forfeiture) causes speeding (a covered traffic regulations violation).

Co-operative causes

59. As explained above, the relationship between the insurer and the insured is not comparable to that of between a tortfeasor and a victim (*cf. supra* section 5.2.). The insurer is not the tortfeasor and the insured is not the victim. On the contrary in the case of a breach of a contractual duty (gross negligence, intentional act, etc.), the insured is the wrongdoer and the insurer the prejudiced party.

Apportionment?

60. For the reason given above (*cf. supra* section 4.1.1.5.2.), under the rule of the equivalence regime apportionment on the basis of the contribution between co-tortfeasors or between the tortfeasor and the victim, who committed contributory negligence, is not possible.

When a loss was caused by the co-operation of the insured's qualified shortcoming and another covered cause, the forfeiture will be total, as under the equivalence regime there is no legal ground for apportionment.

Specific insurance contract law

61. Specific insurance contract law may govern the forfeiture effect of the insured's breach of contractual duty (e.g; art. 65 Belgian Insurance Act 2014).

6.7. Inherent vice

62. Arguably, where appropriate, inherent vice is to be qualified as a case of exclusion of cover and not of forfeiture of cover[94].

Under the rule of the equivalence regime a threefold distinction can be made with respect to inherent vice.

Firstly on the assumption that neither the enacted insurance contract law provisions nor the insurance contract clauses address the issue, the co-operation of the inherent vice with a covered peril would not exclude the loss from cover.

The predisposition of the thing damaged or destroyed is irrelevant for the insurance cover generated by another co-operative cause.

Only when the inherent vice amounts to a parallel (reserve) cause, it affects the causal nexus between the covered peril and the loss and hence it neutralizes the cover.

Secondly when the enacted law or the contract expressly define the inherent vice as a ground for exclusion from cover, the co-operation of a covered cause with the excluded inherent vice results in non-coverage of the loss.

Thirdly in the case of art. 18 former Insurance Act 1874 (present art. 242 Insurance Act 2014), that excludes the loss from the cover only if it was *exclusively* caused the inherent defect (*cf. supra* sectop, 4.1.2.1.), the co-operation of a covered cause with an inherent vice results in a covered loss.

If the inherent vice was in its turn caused by a covered cause, under the rule of article 18 Insurance Act 1874, the insurer shall be held to bear the entire loss[95].

The deterioration of the cargo (as a form of inherent vice "in genere"), due to the delay in the transportation, is not to be borne by the insurer since delay as such as a cause of loss normally is not covered in the delimitation of the cover (delay is not a peril of the sea).

The outcome would be different in case the delay in its turn was caused by a covered cause[96].

As explained before (*cf. supra* section 4.1.1.5.2.) apportionment is not possible in the equivalence system. Only when the loss is divisible (e.g. aggravation of the

[94] C. Smeesters and G. Winkelmolen, *Droit maritime et droit fluvial* (Brussels: Larcier, 2nd edition 1938), III, 129, nr. 1027.
[95] C. Buisseret, "Assurances maritimes", *RPDB*, Complément, III, 179, nr. 662.
[96] R. De Smet, *Traité théorique et pratique des assurances maritimes*, 306, nr. 289.

loss due to the inherent vice), the loss can be apportioned and the insurer shall be held to compensate only the part of the loss that is not due to the inherent vice.

The case law[97] that rules as follows is correct, if it relates to divisible loss[98].

> *"Si le vice propre est provoqué ou aggravé par un risque garanti par l'assurance, l'assureur est tenu pour le tout dans le premier cas, pour partie dans le second".*

7. Conclusion

The findings from this analysis allow to somewhat structure the subject matter.

The combination of the modality of concurrence of causes, the causation rule, the positive or negative cover definition, the characterisation of the causation or other circumstantial correlations determine to a large extent the causation in (transport) insurance.

In some legal systems, there is a need for a more (better) elaborated doctrine on causation in insurance contract law.

Some (more) attention for the issue by the legislator could help avoiding uncertainties.

In transport insurance, being to a large extent characterised by party autonomy, also the contract partners could anticipate the problem by (better) filling in the blank norm of causation in their contract.

The equivalence theory provides a workable option to fill in the blank causation norm in (Civil Law or at least Belgian) transport insurance contract law.

In that case, a few corrections to the pure regime are recommended.

Although it presents a few flaws, the equivalence system provides a transparent regime with predictable outcome and less grey areas than other causation systems[99]. It offers more legal certainty than other causation regimes. The price for nuance is indeed paid with loss of legal certainty.

[97] Brussels 30 November 1928, *RHA*, 1928, 481; C. SMEESTERS and G. WINKELMOLEN, *Droit maritime et droit fluvial*, III, 133, nr. 1029.
[98] R. DE SMET, *Droit Maritime et droit fluvial belges*, II, 887, nr. 772.
[99] M. VAN QUICKENBORNE, *Oorzakelijk verband tussen onrechtmatige daad en schade*, 27, nr. 35.