PREVENTIVE MEASURES

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3RD PLENARY SESSION: PREVENTIVE MEASURES

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INTRODUCTION

"Preventive Measures" concerns the existence or otherwise of obligations on the insured to avoid or reduce the exposure of the insurer to a claim consequent upon the occurrence of an insured event. The obligation may arise before the occurrence of the insured event, or after the occurrence of the insured event. The source of the obligation may lie in the contract of insurance, in statute law or in the common law. The extent of the obligation may vary, depending upon its source, as may the exposure of the insured, or the insurer, to the cost of the measures taken by the insured. The submissions of the participating nations make clear that there exist significantly different approaches to the issues in different jurisdictions.

The juridical basis for an obligation to mitigate damage is not necessarily clear. The duty of a party to a contract to "mitigate" damage caused by the breach of the defaulting party is well established at common law, although the better view is that the obligation is not a "duty" as such. The preferable analysis at common law is that a failure to comply with the requisite breaks the causal nexus between the breach and the loss

Whether that is so in other jurisdictions is not a matter about which responses have been sought. However, it is worth noting the conceptual difference between an obligation to mitigate in response to a breach of contract, and an obligation to "mitigate" where the insurer is under a contractual duty to indemnify. Whether or not the obligations ought to be the same is a matter itself worthy of discussion.

Participating jurisdictions were asked to respond to questions concerning five broad areas for discussion:

(1) Concept and different sorts of measures of prevention;
(2) Ways and degrees of co-operation between insurers and insureds;
(3) Techniques that are used or required by law to implement the preventative measures;

(4) Sanctions;

(5) Burden of Proof.

There was a marked difference in approach in the various jurisdictions. While most if not all jurisdictions recognised the possibility that the topics could be the subject of contractual agreement, there was less consistency in the impact of the common or case law, and in the level of statutory intervention on the topics.

This paper summarises responses received from the participating jurisdictions. Unnecessary duplication of responses has been avoided where the responses of participating jurisdictions have evidenced similar approaches to the issues identified. The paper also proposes as an introduction to the summaries topics for discussion generated by the responses.

The words of introduction to each section are intended to promote particular topics for discussion. However, there are some broader issues raised by the responses which are also worthy of discussion. They include:

- A comparison between the experiences of the jurisdictions with, and without, established statutory obligations concerning preventive measures. As a sideline to that topic, the experience of those jurisdictions with statutory obligations to prevent the occurrence of the risk, as opposed to mitigate loss after the insured event has occurred;

- The state of the common law in relation to preventive measures;

- Where there exists no statutory obligation, and no express contractual obligation, whether there exists a juristic basis for an obligation to prevent or mitigate and, if so, what that basis is;

- Reasons why the source and scope of preventive measures have developed differently in different jurisdictions and legal systems;

- The impact of preventative measures on the availability and price of insurance;
- Whether, in a competitive legal market, contractual obligations adequately protect the immediate and wider interests of the insured and the insurer;

- Whether it is preferable, or not, to have statutory preventive obligations;

- Whether there is, between jurisdictions, any significant difference in the content of the obligation to mitigate, that is, whether there are different standards of conduct in mitigation required;

- Whether "precautionary measures" are relevant to the obligation to avoid an insured event or to mitigate potential damage. The Belgian submission, in the context of "preventative measures", raised the issue of "precautionary measures", a term referring to the attitude of prudence that decision makers are expected to adopt when confronted with a situation of "uncertainty". The issue is of particular significance in the area of "environmental uncertainty". A practical example, relating to insurance and climate change, is the extent to which an insurer may expect a local authority to take into account rising sea levels when granting development approval to buildings proposed on the sea-front. The Belgian submission identified two main questions: whether the non-taking of precautionary measures is insurable; and if and to what extent the costs of precautionary matters must be borne by the insurer.

1.CONCEPT AND DIFFERENT SORTS OF MEASURES OF PREVENTION

1.1 INTRODUCTION

An examination of the responses received showed the laws between States vary considerably.

(a) Although not the subject of detailed exposition below, all jurisdictions had strict requirements concerning disclosure prior to the policy being effected. There was relative uniformity in the proposition that the insured was under a duty to disclose matters relevant to the risk. A failure to do so, if of sufficient moment, would entitle the insurer to avoid the policy;

(b) In most responding jurisdictions, the contract of insurance could and sometimes would contain contractual provisions concerning the duty to mitigate damages and, on occasion, to prevent the occurrence of the insured event. The form and nature of the contractual provision was of relevance: the effect of a breach of the obligation depended on the manner in which the obligation was framed;

(c) In some jurisdictions, statutory provisions regulate the ability of the insurer to terminate by reason of the insured's breach of contractual duty towards the insurer. In Turkey, for example, no such clause is effective unless the insured's breach was negligent;

(d) A number of jurisdictions have statutory provisions requiring positive steps to be taken to avoid or prevent the occurrence of the insured event. In some jurisdictions, there is a positive duty to avoid the occurrence of the risk, but not in respect of life insurance (for example, Korea and Serbia);

(e) In France, the inviolability of the human body is a public order principle that prohibits stipulations in life insurance policies that requires the insured to do something that protects his or her health;

(f) Most responding jurisdictions have statutory provisions compelling the insured to take steps to avoid or mitigate loss once the insured event had occurred. These included Austria, Belgium, Brazil, France (in respect of marine insurance), Germany, Greece, Hungary, Italy, Japan, Mexico, Serbia, Switzerland and Turkey;

(g) The obligation to mitigate damage may extend to an obligation to preserve rights of actions for the insurer against third parties – see, for example, Poland;

(h) Relatively few countries had no statutory provisions requiring the insured to mitigate loss once the insured event occurred. Jurisdictions with no such requirement included Denmark, Hong Kong, the United Kingdom and the United States;

(i) A number of jurisdictions have statutory provisions requiring notification of circumstances giving rise to aggravation of the risk. For example, Article 11 of the Spanish Law of Insurance Contracts places on the insured an obligation during the contract to notify the insurer of circumstances which increase the prospect of the risk occurring. There is a similar obligation in Columbia – see Article 1060 of the Code of Commerce (the obligation does not apply to life insurance). The obligation of disclosure of aggravating circumstances is wider in some jurisdictions than others. In Austria, for example, the obligation of disclosure of aggravating circumstances extends only to circumstances which are not of a nature affecting all like insureds. Some jurisdictions permit the insurer to elect to avoid the policy where the aggravation is sufficiently important. Other remedies for the insurer include a proposal to the insurer to amend the terms of the policy. A failure to notify of an aggravation of the risk, if intentional or

grossly negligent, may entitle the insurer to avoid cover (for example, Germany). Otherwise, some jurisdictions adopt the principle of proportionality, permitting the reduction in the extent of cover by the amount which the premium, had the aggravation been disclosed, bears to the premium charged;

(j) There is a difference of approach in respect of whether, to disqualify the insured from cover, or reduce the cover available, the failure to report the aggravation must be related to the loss suffered. In Germany, for example, section 26(3) of the German Insurance Contract Act provides that the aggravation of risk must cause the occurrence of the risk: otherwise, no avoidance or reduction in liability will occur.

Australia

In Australia, an insurers promise to indemnify is a promise to make good a loss, and hence a suit under a policy is not a suit for damages, but for indemnity. Consequently, the law of mitigation for breach of contract is not directly relevant.

An insured in Australian has a duty under the common law of Australia to mitigate. The duty requires the insured to take "practical and reasonable steps as a matter of self-help which his own self-interest would dictate" for the purpose of avoiding or limiting an insured loss. The onus is not a heavy one.

The common law duty to mitigate is regarded as a causation issue. The insured is entitles to recover insured loss consequent upon taking steps to mitigate insured loss, even if taking those steps causes insured loss different to, or beyond, what would have eventuated if the insured had not taken steps to mitigate. That is so because insured loss resulting from the insured taking steps to mitigate loss is regarded as being proximately caused by an insured event (assuming

the insurance contract requires the insured loss to be proximately caused by the insured event).

Further, the insured is precluded from recovering the insured loss to the extent that it results from not mitigating, because the failure to mitigate interrupts the causal link between the insured event and the insured loss, so that the loss that results from the insured not mitigating is regarded as not having been proximately caused by an insured event. However, it is rare to find circumstances where the failure to mitigate is so serious as to be held to have broken the causal link between the event and the loss.

An insured cannot recover for an insured loss that results from taking steps to mitigate an anticipated insured event. However, the insured is entitled to recover insured loss if it was due to the insured taking steps to avoid or mitigate an imminent insured event. That is so because the loss is regarded as having been proximately caused by an insured event even though the event was "only" imminent.

There is no express obligation under statute law in Australia for an insured to avoid the insured event or to mitigate loss once the insured event has occurred, although it is arguable (although there exists no authority) that the duty of the "utmost good faith" might include such an obligation.

Austria

In Austria, methods of preventing the occurrence of a risk are both the concern of legislation and the terms of the policy of insurance.

However, legislation permits the insurer the opportunity to terminate the contract of insurance where events occur which increase the risk of the insured event occurring. The right of termination arises whether the increase in risk is caused by the culpable or negligent conduct of the insured, or by conduct of the insured which is not negligent, or by the acts or omissions of third parties. The insured is under an

obligation to notify the insurer of an increase in risk, unless the increase in risk is one which affects all insured's rather than the particular insured, in which case there is no obligation to notify. Upon notification, the insurer has a month in which it may terminate the contract of insurance. If the insurer elects not to terminate, then the insurer will continue to be liable under the policy, but only to the extent that does not include the increase in risk. The obligation to inform the insurer of increased risk extends to the period between the application for insurance and acceptance of the application.

The insured is under a statutory duty to mitigate and if possible to avoid damage. When the duty is violated wilfully, or in a manner which is grossly negligent, the insurer is free from the obligation to indemnify. The insurer carries the onus of proving the insured acted wilfully or in a grossly negligent manner. The insured, even in cases of gross negligence, has the opportunity to prove that the gross negligence did not cause the loss.

In exchange for the duties upon it, the insured is entitled to reimbursement of expenses incurred in connection with the obligation to mitigate, even where the steps taken to mitigate loss prove unsuccessful.

There is a legislative requirement upon the insured to notify the insurer of an increase in risk caused by the insured's conduct or by the conduct of third parties. Legislation stipulates that in the case of risk increases which are culpably caused by the insured the insurer is free from the duty to indemnify and may, within one month of notice of the increased risk, terminate the contract of insurance. In the event that the policy is not terminated, the insurer will be free from indemnity to the extent the loss was affected by the risk increase. An insured is under an obligation to inform the insurer of an increase in risk, whether or not the increase in risk is negligently caused by the

insured. Where the insured violates its obligation to inform the insurer of the increase in risk, the insurer is free from the obligation to indemnify, although only from one month after the insured should have notified.

There is legislative regulation in relation to the consequence of breach by the insured of an obligation under the policy. If there is a culpable breach by the insured under the contract the insurer may avoid indemnity, but only if the policy is terminated within one month of notice of the breach. In the case of a breach which is non-culpable, but relevant to the balance between risk and premium, the insurer may avoid indemnity in the proportion which the difference in premium bears to the loss suffered. A breach of an obligation which concerns danger will not relieve the insurer of liability if the breach had no influence on the loss occurrence or indemnity.

Insurance contracts may include clauses positively requiring the insured to avoid or mitigate loss, and clauses in the nature of exemption clauses where such steps to avoid loss are not taken. The policy will often stipulate that a breach of the positive obligation, or circumstances within the exemption, will justify the insurer refusing indemnity.

In Austria, if the insured breaches a post-loss obligation to mitigate the insurer may avoid liability if the insured has violated the obligations wilfully or in a manner which is grossly negligent, unless the insured can show that the breach had no effect on the loss.

In Belgium, the law provides that the insured has the legal obligation to take “all reasonable measures to prevent or to mitigate the consequences of the insured event”. This does not extend to any obligation to prevent the insured vent from happening.

Belgium

Since the Belgian Insurance Contract Act of 11 June 1874, intentional fault and grossly negligent fault have been excluded from insurance cover. Thus, in Belgium, the right to insurance cover has traditionally been considered to be incompatible with a behaviour that is more than just ordinarily negligent. However, the enactment of the Insurance Act of 25 June 1992 radically changed, indeed reversed, that state of affairs. The new rule prescribes that a loss that is caused by the "culpa lata" or "faute grave" is insurable and as a rule even covered, with the sole exception of "faute grave" that are explicitly and in a limited way defined in the insurance contract as being excluded from coverage. The court has interpreted the requirement to explicitly define risks to be excluded strictly, holding void and ineffective clauses excluding liability for, for example, "reckless acts or behaviour".

The intentional causing of the insured event permits the insurer to refuse indemnity.

There is a legislative requirement in Belgium for an insured to give notice to the insurer of an aggravation of risk. The insurer has a number of legal options, depending upon the nature of the aggravation, including terminating the contract or to proposing a modification of the insurance conditions. These rules, it is postulated, tend to discourage the insured from aggravating the risk.

The submission from Belgium noted the commercial imperative to risk and loss prevention achieved by the insured sharing in the consequence of risk occurrence, by means of deductibles (part of the loss suffered by the insured), or caps or ceilings on the amount of cover.

Belgian insurance law does not require an insured, before the insured event occurs, to perform or not to perform certain acts to avert or prevent the occurrence of the insured risk. Belgian law does not impose upon the insured a general obligation to prevent the insured event from happening.

Under Belgian law, the insured's obligation to take reasonable measures of prevention are largely confined to the "consequences of the insured event", although the obligation of good faith requires the insured to take certain measures to prevent the insured event occurring, for example, where the occurrence of the event is imminent.

However, the terms of an insurance policy may impose preventative obligations before the loss occurs. A policy of motor vehicle insurance will, for example, prohibit driving under the influence of alcohol. Overall, three main techniques are applied: clauses defining the insured risk; exclusion clauses, and clauses imposing an obligation to take a specific measure. Generally, where an insured takes preventative measures the insured must bear that cost, although this general rule is subject to an important exception where the danger of the occurrence of the insured event was imminent and provided that the measures taken were urgent and reasonable.

Brazil

In Brazil, insurance law is governed by the Civil Code which provides, by Article 771, that under penalty of losing the right to compensation the insured shall notify the occurrence to the insurer and take immediate steps to mitigate the damage. Article 768 provides the insured shall lose cover if it intentionally increases the risk under the contract. Thus, throughout the contract the insured must refrain from acting to increase the risk and in the case of a claim must take all steps to avoid possible damage.

Measures of prevention in Brazil also include statutory intervention to define circumstances in which cover will be excluded. For example, in the case of life and automobile insurance, there will be no compensation if the insured is under the influence of drugs or alcohol.

Columbia

In Columbia, there is no statutory obligation on the insured to take steps to avoid the possibility of the risk occurring. However, Article 1074 of the Code of Commerce provides that the insured shall take steps to mitigate damage, once the insured event has occurred.

Denmark

In Denmark, preventative measures are not the subject of legislation or common law. However, policies of insurance (with the exception of life insurance policies) include provisions in the nature of preventative obligations, for example, an obligation in relation to house insurance that the house remain locked. A failure to comply with such an obligation may result in a loss of cover.

France

In French law, a legal duty for the insured to take preventative measures exists only in relation to marine insurance (see the Insurance Code). In all other forms of insurance, the contract of insurance is the only way to impose on the policy holder the duty to act diligently in order to prevent the insured event.
In France, the inviolability of the human body is a public order principle that prohibits stipulations in contracts of life insurance that would require the insured to do something which protects his or her health. For example, it would be impermissible, in France, to include in a policy of life insurance a requirement that the insured not smoke.

In non-life insurance policies, preventative measures are included in the contract of insurance. For example, a contract of theft insurance may require the installation of a device; and a contract of fire insurance may include a term requiring an automatic sprinkler system.

Germany

In Germany, there is a statutory obligation to notify the insurer risk factors known to the insured which are relevant to the insurer's decision to insure: section 19, German Insurance Contract Act. There is also a statutory obligation, between the time of the application for insurance and acceptance, and then after the insurance policy is in place, to notify the insurer of an aggravation of the insured risk. An aggravation of the risk, or a failure to notify of an aggravation of the risk, may permit the insurer to terminate the policy: section 24; or permit the insurer to demand an increase in the premium: section 25.

In the event the insured risk occurs after an aggravation of the risk insured, the insurer shall not be liable if the policy holder intentionally aggravated the risk. In the event of a grossly negligent aggravation of risk, the insurer may reduce the benefits payable commensurate with the severity of the policy holder's default; the burden of showing there was no gross negligence lies on the policy holder. The aggravation of risk must cause the occurrence of the risk: otherwise, no avoidance of liability or reduction of liability will occur: section 26(3).

In Germany, after the insured risk has occurred, the insured is required to ensure the loss is avoided or minimised wherever possible: section 82. The policy holder must follow the instructions of the insurer, where reasonable, and obtain instructions, circumstances permitting. If several insurers involved in the contract of insurance

issue different instructions, the insured must act in his proper discretion: section 82(2). In the event of a breach of the obligation to prevent and minimise the loss, the insurer shall not be obliged to effect payment if the policy holder intentionally breached the obligation. In the event of a grossly negligent breach, the insurer shall be entitled to reduce the benefits payable commensurate with the severity of insured's fault: section 82(3). Notwithstanding the above, the insurer shall be liable insofar as the failure to mitigate is the cause neither of the establishment of the occurrence of the insured event, nor the establishment of the extent of the liability: section 82(4). Expenses incurred by the insured and caused by the obligation to avoid or mitigate the damage after it has occurred are refunded by the insurer: section 83VVG. Expenses which are incurred before the occurrence of the risk are regularly borne by the insured.

In Germany, the insurance contract may also include preventative measures.

Greece

In Greece, the Greek Insurance Contracts Act provides for the insured to be under a duty to take all measures necessary for the avoidance or mitigation of the insured loss and to follow the insurer's relevant instructions upon occurrence of the risk. Such duty does not arise in life insurance contracts.

The law in Greece does not provide for the insured to be under a duty to take specific measures for the prevention of the occurrence of the insured event itself, although on the basis of an obligation of good faith, the insured is under an obligation to act as a prudent uninsured.

In Greece, the contract of insurance may impose an obligation on the policy holder to take specific measures for the prevention of the occurrence of the risk.

Hong Kong

In Hong Kong, there are no general statutory duties imposed on insureds to adopt measures to avert or minimise the risk of the occurrence of an insured event or to mitigate loss should the insured event occur. However, specific statutory duties apply to marine insurance. Thus, section 78(4) of the Marine Insurance Ordinance prescribes a statutory to "take such measures as may be reasonable for the purpose of averting or minimising a loss", and by section 78(1) that the assured may recover from the insurer any expenses properly so incurred.

In Hong Kong, there is no common law duty to avert the risk or minimise loss once the insured event has occurred. However, where the insured has refused to avert or minimise the loss, an insurer may argue that the insured acted fraudulently, or that the failure to mitigate the loss was the real cause of the loss; or to argue that liability should be limited to that part of the loss not caused by the insured's failure to mitigate. Where an insured has incurred expense in mitigating loss, it is unlikely the insured will be able to recover these expenses, unless expressly provided for in the contract of insurance. Nevertheless, an insured may attempt to claim these expenses from the insurer, on the basis that: breach of an implied term that the insurer is required to indemnify the insured should the insured take steps to reduce the amount of the claim although this approach has been rejected in England (Yorkshire Water v Sun Alliance & London Insurance [1997] 2 Lloyd's Rep 21); and restitution as the insured has conferred upon the insurer a benefit of the

mitigated claim. However, it is well settled the equity will not assist a volunteer.

In Hong Kong, it is common for policies to contain a term to the effect that "It is the duty of the assured to take such measures as may be reasonable for the purpose of averting or minimising a loss". If such a term is not express in the policy, it is unlikely that it will be implied.

Hungary

In Hungary, section 340(1) of the Civil Code provides that "in the interest of preventing or mitigating damages, the aggrieved party shall act in a manner generally accepted in the given situation; there shall be no obligation to indemnify that part of the damages which arose due to the aggrieved party failing to perform this duty". Therefore, before the occurrence of an insured event the insured is required on the one hand to abstain from conduct which may lead to the causing of damages (negative duty) and an obligation to act to prevent damages from occurring (positive duty). A failure so act may influence the portion of the damages to be indemnified, and may lead to a proportionate allocation of the claim between the insured and other parties involved. The same principle applies to the obligation to mitigate damage once the insured event has occurred.
Section 555(1) of the Civil Code provides that the parties (to the insurance contract) may agree upon the insured party's duties to prevent or mitigate a claim, and contractual provisions of that nature are common.

Italy

In Italy, duties of disclosure are very important. The proponent is under an obligation to declare in writing the events relating to the risk: see Articles 1892 and 1893 of the Civil Code. Further, in order to

permit the insurer to properly assess the risk, the insured must notify the insurer of material aggravations to the risk. The aggravations in respect of which the obligation exists are the facts or acts of such a nature that had they existed at the time of the extension of the insurance contract the insurance company would not have assumed the risk or it would have executed the contract but at a higher premium.

In Italy, Article 1898 of the Civil Code imposes an obligation on the insured to advise the insurer promptly of an aggravation of the insured risk. The insured is also under an obligation to that which it can to avoid loss after the insured event has occurred – see Article 1914 of the Civil Code. The insurer is to pay the costs of steps taken by the insured in mitigation, although it exceeds the amount covered and although the steps may have been unsuccessful. The insurer is not required to repay costs incurred unreasonably by the insured.

Japan

In Japan, Article 13 of the Japanese Insurance Act imposes an obligation on insureds to make efforts to prevent the occurrence and aggravation of loss or damage due to the events. The Article does not extend to an obligation to prevent the insured event from occurring. The standard of conduct required may be measured by that which a person would do if not insured.

Korea

Article 680 of the Korean Commercial Code states that in the case of non-life insurance, the insured bears a duty to prevent the occurrence of the insured events and to mitigate loss should the insured event occur.

Mexico

In Mexico, the insured is under an obligation to communicate to the insurer an increased probability of the risk occurring where the increased probability is such that had it existed at the time of the execution of the insurance contract, the insurer would not have assumed the risk or it would only have accepted the risk at a higher premium. The occurrence that causes the increased probability of the realization of the insured risk must modify the state that was declared when the insurance contract was executed. Furthermore, it must have the following requirements: novelty, unpredictability, durability and relevance. In some circumstances, the insured is presumed to know of the aggravating risks.

Insurance law in Mexico recognizes that the policy may deal with obligations of the insured to diminish the risk or impede its aggravation.

In Mexico, the Insurance Contract Law establishes the obligation of the insured to give timely notice of the occurrence of the casualty and, regarding property and casualty insurance, to prevent or reduce the damage. In respect of the obligation to prevent or reduce the damage, absent immediate danger, the insured must ask for and comply with the instructions of the insurer.

Poland

In Poland, the Polish Civil Code provides (Art. 826) that when an accident occurs the policyholder shall use the means available to him to rescue the object of insurance as well as to prevent the damage or to reduce its scope. Further, the policyholder is obliged to ensure the possibility of pursuing compensatory claims against third parties liable for the damage. If the policyholder intentionally, or in a manner

grossly negligent, fails to us the means available to him to rescue the object of insurance or prevent or reduce the scope of the damage, the insurer shall be free from liability. The insurer is obliged, within the limits of the insured sum, to reimburse the costs incurred by the insured in carrying out the measures taken in mitigation.
Article 827 provides that the insurer shall be free from obligation where the insured has inflicted the damage intentionally, and also where it is caused by the gross negligence of the insured, unless the policy provides otherwise.
The insurance policy may, in Poland, deal with issues of risk prevention and mitigation.

Portugal

In Portugal there exists a salvage legal burden, which consists in preventing or limiting, as much as possible, the economic consequences of the insured event. The salvage obligation relates to the damage caused by the insured event, rather than to occurrence of the insured event. As to prevention of the event, there is no express obligation, although once the contract of insurance is concluded, the policyholder, the inured and the insurance beneficiary must take a diligent and careful attitude in accordance with the standard *bonus pater familiae*, and in this context they may be under a general burden of prevention of the inured event.

The source of the obligation to mitigate damage from the insured event may be found in respect of marine insurance in Decree-Law 203/98 and, in respect of non-marine insurance, in articles 127 and 127 of Decree-Law 72/2008 (the Insurance Contract Law). There are more specific provisions relating to some classes of insurance.

Further, the parties may regulate the salvage burden by the contract of insurance. The salvage burden, entitled “avoidance and mitigation

of the insured event" has integrated various clauses in uniform policies established by the Portuguese Insurance Institute.

Serbia

In Serbia, statutory provisions concerning prevention are found in the Law of Obligations, Insurance Law, the Law on Compulsory Traffic Insurance, the Law on Fire Protection and the Law on Hailstorm Protection. Preventative measures, according to the laws of the Republic of Serbia, are taken to avoid or prevent the insured event. There are also obligations to limit adverse consequences where the insured event has occurred. A failure by the insured to perform such obligations will reduce the liability of the insurer to indemnify. Article 926 of the Law of Obligations required the insurer to meet the insured's expenses of prevention or mitigation.
In Serbia, there is no obligation in life insurance for the life insured to take preventative measures.
In Serbia, obligations of prevention and mitigation may also be included in the insurance contract.

Spain

In Spain, there is no duty upon the insured to prevent the occurrence of the risk. However, Article 19 of the Spanish Law of Insurance Contracts imposes an obligation in the insured to rescue, that is, to use all means at its disposal to reduce the damage. The failure to perform the obligation gives to the insurer the right to reduce the liability proportionate to the failure.
The terms of the contract may otherwise bear on the relevant obligations of the insured.

Switzerland

The Swiss Insurance Contracts Act governs various preventative measures:

a) Article 4 – pre-contractual disclosure of essential risks
b) Article 12 – control of the insurance policy and notification of any discrepancy between the content of the policy and the agreed provisions
c) Article 29 – co-operation duties ("Obliegenenheiten") in conjunction with risk minimisation or prevention of risk increase;
d) Article 30 – notification of any risk aggravation caused without influence of the insured'
e) Article 61 – duty to mitigate loss after occurrence of insured event;
f) Article 67 – co-operation in conjunction with the loss assessment.

In Switzerland, the parties to the insurance contract may and do agree on prevention and mitigation measures.

Turkey

The Primary source of Turkish Insurance Law is The Sixth Book (articles 1401 through to 1520) of the Turkish Commercial Code. The provisions which follow apply to all types of insurance contracts.

Article 1444/1 imposes a general duty on a policyholder to take all reasonable steps and measures not to aggravate the risk. Article 1448 states that in cases where the risk has materialised or materialisation of the risk becomes highly probable, the policyholder has a duty, within the bounds of possibility, to take measures to prevent the loss or its increase, mitigate the loss and to protect the insurer's rights of recourse against third persons. Article 1449 provides a general rule in relation to violations of duty by the insured (including the duty to take

preventative measures) stipulated in insurance contracts. It states that “provisions to the effect that the insurer will be discharged from its obligation of performance by terminating the contract entirely or partly in the event that the policyholder is in breach of contractual duty towards the insurer, shall be ineffective if the breach was not negligent unless otherwise provided by this Code or other legislation”. Articles 1444, 1448 and 1449 cannot be altered to the detriment of the policyholder, the insured and the beneficiary (Article 1452).

Preventative measures may otherwise occur in the contract of insurance.

United Kingdom

In the United Kingdom, there is no statutory duty to take preventative measures.

There may be duties of prevention and mitigation in the insurance policy. There is a strong presumption at common law that policy cover is intended to cover policy holder negligence.

The common law does recognise a duty to mitigate loss, but only when the loss has occurred. It is not a high duty, but nevertheless it is a duty to respond with some degree of care. Writers have asserted that if the insured has no express duty to mitigate, one will be implied. The policy holder must “do his best to avert or minimise the loss” and “take such measures as are reasonable to extinguish the fire or to prevent it from spreading”. Others have treated the issue as one of causation, as a corollary of the principle that “losses that are reasonably avoidable are not recoverable in the law of contract”. In effect, the failure to act breaks the chain of causation.

United States

In the United States, there is generally no duty on the part of the insured, whether contractual, statutory of common law, to prevent losses before they occur.

Post loss, the insured has a duty "to mitigate covered losses, either by preventing them or minimizing their extent …"

A duty to mitigate loss may be provided for in the contract of insurance. Examples include "sue and labour clauses", which impose a duty upon the insured to act when a loss occurs to protect insured property from further damage, and typically provides that reasonably necessary expenses are to be considered incurred at the insurer's expense; neglect exclusions in home owners policies, which in broad terms provide there is no cover in the event of neglect by the home owner.

Uruguay

In Uruguay the insured is obliged not to increase the risk and to inform the insurer of circumstances that modify or increase the risk; and secondly, when the insured event is imminent or has occurred, to employ all means available to reduce or minimise the consequences of the incident and to communicate the occurrence to the insurer (the salvage obligation). The legislation in Uruguay relating to insurance is very old and is established by the Commercial Code (Articles 634-699). Most obligations concerning preventive measures are the subject not of statute but rather provisions in the contract of insurance. There are some more specific provisions concerning fire insurance.

The Commercial Code does provide in Article 668 that the insured has to use diligence to forestall or lessen the damage.

The insurance policy will normally provide that in the case of aggravation of risk the insurer reserves the right to terminate or increase the premium.

2. WAYS AND DEGREES OF CO-OPERATION BETWEEN INSURERS AND INSUREDS

2.1 INTRODUCTION

(a) Generally speaking, statutory obligations to mitigate risk were common and accompanied by obligations upon the insurer to pay the costs of the insured taking such steps, an obligation which subsisted whether or not the mitigation steps were effective. Generally, the indemnity on the loss together with the costs of mitigation could not exceed the insured sum, although in Korea, for example, the Korean Commercial Code provides that the insured should be entitled to recover the prevention and or mitigation cost even if such is beyond the insured amount;

(b) In some jurisdictions, for example in Hong Kong, there is an obligation on the insurer to pay the insured's expenses in relation to mitigation of loss, but the statutory obligation of mitigation in Hong Kong extends only to marine insurance;

(c) There is evidence of an approach whereby the costs of mitigation, in the case of partial insurance, are borne proportionately between insurer and insured – see, for example, the circumstances in Japan;

(d) The industry, broadly speaking, recognises the value to the insurer of contractual requirements for mitigation and avoidance of risk, and premiums vary accordingly;

(e) In some jurisdictions, co-operation between insurer and insured is encouraged more forcefully. In Germany, for example, section 82 of the German Insurance contract Act requires the policy holder to ensure the loss is avoided or minimised wherever possible. The policy holder must follow the instructions of the insurer, where

reasonable, and obtain instructions, circumstances permitting. In Greece, the Greek Insurance Contracts Act provides for the insured to be under a duty to follow the insurer's relevant instructions upon occurrence of risk. And in Mexico, the insured must ask for and comply with the instructions of the insurer;

(f) In the United Kingdom, by contrast, the recoverability of costs incurred in mitigation of damage in more doubtful. A contractual obligation to mitigate damage will not generally carry with it an implied obligation on the insurer to pay the costs, although there are exceptions (for example, some aspects of fire insurance).

Australia

The terms of the policy of insurance may have the effect of requiring or encouraging the insured to avoid the insured event or takes steps to mitigate loss. For example, an insuring clause in a theft of money policy may define the cover in such a way as, if the insured has left the key to the safe in the room, cover is not provided. Similarly, a loss of property policy may require the existence of a security system.

As to mitigation, a policy may require the insured to "take all reasonable care to limit loss, damage or injury and prevent further loss, damage or injury resulting from the insured event".

Austria

There are legislative provisions in Austria which permit the insured to recover from the insurer costs incurred in mitigating, or attempting to mitigate, loss.

The industry recognises also the prospect of reduced premiums in circumstances where the insured agrees to take preventative measures.

France

In France, there is no legislative requirement of co-operation, although there is a general contractual duty of co-operation and good faith. However, there is no particular duty of co-operation in the area of insurance law. Insurers encourage co-operation be contractual means: for example, a reduction in premium if fire prevention measures are taken in respect of fire insurance.

Greece

In Greece, the insured is encouraged to comply with a duty to avoid loss after the occurrence of the risk by the insurer being required to pay the insured's expenses in doing so.

Hong Kong

In Hong Kong, co-operation is assisted by the statutory right in marine policies of recovery of expenses incurred by the insured mitigating loss. Otherwise, there may be a term to that effect in other policies of insurance.

Hungary

In Hungary, the parties to the insurance contract may agree upon the allocation of expenses arising out of preventative measures taken by the policy holder, but in the case of measure taken after the occurrence of the event section 555(3) of the Civil Code provides that the insurer is liable for the payment of the expenses, even if the expenses did not result in mitigation of the damages.

Italy

In Italy, there are measures in the Civil Code and in contracts of insurance which facilitate co-operation between insured and insurer.

Under Article 132 of the Civil Code, the proponent for a policy of compulsory motor vehicle insurance may be required by the undertaking to have their vehicle inspected before the contract is concluded. Should the vehicle be satisfactorily the subject of an inspection, there is a reduction in premium. Further reductions in rates can be achieved by the proponent consenting to the installation of electronic devices in the vehicle which record the activity of the vehicle. Installation occurs at the cost of the undertaking.

Further, clauses in insurance contracts often require co-operation of the insured to reduce risk, for example, by the installation of security systems in homes the subject of theft policies; and clauses which expressly require the mitigation of damages.

A failure to comply with such conditions may result in the insurer acquiring the right to terminate the contract of insurance (see Articles 1892, 1893, 1898, 1926) or impose other sanctions, in particular, the reduction of the amount payable under the policy. For example, a failure by the policyholder to inform the insurer of an aggravation of the risk, the insurer may within a specified time terminate the contract, but if the contract is not terminated, the indemnity may be reduced proportionally (see Article 1898). Similarly, a failure by the insured to perform the obligation of rescue may, if the failure is negligent, cause the proportionate reduction of indemnity (see Article 1915).

Japan

In Japan, Article 23 of the Japanese Insurance Act provides that "expenses necessary or useful for the purpose of preventing the occurrence or aggravation of loss or damage" shall be borne by the

insurer although in the case of partial insurance there is a proportionate sharing of those expenses. Providing the incurring of the expense falls within the requirements of the article, the expenses are to be borne by the insurer regardless of whether the efforts made were successful. The parties may contract out of the Articles.

Korea

Article 680 of the Korean Commercial Code states that the insured should be entitled to recover the prevention and or mitigation cost from the insurer even if such cost is beyond the insured amount.

Mexico

In Mexico, insurance policies may include preventative and risk management mechanisms.

Portugal

In Portugal, clauses in the contract of insurance often encourage co-operation between insured and insurer.

Further, article 127 of the Insurance Contract Law compels the reimbursement by the insurer of expenses incurred by the insured in salvage. The amount provided by way of costs is deducted from the insured sum. Thus, the insured sum acts as a limit. While this solution avoids abuse, it also moderates the amount which the insured may be willing to incur by way of mitigation.

The Portuguese submission suggests there be a predetermined spending limit for salvage, which should not coincide with the limit of the sum insured.

Serbia

In Serbia, co-operation is encouraged by contractual means, including discounts on premium where preventative measures are taken, and by the reimbursement of preventative and mitigation costs incurred by the insured.

Spain

In Spain, contractual provisions may indirectly encourage co-operation by the insured. Some policies impose particular duties on the insured.

Switzerland

In Switzerland, the insurer encourages the insured mainly by lower premiums and contributions to the insured's expenses.

Turkey

In Turkey, by Article 1448/3 of the Turkish Commercial Code, the insurer is obliged to pay the expenses of the policyholder for the preventative measures. It does not matter whether the preventative measures taken are successful or not. Nevertheless, only the reasonable expenses of the policyholder will be paid. The expenses, together with the claim, shall not amount to more than the insured sum.

United Kingdom

In the United Kingdom, the cost of taking specific steps to protect property against the mere possibility of loss, however sensible, and however beneficial to both insured and insurer, is not normally

covered by insurance. Subject to contract this is so even if the precaution has been required by the insurer.

The cost of steps to avert imminent loss insured against can be seen quite differently from that of precautions against loss which is not imminent. But the position is not clear. There is more than one possible basis for recovery by the insured. An express term permitting the recovery of the cost of specified steps to avoid imminent loss will be enforced. For example, *Ace European Group v Standard Life Assurance Ltd* [2012] EWCA Civ 1713 was a case concerning professional indemnity insurance policies where the insured was entitled to recover "mitigation costs". The Court of Appeal upheld the trial judge's finding that, if the costs claimed ("remediation payments" in the form of an approximately US$200m cash injection) were expected and intended to avoid or to reduce third party claims falling within the policy, the insured would be entitled to recover in full even if such costs were also incurred for some other purpose and that the principle of apportionment had no application to liability insurance. Implication of an obligation to mitigate is not common. A special case is fire insurance. Damage done by pouring water on the property insured to prevent imminent fire damage is covered, however arguably the cover is limited to indemnity for physical damage inflicted to stop fire and does not extend to expense which, as a head of loss, is classified differently. The "fire cases" have no applicability to other forms of insurance – see the Yorkshire Water Services Ltd v Sun Alliance & London Ins plc [1997] 2 Lloyd's Rep 21 (CA).

The cost of mitigation may be allocated in the insurance policy. In general, an obligation in a policy to mitigate will not, without more, import an implied obligation for the insurer to pay the cost of doing so. However, there is authority for the proposition that where the insurer requests the steps be taken there is an implied indemnity in respect of the costs of carrying out the request.

United States

In the United States, a number of exclusions promote “good behaviour” on the part of the insured. Examples include “uninsured/underinsured subcontractor exclusions”, regulatory compliance exclusions”, “risk management guidelines exclusion” and “illegal products” exclusion.

3. TECHNIQUES THAT ARE USED OR REQUIRED BY LAW TO IMPLEMENT THE PREVENTATIVE MEASURES

3.1 INTRODUCTION

Preventative measures are implemented by statutes and by the contract of insurance. The implementation of preventative measures is inextricably tied to the sanctions imposed for a failure to carry out prevention or mitigation obligations.

(a) The framing of the contractual prevention and mitigation obligations can affect the consequences of a failure to comply. The obligations may, for example, be expressed as part of the definition of the risk cover; in exclusion clauses; as conditions of coverage when the insured event occurred; as matters going to risk aggravation; and as stipulations of forfeiture (see then submission in relation to France). By way of further example, in Hong Kong the following techniques are used in the insurance industry to implement prevention measures: declaration of risk; provision of warranties; exclusions; and conditions precedent;

(b) The proper interpretation of the insurance contract will be important. The words of "causation" may affect that which is recoverable, and there is potential for the causal nexus to be broken if the insured's breach of obligation intervenes. In some jurisdictions, the principle finds statutory recognition. In Hong Kong, for example, the Marine Insurance Act (in the absence of a contrary provision in the contract) limit the liability of the insurer to loss "proximately caused by the peril insured against", but excludes liability for loss "which is not proximately caused by a peril insured against";

(c) The form and nature of the contractual obligation to prevent or mitigate loss has particular importance in the United Kingdom;

Australia

In Australia, clauses in the insurance contract in the nature of insuring clauses, exclusions and other contractual provisions are used to implement preventative measures. Subject to the terms of the insurance contract and the operation of the *Insurance Contracts Act* 1984 (Cth), an insurer can refuse to pay all or some of a claim if the insured has breached, or failed to conform or comply with, a preventative measure required by an insuring clause, an exclusion, a warranty, a terms descriptive of the risk or a condition precedent, irrespective of whether there is a causal connection between the breach or failure on the one hand, and the occurrence of the event on the other.

Denmark

Under section 51 of the Insurance Contracts Act, in the case of a negligent contravention of an obligation to implement preventative measures prescribed in the insurance contract, the insured only has the right to insurance cover if the occurrence or extent of the insurance event was not a result of the contravention of such obligation. It is not sufficient for this consequence to occur that there have simply been a contravention of the obligation: there must have been a negligent contravention. Further, a clause which purports to reduce the liability of the insurer more than that prescribed by section 51 is void. The clause in the contract requiring preventative measures must be specific: a general requirement to take preventative measures will not be sufficient.

France

In France, contractual means are used to implement the preventative measures. These extend to the definition of the risk cover; exclusion clauses; conditions of coverage when the insured event occurs; risk aggravation; and stipulations of forfeiture.

Italy

Duties of disclosure in relation to the insured risk are very important in Italian insurance law.
Further, if the policyholder breaches obligations in the nature of prevention of damage, cover may be refused or reduced proportionally with regard to the effects of the negligent behaviour on the occurrence of the damage.

Hong Kong

In Hong Kong, as noted, with the exception of marine insurance or where expressly provided in the policy of insurance there is no general law duty to avert or mitigate loss. However, the following techniques are commonly used in the insurance industry to implement preventative measures: declaration of risk; provision of warranties; exclusions; and conditions precedent. Further, under the proximate cause doctrine at common law, an insurer is only liable to cover the loss if the proximate cause of the loss was an insured peril. In the marine insurance context, this principle is codified by section 55(1) of the Marine Insurance Act, which provides that:
"Subject to the provisions of this Ordinance, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against".

Portugal

Under Portuguese law, the insured's preventative duties should be characterised as "Obliegenheiten". In addition, one of the techniques used by the Insurance Contract Law to implement preventative measures is by establishing the initial declaration of risk, breach of which will import various sanctions for the policy holder and insured (Article 24 of the Insurance Contract Law. Based on this initial declaration of risk, the insurer may stipulate in the policy appropriate salvage measures to be adopted by the policyholder when the insured event occurs.

United Kingdom

If the nature of the obligation in an insurance contract to prevent or mitigate is an "insurance condition", in that until the steps are taken there is no insurance cover, there is an important consequence of non-fulfilment. If, however, they are warranties, cover ends even though there is no causal connection, a feature of the law which has been much criticised.

4. SANCTIONS

4.1 INTRODUCTION

(a) It was common ground that cover would not extend to loss intentionally caused by the insured. For example, in all European systems, the insurer may be exempted from the duty to pay compensation if the insured event was deliberately caused by the policyholder or insured. But the particular rules differed from jurisdiction to jurisdiction. While it is generally accepted that the insurance does not cover the loss if it was caused by an intentional act on the part of the policyholder, there was less consensus on the extent, if at all, careless conduct may affect a claim. Further, the consequences of careless behaviour varied: some jurisdictions providing for total forfeiture, others providing for a reduction in the claim.

(b) Until recently, in Belgium, grossly negligent conduct was excluded from the scope of insurance cover (Belgian Insurance Contract Act 1874). However, the Belgian Insurance Act of 1992 reversed that state of affairs, such that "*culpa lata*" and "*faute grave*" is insurable;

(c) The jurisdictions of Austria, Greece, Italy and Poland equate gross negligence with intentional behaviour. In those circumstances the insurer may refuse any payment (s61 Austrian ICA, art 7 para 5 Greek ICA (for indemnity insurance) art 1900 para 1 Italian CC and art 827 para 1 Polish CC). In Germany and Switzerland, on the other hand, gross negligence on the part of the insured only gives the insurer the right to reduce compensation. In other legislation the policyholder is entitled to full indemnity even if he caused the loss through grossly negligent conduct. For the United Kingdom, if a policy contains a term requiring the insured to take reasonable care,

indemnity will be denied in the event of recklessness *Fraser v Furman (Productions) Ltd* [1967] 1 WLR 898 (CA); *Sofi v Prudential Assurance* [1993] 2 Lloyd's Rep 559 (CA);

(d) In some jurisdictions, for example in Hungary, the Civil Code provides that the insurer shall be exempted from liability if the damages were illegally caused due to the grossly negligent conduct of the insured or policy holder;

(e) The legal consequences arising from the failure to observe the duty to mitigate loss differ to some extent. In some jurisdictions, for example, in Austria, Germany, and Poland the failure to mitigate loss is treated in a manner similar to the causation of the insured event: the insurer may deny (or reduce) compensation if the insured or the policyholder acted deliberately or through gross negligence. Generally, where the exists an obligation to avoid or minimise loss, a breach of that obligation by the insured will permit the reduction in the amount of indemnity to that which would have been payable if the obligation had been complied with – see, for example, Mexico and Serbia. The UK is an exception in that it lacks a statutory requirement to mitigate loss;

(f) A slightly different mechanism for adjustment appears to exist in, for example, Turkey. There, if a policyholder fails to take preventative measures and this results in detriment to the insurer, the indemnity can be reduced in a manner proportionate to the degree of negligence by the insured;

(g) In some jurisdictions, for example Hong Kong and Japan, the obligation for the insured to avert or minimise risk may be relied upon, if breached, in an action for damages against the insured;

(h) In the United Kingdom, a failure of the insured to fulfil specific requirements in the contract of insurance may relieve the insurer from

liability for the insured event, depending on the nature of the breach. This approach tends to focus on the nature of the obligation, rather than on the issue of whether the breach of obligation caused or contributed to the loss;

(i) In Australia, there is legislation which affects and may often ameliorate provisions in the contract of insurance which may provide for the insured to take steps to avoid or mitigate loss. These provisions appear to be relatively unique, and are set out in some detail here, for discussion purposes.

Australia

The *Insurance Contracts Act* 1984 (Cth) precludes an insurer from refusing to pay all or some of a claim because of an insured's:

a) pre-contractual non-disclosure or misrepresentation: Pt IV – Disclosures and misrepresentations;
b) post-contractual breach of, or non-performance or non-compliance with, a contractual term, or failure to exercise a right, choice or liberty available under an insurance contract: Pt II – The duty of utmost good faith, ss 13 and 14; Pt V – The contract, s 54.

An insurance contract to which the Act applies is based on utmost good faith, and there is an implied term in the contract that requires each party to act towards the other with the utmost good faith in respect of any matter arising under or in relation to the contract: Part II s 13.

The Act does not define 'utmost good faith', so the common law meaning applies. Broadly speaking, this requires that the insurer and insured deal with each other openly, honestly and fairly in their performance of the contract, with due regard for their own interests and for the legitimate interests of the other: CGU Insurance Ltd v AMP Financial Planning Pty Ltd (2007) 235 CLR 1 at [15]. An insurer cannot rely on a preventive provision if this would be to fail to act with the utmost good

faith: s 14. Section 14 is in the following terms:

14 Parties not to rely on provisions except in the utmost good faith

(1) If reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision.

(2) Subsection (1) does not limit the operation of section 13.

(3) In deciding whether reliance by an insurer on a provision of the contract of insurance would be to fail to act with the utmost good faith, the court shall have regard to any notification of the provision that was given to the insured, whether a notification of a kind mentioned in section 37 or otherwise.

Section 54 could apply to terms in the contract that impose 'preventive measures', because it limits an insurer's ability to refuse to pay all or some of a claim because of a post-contractual "act" by an insured or "some other person".

It appears in the ICA Part V (The contract) Division 3 (Remedies) and is in the following terms:

54 Insurer may not refuse to pay claims in certain circumstances

(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

(2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

(3) Where the insured proves that no part of the loss that gave rise to the claim was caused by the act, the insurer may not refuse to pay the claim by reason only of the act.

(4) Where the insured proves that some part of the loss that gave rise to the claim was not caused by the act, the insurer may not refuse to pay the claim, so far as it concerns that part of the loss, by reason only of the act.

(5) Where:

(a) the act was necessary to protect the safety of a person or to preserve property; or

(b) it was not reasonably possible for the insured or other person not to do the act;

the insurer may not refuse to pay the claim by reason only of the act.

(6) A reference in this section to an act includes a reference to:

(a) an omission; and

(b) an act or omission that has the effect of altering the state or condition of the subject matter of the contract or of allowing the state or condition of that subject matter to alter.

Section 54 divides post-contractual acts or omissions into those that are:

(a) potentially loss-causing, in which case the insurer can refuse to pay the claim, except to the extent that the insured proves the relevant act or omission did not cause or contribute to the loss (s 54(2));

(b) not potentially loss-causing, in which case the insurer cannot refuse to pay the claim; it can only reduce its liability to pay the claim by the extent to which it has been prejudiced by the act or omission (s 54(1)).

The Australian Response makes the following points about s54:

- s54 does not qualify the act or omission by reference to the word "*breach*" or to the nature or characteristics of the relevant contractual term. Accordingly, it will be brought into play by acts or omissions relating to all manner of contractual terms, including exclusions, warranties, terms descriptive of risk (suspensive conditions), conditions precedent and subsequent and conditions that are not conditions precedent or subsequent.
- the word 'act' in s 54(1), (2), (3) and (4) includes an 'omission': s 54(6)(a)
- a contractual term that purports to limit or exclude the

operation of s 54 to the prejudice of a person other than the insurer, is void: s 52.

The Australian Response summarises the process of applying s54 as follows:

Question 1

But for s 54, can the insurer refuse to pay a claim? If the answer is 'no', s 54 has no work to do.

Question 2

But for s 54, can the insurer refuse to pay a claim because of a post-contractual act or omission by the insured or "*some other person*"? If the answer is 'no', s 54 has no work to do.

Question 3

If the answer is 'yes' to the first two questions, does the act or omission fall within the insurer's 'core' promise? If it does, s 54 has no work to do.

Question 4

If s 54 is engaged, does the act or omission fall within s 54(1) or within s 54(2)? If the act or omission falls within:

a) s54(2), the insurer can refuse to pay the claim, except to the extent the insured proves the act or omission did not cause or contribute to the loss;
b) s54(1), the insurer cannot refuse to pay the claim, but can reduce it by the extent to which the act or omission actually financially prejudiced it.

Belgium

In Belgium, measures of prevention are mostly specific requirements of the policy of insurance. The clearest and most straight forward way is to formulate the insured's obligations as duties under the contract.

However, it may also be achieved by incorporating these requirements into the description of the risk. Thus, instead of stating that the insured has the duty under the contract to take a further specified measure of prevention (like installing or maintaining fire resisting doors or sprinklers), under the threat of losing all rights of cover in the event of non-performance, the insurer can also state that the cover under the contract only extends to those installations or rooms that are at the time of the conclusion of the contract and throughout the contract period equipped with such safety devices. Finally, the insured's obligation could also be expressed in a pre-contractual declaration of the applicant. The sanction of a violation of the duty of disclosure is a proportional one, that is, a reduction of the indemnification or to the degree of fault of the applicant and the presumed attitude of the insurer. Only an intentional deception by the insured will nullify the insurance.

France

In France, sanctions concerning the failure to take preventative measures are contractual in nature. Possible sanctions include non-commencement of cover in cases of non-observance of the preventative measure; discharge of the insurer's liability when the insured event occurs; and reduction of the insurance indemnity. Termination of the contract is not an option.

The question of whether there is a requirement of a causal relation between the breach of duty by the insured and the occurrence of the event depends on the terms of the insurance contract. There is some uncertainty in relation to discharge of the insurer's liability. It used to be thought that if the occurrence of the risk falls outside scope of the cover, or falls within an exclusion clause, it is unnecessary to prove a causal link between the non-compliance with a preventative measure

duty and the loss. Two recent decisions of the French Supreme Court, however, decided that a causal link was necessary.

In France, in respect of a reduction of liability, rather than absence of cover, there must be shown to be a causal link between the contravention and the occurrence of the risk. However, it is not necessary to prove an intentional or negligent breach: the simple non-observance, with or without intention to cause the loss or negligence, reduces liability providing the prejudice exists.

Hong Kong

In Hong Kong, the obligation in marine insurance for the insured to avert or minimise risk may be relied upon, if breached, by the insurer, in an action for damages against the insured (Noble Resources Ltd v Greenwood (The Vasso) [1993] 2Lloyd's Rep 309.

Hungary

In Hungary, section 556 of the Civil Code provides that the insurer shall be exempted from providing liability if the insurer can prove that the damages were illegally caused due to the intentional or grossly negligent conduct of the insured or policy holder.
The contract of insurance may contain provisions which deal with the issue.

Italy

In Italy, a breach of the obligation of disclosure prior to the issue of the policy the insurer may avoid the policy if the non-disclosure was malicious or seriously negligent. Other non-disclosures may result in a proportionate reduction of the scope of cover, depending on the effects of the insured's negligent behaviour. A serious but non-negligent breach of the duty of disclosure may permit the insurer to

avoid the policy where it is sufficiently material to the policy and terms of cover.

A failure to inform the insurer of a material increase in the risk after the contract has been entered into may, if of a nature as would have meant the insurer would not have accepted the risk in the first place, may permit the insurer to avoid the policy. A failure of less serious nature will permit a reduction in the cover of a nature proportionate to the difference in the premium that would have been charged taking into account the increased risk.

A failure to mitigate damage may permit the insurer to avoid the policy if the failure is malicious; otherwise, the cover may be reduced proportionately to the further damage caused by the failure to take steps to avoid the damage.

Japan

In Japan the Insurance Act does not provide for sanctions for non-compliance with the obligations under Article 13. However, a breach of the duty will give rise to a right of action in damages for the insurer, which effectively means the losses may be offset against the indemnity.

Mexico

In Mexico, where the insured omits to give notice where required of an aggravation of the risk, the insurer has the right to rescind the insurance contract.

If the insured does not comply with its obligation of preventing or reducing the damage, the insurer may reduce the compensation to the amount that would have been payable if the obligation had been complied with.

Serbia

In Serbia, if the insured fails to comply with the obligation to prevent the insured event occurring, or loss flowing therefrom, the obligation of the insurer is reduced by the amount to which the contravention contributed to the damage. (Art.926 of the Law of Obligations).

Portugal

The failure to perform the salvage burden can affect more or less broadly the cover by the insurer, taking into consideration the conduct of the defaulting party, the damage resulting from the failure and the causal relation between the conduct of the defaulting subject and the damage caused. The insurance contract may include clauses relating to the consequence of a failure to discharge the burden. See Article 101.

Turkey

In Turkey, a breach of a statutory duty in the Turkish Commercial Code, so far as it relates to insurance, does not give tho the insurer the right to sue. The legal consequence of a breach of statutory obligation is the reduction of the insurance indemnity depending on the degree of negligence. According to Article 1448/2, if a policyholder fails to take preventative measures and if this results in detriment to the insurer, the indemnity can be reduced proportionally taking into consideration the degree of negligence of the policyholder.

A breach by the insured of a relevant contractual obligation will not give a right to then insurer to terminate the contract if the breach is the contract is not effective on materialisation of the risk or on the extent of the insurer's performance (Article 1449/3).

In Turkey, an aggravation of the risk during the period of cover may permit the insurer to terminate the policy, having first given the insured an opportunity to pay an increased premium.
If a policy holder fails to take preventative measures, and this results in detriment to the insurer, Article 1448/2 provides that the indemnity can be reduced proportionally taking into account the degree of negligence of the policyholder.

United Kingdom

The failure of the insured to fulfil specific requirements may relieve the insurer from liability for the insured event. In the case of a breach of warranty, breach of warranty automatically terminates the contract from the date of the breach unless waived. In contrast, a breach of condition sometimes gives right to a right to terminate the contract if the breach is repudiatory and accepted as such, but much more usually only to a remedy of damages.

Uruguay

The sanctions available generally depend upon the provisions in the policy. The statute law provides for sanctions only in respect of fire insurance (Article 681 Commercial Code), and those sanctions may include termination of the policy or refusal to indemnify.

5. BURDEN OF PROOF

5.1 INTRODUCTION

Burden of proof issues have potential to arise in the following contexts:

(a) Whether the loss falls within the scope of cover;
(b) whether the insured breached a preventative obligation;
(c) the nature of the breach of obligation – intentional, grossly negligent, negligent, innocent;
(d) whether the breach was causative of loss;
(e) whether the claim falls within an exclusion clause;
(f) whether the loss would have occurred in any event;
(g) whether there was an aggravation of the risk;
(h) the nature of any failure to report an aggravation of risk to the insurer.

Austria

In Austria, the general rule for the burden of proof regarding alleged breaches of obligation by the insured is that the insurer has to prove the violation and, having done so, it falls to the insured the prove that the violation was not done culpably or that it did not contribute to the loss.

Belgium

A claimant will generally bear the onus of proving that the loss falls within the cover. That said, it is generally accepted that conditions for forfeiture of rights must be proven by the insurer. The insurer bears the onus of proof of intentional fault in the sense of proving that intentional fault caused the insured event, and the causal connection between “faute grave” and the loss. Although there has been some

uncertainty, the general rule now is that the insurer bears the onus of proving that the claim, although falling inside the "normal" extent of the cover, is nevertheless excluded by virtue of an exclusion clause.

Denmark

In Denmark the burden of proof that a preventative action clause has been negligently contravened by the insured lies with the insurer. If the insurer is successful in establishing this, the event will only be covered by the insurance if the insured can prove that the insured event would have occurred even if the preventative action had been taken.

France

The burden of proof depends on the contractual term. If the clause in question is regarded as a definition of the risk, or an obligation or a condition of the insurance cover, the burden of proof shall lie with the insured. However, if the clause is an exclusion clause, or a forfeiture clause, the burden lies on the insurer to prove that the event constitutes an excluded case. Finally, in respect of aggravation of the risk, the insured is required to prove that the necessary declarations were made or should be considered as made.

Hungary

The onus is upon the insurer to prove that the insured failed to act in a manner generally accepted in the given situation.

Japan

In Japan, the insurer bear the onus of asserting and proving that there was a breach of the loss or prevention requirement.

Mexico

As a general rule in Mexico, the party that makes a statement has the obligation to prove it and the party who denies does not have the obligation to prove his denial, unless his denial involves an affirmative declaration of a fact or when the other party's favourable legal presumption is refused.

Poland

In Poland, the burden of proof of proving a fact lies with the person who asserts legal consequences arising from this fact (Art.4).

Portugal

According to Article 127(1), the policyholder, the insured and/or the insurance beneficiary who fulfilled the salvage burden are entitled to the costs of doing so. Consequently, thy bear the onus of proof that the salvage operation was reasonable and proportionate or resulting from instructions of the insurer. This is consistent with article 342(1) of the Portuguese Civil Code (the general rule on the burden of proof).

If the insurer claims the salvage operation was a failure, the insurer bears the onus of proving that to be so.

Turkey

The burden of proof is on the insurer to prove the breach of duty by the policyholder. Once the insurer proves breach by the insured, then the burden of proof shifts to the insured to prove that there was no negligence on its part in not taking preventative measures.

United Kingdom

The insured may have to prove that he has fulfilled his duty where the outcome depends on the interpretation of the contract. Also the insurer may have to prove breach by the insured where the issue is one of contract interpretation; proof and its burden are themselves matters for interpretation of the contract. In other cases the burden of proof is usually on the insurer.

United States

The insured generally bears the burden to prove that his mitigation expenses are the result of covered loss and incurred for the prevention of further covered loss. However, the insurer generally bears the burden of demonstrating that the insured failed to perform its obligations to mitigate the loss in the first place.