

Contractual Duty of Insurance

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1 Aim of the Duty of Insurance

The parties to a supply contract may incorporate into it provisions relating to insurance of the risks which follow from the agreement, whereby one party enjoins the other party to take out a specific insurance policy or specific cover. A contractual obligation of this kind to effect insurance is referred to in what follows as a *duty of insurance*.

The aim of contractual provisions relating to a duty of insurance is to achieve coverage of the risk. A party can in this way reduce by various means the consequences of a risk to which one or both parties are exposed. In the first instance it is usually the financial protection afforded by insurance that is sought: by imposing on the other party a duty of insurance, one party can achieve a kind of guarantee that the other party has the ability to fulfil certain basic obligations under the agreement.

A duty of insurance is also a means of securing cover for property which has been placed at the disposal of the opposite party under a rental agreement or a lease. By enjoining the other party to effect insurance, the party who owns the property in question can be assured of financial cover in the event of the property suffering damage during the period of the agreement.

Provisions relating to a duty of insurance may also be a means of sharing liability risks between the parties. These may be risks which one party has the best prospects of handling or of insuring against. In combination with an exclusion of liability or other contractual provision governing the apportionment of liability, prescribing a duty of insurance is an effective method of making one party liable for specific risks which otherwise, according to optional law or other contractual practice, may affect the stipulating party.

Finally, a contractual duty of insurance can be used to achieve exemption for one of the parties from liability towards the other party. Such an agreement may be reached without taking any account of the insurances that are available on the market, as mentioned in the previous paragraph. In this case the duty of insurance is mainly directed at urging the other party to guard against the

consequences of potential loss or damage.

Provisions relating to a duty of insurance seem to be few and far between in Swedish standard contracts that apply outside the building trade and the transport sector. This circumstance indicates that no particular importance is attached to the possibilities of insurance when drawing up and entering into a supply contract.

2 Various Definitions in Liability Rules and Insurance

If a working interaction between liability rules and insurance cover is the aim, clear and unambiguous reference conditions are required for the insurance referred to. The lack of standardised or common provisions in the insurance industry complicates such a task. At the beginning of the 1980s there were still insurance conditions common to the industry to which simple reference could be made.¹ However, the increased competition between insurance companies has given rise to such variations in the conditions for business insurance that references of this kind cannot be made to the same extent.

Some supply contracts have ambiguous or imprecise insurance rules. These rules may be understood by the party bound by them to mean that freedom of choice exists regarding insurances that are marketed by insurance companies under the same or a similar name. In this connection, for example, the choice may be between one insurance which gives limited cover at a low premium and another insurance which gives adequate cover at a high premium.

3 Examples of Provisions Relating to a Duty of Insurance in Standard Contracts

3.1 Standard Purchase Contract

General provisions for the purchase of goods for commercial construction activities – ABM 92

ABM 92 is a supply contract that has become widespread in the building trade. This agreement, which is the outcome of negotiations representing the interests of both sellers and buyers, is an interesting example of a standard contract containing a provision stipulating a duty of insurance.

Under ABM the seller has a strict liability for defects which entails comprehensive liability for damage due to a defect. This liability is the object of a limitation of liability which relates to the insurance cover of the seller. A corresponding ambition to attain an interaction between liability and insurance is not reflected in the seller's insurance obligation. The agreement states, in fact, that "the seller must have the customary liability insurance". This rule appears to

¹ The insurance conditions were drawn up collaboratively over many years within the industry. The 1978 business insurance conditions (K 700) are the last general conditions which became available in this way.

be incomplete in view of the fact that a customary liability insurance does not normally cover the extended liability of the supplier.

ABM also states that the seller shall supply the buyer with evidence that insurance has been effected. If the buyer fears that the seller has not taken out insurance with the agreed content, he is entitled to take out insurance cover equivalent to the cover that has been agreed. A buyer who tries to make use of this right will in all probability be informed by the insurer he contacts that as far as liability is concerned, it is not possible to effect "equivalent insurance". The reason for this is that liability insurance is always individually drawn up according to a risk assessment based on a number of particulars about the business to be insured, such as its net sales, number of employees, total salary amount and previous claims. The buyer normally does not have access to this basic information about the circumstances of the seller. What is worse, a buyer who acts on behalf of the seller does not have an insurable interest capable of forming the basis of an insurance contract which is intended to apply in place of the insurance that the buyer has neglected to take out. The obligation for damages which only the seller can insure against through his own liability insurance cannot in practice be assigned to the buyer and serve as a basis for the buyer's need for insurance cover. Consequently, the right of a buyer to effect an insurance of the scope stipulated is entirely illusory since it is based on false premises. Similar "rights" for the stipulating party in the event of a duty of insurance being ignored unfortunately are also found in other standard contracts in Sweden.

3.2 Provisions Relating to a Duty of Insurance in Standard Construction and Erection Contracts

3.2.1 General Provisions for Building, Installation and Contract Works – AB 92/ABT 94

The duty of insurance in general

The standard contract of the building trade for contract activities, AB 92/ABT 94, contains a rule which stipulates a duty of insurance. This rule is of central importance for the attitude of the building trade to how the parties to a supply contract arrange insurance cover. Not only does the rule amount to a model for drawing up other supply contracts in the building trade, it also expresses a basic view which underlines the importance of interaction between liability and insurance. The rule stipulates that the contractor should effect both an all-risks property insurance and a liability insurance. As far as the all-risks insurance is concerned, it is necessary for the purchaser/the developer to be co-insured. Should the contract works suffer damage, it follows that both parties to the supply contract will be covered by insurance cover which one party has taken out.

What the stipulated insurances should include can be seen in a description in a publication called AF AMA 98. This description, which has been drawn up by a working group in the insurance industry in cooperation with the Building

Contracts Committee (BKK), specifies the minimum cover of an all-risks insurance for contract works or a liability insurance if it is to conform to what is stipulated in the agreement. The description, known as the Minimum Scope, thus serves as a tool for setting out in detail the contractor's obligation under the agreement.²

Division of liability arising from a duty of insurance

One question about the significance of the duty of insurance to which some attention has been given in the insurance industry is how this duty relates to the liability of the contract in the event of damage to the contract works. If the damage is covered by the all-risks cover which the contractor has been enjoined to take out with the purchaser as co-insured, the question may be raised as to whether the insurance duty of the contractor is to be perceived as a rule governing the ultimate apportionment of liability between the parties.

In an important statement of principle from 1984³ made by the BKK, which drew up the provisions of AB 92/ABT 94, the committee dealt with the question of the relationship between the property insurance of the purchaser and the liability insurance of the contractor according to the then AB 72 chap 5 s 13.⁴ In the statement the BKK laid down the following principle:

The BKK is (however) of the view that the party who is contractually obliged to maintain insurance which, according to the conditions, covers the damage in full or in part is also the party on whose insurance a claim should ultimately be made. If no obligation is laid down in the contract to effect insurance, a claim shall ultimately be made on the insurance of the party who is liable.

The BKK's view was thus that a provision regarding a duty of insurance should underlie a final apportionment of liability between the parties to an agreement.

3.2.2 The General Contract Terms of the Forest Industries Association for the Supply and Installation of Equipment – SSG 96

The SSG form has been used for many years for contracts for the supply and installation of mechanical equipment which is used in paper production. It thus amounts to the purchasing conditions of the papermaking industry, most recently issued in 1996.⁵ The general conditions include contract appendix 6, in which

² For more details, see *Minimiofattningen i AB 92/ABT 94* in Ullman, *Entreprenörens försäkringsplikt enligt AB 92 och ABT 94*, tidskriften AMA Nytt 1/98 p 6, where it is stated that the effect of the minimum scope provisions of these two standard contracts, as far as the insurance companies are concerned, is that they have undertaken to bring the contractors' insurance in line with the level of cover contained in the descriptions. Limitations in cover which mean that this level is not achieved will thus not occur. This undertaking also means that the companies should not cite a limitation in cover in relation to the insured which entails worse cover than that which is described in the minimum scope.

³ Statement dated 17 August 1984.

⁴ An equivalent provision is found in AB 92 in chap 5 s 14.

⁵ Here version 97–03 is commented on.

the parties specify the insurance cover to be taken out and maintained by them. What is involved here, then, is a *mutual duty of insurance* of an unusual type. According to the appendix, it is the duty of the *supplier* to effect and maintain property insurance, liability insurance⁶ and industrial injuries insurance (TFA).⁷ The property insurance should be an all-risks insurance for damage to the agreed plant and also to materials and accessories supplied by the purchaser. The insurance should also cover existing property adjoining the work area within the scope of a sum insured stated in the appendix.⁸ The insurance shall be in force during the installation period and cease to apply when installation is complete and the purchaser has taken over the plant. Insurance cover for loss which occurs during the “guarantee period” after takeover is thus not required, even though such cover is currently available from some insurers.

With regard to the *purchaser*, he is obliged according to the appendix to the contract to take out fire insurance for property which is not part of the building. In addition, he shall have liability insurance which covers bodily injury and material damage up to a specific amount, together with industrial injuries insurance (TFA) for his own personnel.

The parties are both obliged to hand over an insurance certificate which confirms that the agreed insurances have been effected.

The SSG’s insurance appendix is a well-designed contract form relating to a duty of insurance and stands out as a good example for the industry of how the parties to a supply contract can together arrange insurance cover in connection with an installation project.

3.2.3 ABA 99

In the engineering sector, too, there is a standard contract relating to questions of insurance. Paragraph 19.2 states as follows: “The obligations of the parties regarding insurance are governed by the contract appendix Insurance.”

In the form drawn up by the trade association and representatives of insurance companies, the parties can choose insurance cover which offers different levels of protection. A minimum scope provision similar to that which exists in the building trade (see 3.2.1 above) forms the starting point. The purchaser’s obligation to insure his risks is also determined. The duty of insurance thus applies to both sides.

⁶ The liability insurance should include general liability, product liability, goods in trust and environmental liability up to a sum insured stated in the appendix which is common to both bodily injury and property damage. The deductible shall be specified. The liability insurance shall be in force at least during the entire guarantee period.

⁷ The duty of insurance probably relates to personnel who do not have the ordinary cover of TFA and are thus not otherwise covered by the insurance. This refers mainly to foreign labour.

⁸ The deductible of the all-risks insurance shall also be specified in the contract appendix.

3.2.4 Standard Contract for the Supply of Major Components to the Norwegian Continental Shelf – NF 92

Provisions governing a duty of insurance can be found in agreements relating to the supply of offshore installations. In existing supply contracts belonging to this category there are comprehensive regulations concerning the insurance cover which a party must take out. There are no Swedish standard contracts for offshore deliveries. Due to the comprehensive duty of insurance involved, I would like to refer to this special type of supply contract.

According to art. 31.1 of NF 92, it is the duty of the *purchaser* to take out all-risks insurance for the contract work (*byggerisikoforsikring*), transport insurance and liability insurance.⁹ The insurance shall specify the supplier (the supplier group) as a named insured.

With regard to the *supplier*, it is his duty under art. 31.2 to take out hull insurance for his vessels and other “floating objects”, P & I insurance (Protection and Indemnity) and liability insurance.

The agreed insurance shall be in force from the commencement of the works until a certificate of handover has been issued. The insurances are thus not intended to apply during the supplier’s guarantee period.

If a party does not fulfil his duty of insurance according to art. 31, the other party is entitled to arrange the agreed insurance at the expense of the negligent party.¹⁰

A party who intends to make use of the opposite party’s insurance is also obliged at his expense to assist with investigations and other material to enable the claim to be settled.

NF 92 contains some interesting features where the duty of insurance is concerned. The parties are, as is made clear, named persons in each other’s insurances and in this way have an independent relationship each other’s insurer. Thus, for example, according to the agreement, the supplier shall ensure that the purchaser can approach the supplier’s insurer directly, claiming compensation relating to the stipulated cover. The significance of the duty of insurance and of an agreement which includes named persons has been analysed by *Hans Jacob Bull* in his thesis *Tredjemannsdekninger i Forsikringsforhold* (Third-Party Cover in Insurance Conditions).¹¹

In this context it should be remembered that a claim for compensation from insurance under NF 92 is not based on liability towards the other party. The insurance rules in the agreement are based on extensive exclusions of liability according to the knock-for-knock principle. It should further be noted that it is the purchaser, and not the supplier, who effects all-risks insurance. Here the reverse order applies in relation to existing insurance rules in by far the majority of construction and supply contracts. Finally, it is of interest that the parties to the agreement mutually undertake to ensure that their insurers cannot exercise

⁹ Knut Kaasen, *Kommentar till NF 92*, Oslo 1994, p 720.

¹⁰ Cf. what was said above about the possibility of effecting liability insurance in place of a party to an agreement.

¹¹ See Bull, Oslo 1988, p 415.

subrogation against the opposite party. The division of liability achieved by means of the agreement will thus affect the insurance agreement and cannot be jeopardised by either party's insurer.

4 Provisions Relating to a Duty of Insurance in Delivery Clauses – Cargo Insurance

In the delivery clauses in a purchase agreement in which it is laid down when and where the risk for the goods passes from the seller to the buyer or which of the parties shall be liable for the costs in connection with the delivery from the seller to the buyer, it also happens that the seller undertakes responsibility for taking out cargo insurance.

The risk of the goods being damaged or lost in transit gives the buyer a financial reason to effect transport insurance. Practical reasons can also here cause an agreement to be reached for the seller to effect insurance. According to the delivery clauses CIF (Cost, Insurance, Freight) and CIP (Freight Carriage and Insurance Paid to), the seller shall effect insurance in favour of the buyer or other party who has an insurable interest in the goods. The seller is in this connection responsible for the premium. The duty of insurance means that minimum cover according to Institute of Cargo Clause C shall be effected.¹² A buyer who prefers transport insurance of the current all-risks type may reach agreement with the seller that the latter should instead effect such cover (i.e. Institute Cargo Clause A or so-called normal insurance under Swedish transport insurance conditions AV 85/92).

The buyer sometimes requests the seller to supplement the insurance cover with extra cover for damage due to war, strike, uprising or civil unrest.¹³ The seller need not be responsible for the cost of the additions to the minimum scope just mentioned that the buyer agrees on, unless otherwise agreed.¹⁴

The advantages to be gained from the seller effecting insurance on behalf of the buyer may be many. Insurance indemnity which is collected by the seller may be used by him directly to cover the cost of the restoration or new production of goods which have been damaged or lost. In this case it is assumed that the buyer approaches the seller in connection with a claim. Even where the buyer does not receive the goods at their destination, the seller may benefit from being the insured¹⁵. The latter can then, with the help of the insurance cover, take suitable measures with the goods. Finally, an advantage may exist in avoiding local national obstacles or complications at legal level. One known problem of this kind is legislation in the buyer's country regarding mandatory national insurance.

¹² See above regarding transport insurance in section 4.4. A full description of the cover provided in the Institute Cargo Clauses can be found in Robert Brown & John Novitt, *Marine Insurance, Cargo Practice* Vol. 2, London 1985, p 97.

¹³ Jan Ramberg, *Köpavtal*, Stockholm 1993, p 90.

¹⁴ Jan Ramberg, *International Commercial Transactions*, Stockholm 1998, p 111.

¹⁵ Kurt Schalling, *Transportförsäkring*, Stockholm 1982, p 18.

5 Formulation of the Rule

5.1 *Stipulated Scope*

As is clear from the above, provisions are found in some standard contracts which oblige a party to an agreement to effect a specific insurance. Provisions of this kind are used to a large extent in the construction industry. On the other hand, they are unusual in the basic industries outside this sector. These circumstances point to shortcomings in the interaction between the division of liability in the standard contracts and the cover provided by business insurance.

The insurance conditions for business insurance in Sweden may contain differences which in many cases are substantial. For this reason there are good reasons for the party who stipulates a duty of insurance in an agreement to be specific, at any rate if the duty relates to a type of insurance where differences exist. A duty to take out fire insurance or other property insurance which covers the *usual perils* of the generally occurring business insurance should be able to be used without further ado. A similar situation applies to *machinery breakdown insurance*, apart from the exclusions for the supplier's guarantee and for erection works. More dubious is *industrial all-risks insurance*, even though the differences there are still comparatively small. This form of insurance is under development and "offers" limitations which increase the insurer's opportunities to compete with a low premium. The circumstances just described in Sweden may change in the near future. A greater element of foreign all-risks insurance may result in a completely different picture and make rules about insurance even more problematical.

Considerably uniformity also exists with regard to *business interruption insurance*. A rule regarding such insurance can be framed in a simple manner. The opposite is the case where *liability insurance* is concerned, where there are significant differences. An obligation for a contractor or supplier to effect "customary liability insurance" thus scarcely amounts to much. For this reason the principal/purchaser should be specific about the cover desired. This can be done in several ways, whether liability insurance or other business insurance is stipulated:

1. The principal/purchaser incorporates in the rule a descriptive text devoted to specifying the scope (e.g. by ruling out certain exclusions in the stipulated insurance).
2. The principal/purchaser makes use of an appendix to the contract in which adequate insurance terms and condition names are used.
3. The principal/purchaser indicates the text of specific conditions.
4. The principal/purchaser refers to an established Minimum Scope, i.e. to a norm drawn up by the insurance industry and a trade organisation.

5.2 *Stipulated Term of Insurance*

A rule relating to a duty of insurance should contain details of how long this insurance should apply, otherwise there is a risk that the insurance cover will not

be kept up for as long as the stipulating party intended. In particular, the varying principles underlying insurance periods of an insurance agreement should be observed.

Different principles relating to the term of insurance are a reason for the party prescribing the duty of insurance to clearly specify the period during which the stipulated cover should apply. That this cover is, in fact, maintained for the stipulated period can be verified with the aid of an insurance certificate, the production of which by the party with the duty of insurance can be requested annually. In this connection special attention should be paid to whether this party has changed insurer. A change of this kind, particularly if prompted by the offer of a lower premium by the new company may often, in fact, mean inferior insurance cover.¹⁶

5.3 *Insurance Certificate*

Rules concerning a duty of insurance generally contain a requirement for the production of an *insurance certificate*, confirming that the duty has been performed. The certificate referred to is a document of a fairly simple kind which is issued by the insurer on request and which amounts to a declaration that insurance cover of a particular kind has been effected.

6. More Details of what the Duty of Insurance Entails

6.1 *Final Division of Liability*

6.1.1 Swedish Case Law

In the standard contracts that have been studied there are no explanations of what is meant by a party's duty of insurance. This circumstance entails lack of clarity in the division of liability between the parties. If the duty of insurance is only seen as a wish on the part of the stipulating party to create a practical solution in the event of loss, it may be argued that the duty of insurance has no bearing on the ultimate apportionment of liability between the parties.

In general, both parties to a supply or construction contract have opportunities to effect property insurance and business interruption insurance in order to obtain cover for the risk that the contract may entail. In some property insurances the opposite party can be co-insured, whereas in the case of liability insurance, no such reciprocity exists. It is true that parties sometimes reach agreement about which of them should effect liability insurance; however, in the normal nature of things the supplier/contractor effects such insurance. The significance of a duty of insurance which relates to liability insurance will therefore not be touched on in the following discussion about the apportionment of liabilities between the parties.

¹⁶ A clear example of this is the considerably much worse protection in one of the policies of the major Swedish insurance companies for access and restoration costs.

In the judgment FFR 1943 p 277, a discussion took place of the meaning of the duty of the owner to effect insurance according to a lease relating to a cafeteria. The owner's insurer exercised subrogation against the tenant due to water damage. The tenant denied liability, maintaining that the owner's obligation under the lease to effect and pay for the necessary water-damage insurance absolved him from liability for negligence. However, the appeal court found that it had not been shown that the provision in question entailed any curtailment of the tenant's liability.

In another decision, NJA 1949 p 732, the owner of a building that had been destroyed by fire made a claim against the state, which had hired premises in the building. The claim was founded on the fire having been caused by negligence on the part of the state in connection with the installation of electric lighting on the premises. The state denied liability, maintaining, inter alia, that the owner's obligation under the lease to maintain fire insurance for the full value of the building removed his right to claim damages for loss which should by rights have been covered by his insurance. The Supreme Court considered that the provision regarding the duty of insurance "must be considered to mean that liability for damages relating to fire damage should rest with the state only to the extent that subrogation by the insurer founded in the Insurance Contracts Act could be exercised against the state." In the light of the fact that the negligence that could be ascribed to the state could not be regarded as gross, the state was not liable for damages. The Court almost certainly considered that the limitations in section 25 of the Insurance Contracts Act applied.¹⁷

From the 1949 judgment one can draw the conclusion that the extent of liability for damages by the party prescribing insurance does not change by reason of the fact that the obligated party neglects in full or in part to effect this insurance. The stipulating party should at any rate be able take for granted the liability that could be placed on him in the hypothetical event of subrogation being instead exercised by the insurer of the party with the duty of insurance. To the extent that this insurer's right of subrogation is limited in this hypothetical case by section 25 of the Insurance Contracts Act, the stipulating party is entitled to invoke this limitation if he is the object of a claim for damages by the party who has neglected his contractual duty of insurance.¹⁸

6.1.2 Finnish Case Law

While cases involving a duty of insurance are also uncommon outside the borders of Sweden, this subject has been discussed in Finnish case law. Agreements which stipulate a duty of insurance are ascribed crucial importance. Even the circumstance that a party – without a duty of insurance having been agreed – has expressly attached importance to the details provided by the opposite party about his insurance cover may mean that the party who has

¹⁷ According to these limitations, subrogation is only allowed in the event of loss which has been caused by gross negligence or by intent.

¹⁸ Cf. Jan Hellner, *Försäkringsgivares regressrätt*, Uppsala 1953, pp 163.

provided these details becomes liable for the loss.¹⁹

In the Supreme Court case HD 1994:5 a person who ordered roof-covering work to be carried out suffered severe fire damage due to the use by the contractor of a careless method of laying tiles which presented a fire hazard. The contractor's agreement contained a provision to the effect that the purchaser was obliged to take out fire insurance for the building on which the work was being done; however, the purchaser neglected to do this. The Court made the insurance rule a basis for the apportionment of liability between the parties and so rejected the principal's claim for damages.

The view taken by the Supreme Court is similar to that which found expression in the statement of the Building Contracts Committee of 1984, mentioned in 3.2.1 above.

6.2 *Agreements Between the Insurance Companies*

It is in accordance with the fairly limited case law described above for Sweden that the courts have assessed the liability for damages on the part of the negligent party who has invoked in his defence the duty of insurance of the opposite party. In assessing the party's right of recovery, the decisions of the courts were undoubtedly based on the assumption that the extent of the insurer's subrogation right follows from the law, i.e. the optional rules contained in section 25 of the Insurance Contracts Act and in the insurance agreement in question. It should be noted, however, for the sake of completeness that another two rules have long been in existence which govern the subrogation right of the insurance companies: the Double Insurance Agreement (DÖ) and the Subrogation Agreement (RÖ). In my opinion, these agreements should also serve as a basis for a division of liability. For reasons of space, this question cannot be developed here.²⁰

7 The Liability in Particular for Neglecting to Effect Insurance Cover

7.1 *The Nature of the Liability*

An undertaking to effect insurance has been described by Jan Hellner as a type of strict liability:²¹

If anyone undertakes to take out insurance for another person's property, e.g. against fire, this means from one view that he assumes – over and above any liability which he would otherwise have had – a type of strict liability. Should he fail to take out insurance and the property is destroyed by fire, he will, in fact, be personally liable to compensate the owner in the amount that would have been paid if insurance had existed.

¹⁹ In HD 1991:176 the defendant was ordered to pay for loss which fell within the deductible for the liability insurance in question.

²⁰ See further in Ullman, *Försäkring och ansvarsfördelning*, Uppsala 1999, p 334 f. and 336 f.

²¹ Hellner, *ibid* p 160.

A party who does not observe his duty of insurance renders himself liable to a breach of agreement. According to current principles of liability for damages in contractual relationships, such an omission should entail the obligation of the party with the duty of insurance to be responsible for the consequences of the breach of the agreement. In clear cases of failure to effect insurance, the question of the extent of liability for damages should not cause major problems. In the event of failure to effect *liability insurance*, strict liability thus normally means that the negligent party is obliged to pay the damages covered by the liability insurance, had such insurance been effected.

The principle should thus be that the negligent party should be regarded as a self-insurer. A principle of this kind is of particular significance for the application of such exclusions of liability in construction contracts and supply contracts that relate to a party's insurance cover. In these cases the exclusion of liability should presumably be applied without account being taken of whether the stipulated liability insurance had actually been effected.

In the event of failure to take out *property or business interruption insurance*, the consequence is sometimes that the stipulating party chooses to rely on his own insurance cover. If, for example, a subcontractor does not observe his contractual duty to insure the subcontract work, the purchaser/contractor may find it necessary to rely on the insurance he has taken out for his contracts works.²² In the light of the fact that this example of a neglected duty of insurance relates to a construction claim, the statement made by the BKK in 1984 probably has the effect that liability lies with the subcontractor. However, even on general principles, the subcontractor should, according to what will be developed below, be identified as the one who is ultimately liable for the cost which the stipulated, but not effected, insurance would have covered. In addition, the liability of the negligent party under general principles of contractual liability for damages should cover the property damage caused to the purchaser through the breach of agreement. Here it is more or less a question of liability for damages for the purchaser's deductible,²³ together with administration costs, the cost of an increased premium and other additional cost that can be shown arise from the purchasers claim on his own insurance.

The situation can be more complicated when the stipulating party claims that an insurance effected by the obligated party is not as agreed since its scope is not what the party considers that he stipulated.²⁴ The assessment of the extent to which the cover effected is as stipulated in the agreement should naturally be

²² This insurance also covers that part of the contract which is being performed as a subcontract. It is conceivable that the customer of the subcontractor, in his capacity of a contractor in relation to his own principal, may be obliged to make use of the insurance.

²³ This is not the case if the purchaser bears the risk of damage according to AB 92/ABT 94 chap 5 s 4.

²⁴ A typical, though uncomplicated, case is when the scope of an insurance that has been effected according to the rule contained in the above-mentioned construction agreement AB 92/ABT 94 falls short of what is described in the Minimum Scope of AF AMA 98. In this case the difference means that the obligated party has to meet a claim as if insurance cover had been present.

made on the basis of how the rule is to be understood. In this case, as the stipulating party, one should be able to expect the opposite party to effect an insurance which is in line with the prevailing standard in the insurance industry. If the insurance effected clearly deviates from the cover which most other insurers offer, it should not be accepted as being as stipulated in the agreement. The assessment of this should in this connection comprise the insurance conditions in their entirety, i.e. including deductibles (even special deductibles), sums insured and safety regulations.

7.2 *A Party to an Agreement who is Co-insured*

Making a party to an agreement a named insured in a policy is a form of insuring the interest of a third party. A rule that a party to an agreement should effect insurance in favour of the stipulating party is regarded as a duty for the party to effect insurance for a third party.

Even though a party to an agreement, as a result of the provision in section 54 of the Insurance Contracts Act,²⁵ already enjoys in his capacity as third party a significant degree of cover through being “potentially entitled to compensation”²⁶ in the event of loss affecting insured property, an explicit reference to him as a named insured may be preferable owing to the general advantages which this confers. Apart from the advantages of the security which lies in the fact that the party acquires his own relationship with the opposite party’s insurer, this has the effect that the insurer in question is not entitled to exercise subrogation against the co-insured other than in accordance with what follows from section 18 of the Insurance Contracts Act, i.e. in the event of intent or gross negligence.²⁷

Details of a co-insured party can be written into the insurance conditions or the policy. The former case involves a general undertaking on the part of the insurer, as when the owner of insured property is co-insured. In the latter case the name of the co-insured is noted in the policy for the insurance in question.

8 **Premiums and the Duty of Insurance**

8.1 *Payment of Premium and Premiums in General*

An agreement that a party is to effect specific insurance cover entails payment by the party in question of the premium the cover requires. Where insurance cover of some substance is concerned, the size of the premium may affect the party’s financial prospects of fulfilling his insurance duty. Especially in a

²⁵ Bertil Bengtsson, *Försäkringsrätt*, Stockholm 1999, pp 90 f.

²⁶ Göran Almgren, *Försäkring av tredje mans intresse*, In Allmänna Brands jubileumsskrift, Bör försäkringsavtalsrätten reformeras, Jönköping 1968, p 128 and Hellner, *Försäkringsrätt* p 310.

²⁷ Almgren, *ibid* pp 140f.

situation of competition, the cost of the insurance cover to be effected may be significant and may even conceivably be a decisive factor for those competing for a tender with bids which are not far removed from each other.

The basic cover afforded by business insurance to some extent includes property which belongs to a third party. The conditions for property insurance state that property belonging to someone other than the insured which the insured has undertaken to insure is regarded as insured property. In the business conditions of Länsförsäkringar, Wasa and If P&C the current text of the conditions in this matter are essentially the same. The conditions of the first company mentioned are quoted here:²⁸

The insurance covers property which the insurer *owns* or *is responsible for* or *has contractually undertaken to insure* and which is *stated* in the policy as an object type or in some other way.

Business insurance thus starts out from the assumption that the insurer has a need for risk coverage in the event of loss or damage which is included in an agreement about a duty of insurance. The insured should therefore, in general, be able to undertake a duty of insurance to a normal extent for his business without running the risk of having to pay an additional premium for this.

8.2 Double Insurance and “Pyramidisation”

A provision relating to a duty of insurance may give rise to a kind of chain reaction between the contractual links of a contract chain. Such a reaction can occur whether the duty of insurance relates to the risk of damage to the sold product or the property erected or the risk of consequential loss arising from the sold product or property erected.

The total premium for several agreements relating to a duty of insurance may be considerable. The situation has rather aptly been referred to as pyramidisation in German literature.²⁹ The consequences of overlapping insurance cover, however, may be reduced or even eliminated. In property insurance this is done by requiring a contribution regarding double insurance at each stage of the contract. A claim which exclusively affects a subcontracted building which is last in the contract chain may ultimately in this way be charged to the property insurance of the subcontractor in question. The double insurance agreement of the Swedish insurance industry rests on the principle that contribution should now take place in the way just mentioned.

Methods of the kind outlined which are aimed at avoiding pyramidisation of premiums give rise to few objections in theory; in practice, however, there arise a number of obstacles to a successful contribution system of this kind. To start with, contribution is conditional on the individual agreement not containing exclusions of liability or other contractual obstacles which can be invoked by the contractor in question. In addition, it may also be necessary, in order for such a

²⁸ V 065:6 A 06.1.

²⁹ Friedrich Schreiber, *Produkthaftung bei arbeitsteiliger Produktion*, Karlsruhe 1990, pp 336.

division of liability to be realised, for the provision in question of a duty of insurance to have the effect of being able to channel the compensation claimed towards the obligated party. Finally, it requires the charging of premiums to be so firmly related to the current insurance year that income from successful double-insurance claims and subrogation has a full impact on the size of the insurance premium. In my view, the first two obstacles mentioned may be overcome, but hardly the third. Most insureds do not, in fact, have access to an established experience rating system. This means that in the circumstances there is rarely a question of other than reducing the size of the pyramid.

8.3 *Fire Insurance and Water Damage Insurance*

A stipulation requiring a party to effect fire or water damage insurance should be seen as urging this party to maintain the normal basic insurance cover for his company. The premium for fire or water damage insurance is part of a company's normal operating expenses. It is a cost which is not specially affected by ongoing operations, unless major interventions in these take place. It is true that a change of the premium basis through increased risk due to major erection or construction works, the purchase of valuable equipment or other similar event may entail an increased premium. In the light of the fact that the obligation to effect insurance for traditional risks such as fire or water damage normally lies with the purchaser, any resulting increase in cost can be regarded as a project cost which should remain with the purchaser.

8.4 *Machinery Breakdown Insurance*

Machinery breakdown insurance is effected on top of the basic cover of business insurance and a duty of insurance may thus entail an increased premium. Many enterprises who have extended their business insurance to include machinery breakdown, however, have an opportunity to undertake investments in the business without this having any effect on the premium agreed for the period of insurance when the increase in value takes place. In these cases there are no reasons to discuss the financial consequences of a duty of insurance.

When the delivery in question relates to property which is to be insured in special circumstances through a separate machinery breakdown insurance for the delivered property, the cost for this can be considerable.

8.5 *All-risks Insurance*

8.5.1 *Industrial All-risks Insurance*

An industrial all-risks insurance is a so-called annual insurance which can be effected for industrial operations in the same way as traditional fire or water damage insurance. What was said in 8.3 about the effect on the premium should, therefore, also apply here. It is probably not conceivable in practice for a seller to enjoin the buyer to effect all-risks insurance if the aim of doing this is to get the buyer to move from fire/water insurance to all-risks insurance. Such a

demand, in fact, means not only that the buyer should restructure the basic insurance for his entire business, but also that the premium will rise with the extension in cover.

8.5.2 Construction and Erection Works Insurance

All-risks insurance for construction and erection agreements is normally made available in the form of an *annual agreement* as part of the insurance cover taken out for the business in general. The premium is based on a kind of budget for estimated activities during the year. The insured in this connection informs the insurer of the calculated net sales for the coming year and the highest contract sum that he expects to reach an agreement about. The final premium is determined retrospectively when all the arguments on which the premium is based are known. The consequences for the premium of a duty of all-risks insurance for construction and erection risks can thus only reliably be assessed after a total review of both basic cover and additional cover.

With regard to all-risks insurance which is effected specifically for a *particular project*, the premium is estimated directly in connection with the insured's role and risk exposure in the insured project. Here there are opportunities of directly modifying the insurance agreement in line with any specific requirements that the parties have. The premium arguments just referred to do not apply in this case and the premium for the insurance can be read off simply. Moreover, with regard to project insurance, there may be advantages associated with the fact that the premium does not affect the buyer/the principal. Such a cost may be seen as a project cost and therefore comprise part of the tax-related depreciation basis of the investment.

8.6 Business Interruption Insurance

Business interruption insurance is also an insurance effected on an annual basis for regular ongoing operations and is, as a rule, part of business insurance. A duty to effect business interruption insurance should thus normally not have a significant effect on the premium.

If business interruption insurance is involved which is linked to an insurance which is not part of the basic cover of business insurance, i.e. the insurance does not go together with fire/water insurance or industrial all-risks insurance, this changes the situation. Here it is a question of a separate insurance agreement for business interruption insurance. A rule stating that the buyer/principal should effect machinery breakdown insurance, for example, may involve a significant premium cost.

8.7 Liability Insurance

The commonest type of insurance rule is that which obliges a supplier or a contractor to effect "customary liability insurance". Nowadays by far the majority of enterprises can certainly be expected to have a liability insurance, for which reason a rule stipulating such insurance does not entail a special cost for

the party in question. A liability insurance is normally part of a combined business insurance, which is taken out for one year at a time.

When a duty to take out additional cover follows from the contract, it is in the nature of things that such cover entails a additional premium. If the additional cover is effected because it is not part of the basic cover provided by a particular insurance company, its cost should be assessed against the background of what equivalent cover included in the basic cover of another company would have cost. A typical example of additional cover of this kind is insurance for ingredients cover. Such cover may be offered either as part of the basic cover or as additional cover. When comparing the total costs of both alternatives, it may be that in an individual case the difference is small and that different actuarial details of insurance cover need not necessarily increase the company's total cost for obtaining particular cover. What has been just said means that the stipulating party should have no special misgivings about prescribing cover which can be obtained on the market as part of basic cover in a liability insurance.

9 Concluding Comments

Several standard contracts contain provisions relating to a duty of insurance which do not satisfy reasonable demands of clarity and precision. The framing of the provisions sometimes betrays evidence of a lack of insight into insurance issues and a certain amount of ignorance about the function of the insurance and its relationship with the agreement. The duty of insurance according to AB 92/ABT 94 chap 5 s 22 differs from other standard contracts in that the general, rather non-specific contents of the provision is lent concrete form by an associated description which has been published in AF AMA 98, the so-called minimum scope. This description not only provides detailed information about the extent of the stipulated insurance cover, but also makes clear those parts of the provision which do not correspond with the prevailing insurance standard. It may undoubtedly be said that the building sector with its minimum scope has access to a tool which may be used to ensure the quality of the stipulated insurances.

Outside the building sector, the trend has been towards a situation where appendices in contracts specify the insurance cover that the parties should hold. This method, in my view, creates the best prospects of a working interaction between commercial agreements and insurance. A well-thought-out appendix relating to insurance cover, similar to those which are used in the papermaking industry (the SSG agreement) and the engineering industry (ABA 99), should satisfy the most basic needs of the parties for collaboration in insurance matters, with a view to bringing about an interaction.

For parties who request insurance cover which is more closely adapted to the risks which follow from the agreement, the use of an insurance appendix is not a suitable method. It is probably better to integrate the insurance issues into the agreement and to link the liabilities rules present in the agreement to the insurance cover agreed between the parties. In Sweden such an integration is reflected in AB 92/ABT 94, which, inter alia, has resulted in a number of special insurance solutions.

One important question is whether a party's duty of insurance entails an undertaking to bear the ultimate responsibility for any loss which the stipulated insurance covers. Is a provision regarding a duty of insurance of decisive importance for the apportionment of liability between the parties? The meagre precedents that exist concerning the meaning of a provision relating to a duty of insurance provide only limited guidance. The pronouncement by the Supreme Court in NJA 1949 p 732, whereby the stipulating party was liable "only to the extent that subrogation by the insurer founded in the Insurance Contracts Act could be exercised", gives rise to several questions: Did the Court intend to lay down a rule which was to be regarded as reasonable in general terms, without taking account of the fact that the provision of section 25 of the Insurance Contracts Act is optional? If the claimant had, in fact, effected insurance, it would be conceivable that the insurer in question, as is usually the case, would have reserved the full right of subrogation. Or did the Court intend to limit the right of subrogation in the same way as if the stipulating party had been co-insured? In this case section 18 of the Insurance Contracts Act was the basis for the pronouncement.

No definite answers to these and other questions on the subject of a duty of insurance are likely to be forthcoming from an analysis of the summary ruling in the case mentioned. To start with, it may be dubious to lay down principles in today's situation which derive from a case which is over fifty years old. At any rate it is not possible to draw the conclusion from the opinion of the Supreme Court that it had interpreted a contractual insurance obligation as an ultimate division of liability between the parties. On the other hand, it is not inconceivable that the Court intended to achieve a significant curtailment of subrogation when a party had a contractual duty of insurance. In my view, such a curtailment would be fully acceptable in the light of the purpose generally of the duty of insurance. In fact, as I see it, an agreement which enjoins one part to effect insurance, should be of immediately decisive importance for the mutual liability of the parties under the agreement and, among other things, have the effect that subrogation cannot, in principle, be exercised by an insurer who issues the stipulated insurance. In other words, one should interpret a duty of insurance in accordance with the view set out by the BKK, as described above.³⁰

Rational reasons can be adduced in support of such an interpretation of a provision relating to a duty of insurance. The fact that one party undertakes to hold specific insurance cover should give the stipulating party a reason to modify his own risk management accordingly and limit the extent of his own risk cover through insurance. A double insurance system where the stipulating party is obliged to hold insurance when the stipulated cover is lacking makes a rule regarding a duty of insurance rather meaningless.

The legal situation, therefore, is so uncertain when it comes to the meaning of a duty of insurance in an agreement outside the building trade or the transport sector that a stipulating party would be well-advised to combine the rule with a requirement for the obligated party to be a named insured in the stipulated insurance or at any rate with an exclusion of liability intended to limit the

³⁰ See 3.2.1.

liability of the stipulating party for any cost which the stipulated insurance is intended to cover.³¹ In this way one reaches a settlement similar to that which is successfully applied in the well-thought-out supply contracts for the offshore industry (NF 92).

A provision relating to a duty of insurance which makes it possible for one party to employ highly risky and reprehensible working methods and avoid the consequences of any losses arising as a result may lead to an obligated party being put in an unsatisfactory position. When the duty of insurance is stipulated by a contractor – and not, as is normally the case, by the purchaser – there is, in other words, a risk that the duty will have an unreasonable result. The arguments used in the Finnish case – Supreme Court HD1994:5 (hot works with an open flame on the roof) – probably reward an abuse of provisions relating to a duty of insurance and have little to do with rational considerations.³² Decisions of this nature underline the need for provisions relating to a duty of insurance to be clarified with explanations of what is meant by this duty. An insurer who risks a limited right of subrogation should have a special interest in such clarifications materialising.

Imprecise demands for insurance leave the field open for insurances which are marketed under the same name which is frequently modified in line with the insurance rules, but which contain clear differences in scope and quality. A supplier or contractor who effects an inexpensive insurance with poor cover may in this way obtain competitive benefits compared with a competitor who takes out better and more expensive cover. Only through control from the purchaser can the cover sought after through the rule actually be achieved. Such control, in my view, can be exercised foremost as a result of the purchaser/principal

1. requesting copies of the conditions of the insurance that the supplier or contractor has effected by virtue of the insurance rule.
2. stipulating that specifically designated insurance in an insurance company referred to by name is effected, or
3. stipulating that the opposite party should turn to his insurance company for insurance cover which accords with conditions which the purchaser/principal has had drawn up.

³¹ Jan Hellner, *ibid* p 162.

³² Esko Hoppu, *Försäkringens inverkan på skadeståndsskyldighet i finsk rättspraxis*, Festskrift till Sandström p 222 and Hans Saxén, *Skadestånd vid avtalsbrott. HD praxis i Finland*, Stockholm 1995, p 237.