

AIDA XIV World Congress
Rome 29 September - 2 October 2014

PREVENTIVE MEASURES¹
Belgian report²

Prof. Dr. em. Herman Cousy
Prof. Dr. Caroline Van Schoubroeck
KU Leuven University

I. By way of introduction

1. Insurers are very much worried about the so-called “moral risk” or “moral hazard”, i.e. the risk or danger that a person who has obtained insurance cover, would for that very reason feel induced to behave less carefully than what he/she would do in the absence of insurance cover, because he/she knows that the potential costs of taking the risk will be borne by the insurer. The risk is a moral one in the sense that the risk concerns the standard of care of the insured and the danger that this standard might be negatively affected by the insured’s awareness of being protected “anyway”.

The reason why “moral risk” causes so much worry to insurers is because the substandard degree of care of the insured will disturb and negatively affect the insurer’s assessment of the insured risk. While evaluating the risk, and calculating the premium tariffs, insurers do take into account that the insured will behave with a certain degree of care, which is explicitly or implicitly agreed upon by the contracting parties, and which in normal circumstances, will correspond to the degree of care that a ‘bonus pater familias’ would live up to under the circumstances and in the absence of insurance cover. However, when the insured behaves below such standard, the insurer’s risk

¹ As stated in the Questionnaire, the term preventive measures has to be interpreted as “*Measures that the insured is obliged to take, **in order to avoid the occurrence** of the insured event or to **mitigate loss** should the insured event occur*”.

² Finalized on 28 July 2013.

assessment will prove to be wrong and consequently the equilibrium between premium income and the loss actually incurred will inevitably be disturbed.

Insurance law and insurance practice have developed several methods or techniques to fight moral hazard. One usually distinguishes between two sorts of techniques: the direct ones and the indirect ones.

The direct way of fighting the danger of substandard behavior by the insured is a simple one. It consists in leaving a part of the risk directly on the shoulders of the insured person, so as to induce him to apply the proper degree of care, i.e. the care that he would be spending if he were not insured. The way to achieve this is by providing deductibles (part of the loss is suffered by the insured), or caps or ceilings limiting the maximum amount of loss to be borne by the insurer. Another technique, which is used when the law regarding liability insurance provides for the possibility of a “direct action” of the victim against the insurer and a regime of non-opposability of defenses against such direct action, consists in giving the insurer a right of recourse against his own insured for the amount of money that the insurer is legally obliged to pay to the victim.

The indirect techniques for fighting moral hazard consist in efforts to make sure that the premium effectively corresponds to the real risk (and so to the actual behavior of the insured). To this end modern insurance makes use of segmentation techniques, consisting in splitting up the insured population in different “risk categories” and making sure that the corresponding premium tariff corresponds to the expected average loss profile of the insured persons in that risk category. Segmentation can be done on the basis of an *ex ante* risk classification, or on the basis of *ex post* rating (e.g. via personalization *a posteriori* of the premium, as is done in “bonus-malus systems”).

2. If the existence of insurance should not lead the insured to behave with *less than* normal care, insurance does on the other hand not require the insured to behave with *more than* normal care. Indeed, the standard of care that is expected from the insured, which as above mentioned corresponds to the degree of care that a ‘bonus pater familias’ would live up to under the

circumstances and in the absence of insurance cover. The degree of care that is thus expected, takes reality into account, and in reality insured persons do behave once in a while in a way that can be considered as 'substandard'. In other words, as a general rule, insurance does allow the occasional negligent behavior. The house fire that is caused by a negligent handling of the candles on the Christmas table (or tree) will normally, i.e. in the absence of clauses to the contrary in the policy, be covered.

However, there are limits. The traditional and omnipresent utter limit to the cover of faulty behavior is that intentional fault, i.e. intentional causation of the insured event, is always excluded from coverage. Another traditional limit, in the sense of a kind of faulty behavior that has been traditionally been excluded from cover, is the "heavy fault", also called "gross negligence", "culpa lata", "faute lourde" ("zware fout") or "faute grave" ("grove fout"). Generally speaking, this is the sort of negligent fault that is so gross or heavy that it can be assimilated to an intentional fault. In this respect, it should be noticed that in Belgium a remarkable legislative development has taken place, leading to the insurability of "culpa lata", and even to the rule that in principle such gross negligence is covered.

3. Indeed, applying the old rule "culpa lata dolo aequiparatur", the Belgian Insurance Contract Act of 11 June 1874 (hereafter cited as "ICA 1874")³ excluded the "faute grave" from cover whenever it had caused the insured event⁴, in the same way as it did with intentional fault (Article 16 of the ICA 1874). This means that the right to insurance cover has traditionally been

³ This Insurance Contract Act of 11 June 1874, *Belgian State Gazette* 14 June 1874 (ICA 1874) was not abrogated by the Insurance Contract Act of 1992, but the old Act is currently only applicable to the branches of maritime, fluvial, air and transport insurance. A major reform of the law on these branches is under construction.

⁴ On the rather peculiar history of the "faute grave" or "faute lourde" under Belgian law, about the concept itself as defined by case law (objective and subjective criteria), and the question whether this rule as provided in Article 16 of the Insurance Act of 11 June 1874 is to be considered a rule of "ordre public", see e.g. M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 1975, p. 83-86, nr. 19; S. FREDEROCQ, H. COUSY and J. ROGGE, "Overzicht van rechtspraak (1969-1978) Verzekeringen", *TPR* 1981, p. 398-401, nr. 27-30; J.L. FAGNART, "Examen de jurisprudence (1981 à 1990) Les assurances terrestres", *RCJB* 1991, p. 701-705, nr.13-14.

considered to be incompatible with a behavior that is more than just ordinarily negligent.

However, the Insurance Act of 25 June 1992 (hereafter cited as “ICA 1992”)⁵ took a fundamentally different approach. Under this Act (covering so-called land insurance contracts) a revolutionary legislative change took place. Whereas under the old regime an insured event caused by a “faute grave” of the insured was excluded from cover by a compulsory rule (Article 16 of the ICA 1874), the new rule prescribes that the loss that is caused by the “culpa lata” or “faute grave” is insurable and as a rule even covered, with the sole exception of those cases of “faute grave” that are explicitly and in a limitative way defined in the contract as being excluded from coverage (Article 8, 2 of the ICA 1992).

It should be obvious that here the legislator has taken an almost hundred degrees change: whereas “faute grave” used to be left without cover by virtue of an absolutely mandatory legal provision, the new rule in this Article 8, 2 states that such fault is automatically covered and that only acts or conducts specifically and in a limitative way described in the policy as “culpa lata” are validly excluded from cover. The courts have interpreted this rule in a very strict sense by requiring a very detailed, specific and restrictive description of those acts or conducts that are not covered. For example, clauses defining gross negligence as “reckless acts or behavior”, “failure to comply to general safety requirement”, “not performing according to the laws, regulations and customs of the profession”, or clauses providing the word “inter alia” do not satisfy the legislative requirement of precision and are therefore null and void.⁶

⁵ Insurance Contract Act of 25 June 1992 on land insurance, *Belgian State Gazette* 20 August 1992 (ICA 1992).

⁶ See e.g. Cass. 29 June 2009, *Arr. Cass.* 2009, 1849; Antwerp 30 November 2005, *Bull. Ass.* 2007, 179, obs. P. FONTAINE; Ghent 31 May 2007, *Bull. Ass.* 2008, 24; Antwerp 5 December 2007, *Bull. Ass.* 2008, 240; J.L. FAGNART and C. PARIS, “Actualités législatives et jurisprudentielles dans les assurances en général”, in C. PARIS and B. DUBUISSON (ed.), *Actualités en droit des assurances*, Liège, Anthemis, 2008, 49-50, 62-65; B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, in *ibidem*, 180; C. VAN SCHOUBROECK, G. JOCQUE, A. DE GRAEVE, M. DE GRAEVE and H. COUSY,

In contrast, the ICA 1992 still provides in a compulsory rule considered to be of “ordre public”, that the insurer cannot give coverage to the person who intentionally causes the insured event or commits an intentional fault (Article 8, 1 of the ICA 1992). The “intentional fault” is presently described as the willful misconduct with the intent to cause damage and not just the intent of causing a risk of creating damage.⁷

This Article 8, 1 makes clear that the intentional causing of the insured event is a legal ground for the insurer to refuse cover to the individual⁸ who intentionally caused the insured event.⁹ The ratio legis for the exclusion of intentional behavior is not, as is sometimes alleged, that the intentionality of the act takes away or is incompatible with the so-called aleatory character of the insurance contract¹⁰. This argument is not convincing because damage caused by an intentional fault is not as such uninsurable, which is evidenced by e.g. the fact that vicarious liability in case of intentional fault remains insured. The reason should rather be sought in the fact that insurance cover for intentional causation of the insured event is considered to be contrary to a rule of public order and morality. It is intolerable that the actor of such willful misconduct would enrich himself through insurance and pass the financial consequences on to an insurer.¹¹ Founding its justification in general morality,

“Overzicht van rechtspraak. Wet op de landverzekeringsovereenkomst (1992-2003)”, *TPR* 2003, 1847-1849.

⁷ Cass. 24 April 2009, *TBH-RDC* 2010, 56, obs. H. COUSY; *Bull. Ass.* 2010, 38, obs. J.L. FAGNART; Cass. 26 October 2011, *NjW* 2012, 214, obs. G. JOCQUE.

⁸ One will notice that under Belgian law, and by virtue of a clear phrasing of Article 8, 1 of the ICA 1992, only the person committing the intentional fault is not covered, whilst the person who is vicariously liable for the actor remains covered, see e.g. Cass. 25 March 2003, *RGAR* 2004, 13.803, concl. Adv.-Gen. H. DE SWAEF; Cass. 4 June 2012, *Pas.* 2012, 1271.

⁹ Recently the *Cour de cassation* confirmed the point of view of the majority of the doctrine that intentionally causing the insured event should be qualified as a “forfeiture” (“déchéance” – “verval van recht”) in the sense of Article 87 of the ICA 1992, Cass. 14 May 2012, *Pas.* 2012, 1081.

¹⁰ J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, *Traité pratique de droit commercial*, Tome 3, Waterloo, Kluwer, 2011, p. 182, nr. 324, referring to P. COLLE and L. SCHUERMANS.

¹¹ M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 270, nr. 368, and footnote nr. 964; C. VAN SCHOUBROECK, “Over opzettelijk veroorzaakte schadegevallen en verzekering”, *TBH-RDC* 2005, 827; B. DUBUISSON, “La faute intentionnelle du mineur dans les assurances R.C. familiale. Commentaire d’un arrêt de la cour d’appel de Liège du 2 février 2001”, *J. dr. jeun.* 2002, 23.

the non-cover of the intentional fault, although having a preventive effect, cannot really be considered a specifically preventive measure.

4. In the context of the topic of preventive measures in insurance, another issue should also briefly be touched upon, that is to say the rule concerning the consequences of aggravation of risk. Aggravation of risk implies that in the course of the insurance contract new circumstances or modified circumstances known to the policy holder come up, which are likely to achieve a significant and durable increase in the risk that the insured event would materialize in such a way that, if the insurer had known these circumstances at the time of conclusion of the contract, he would only have agreed to subscribe on other conditions (Article 26, §1 of the ICA 1992).

The circumstance or the situation that leads to an aggravation of risk, can be attributable to the behavior of the insured, e.g. the change of profession in accident insurance, or the replacement by the insured of a tile roof by a straw roof in fire insurance, but can also be caused by an event external to the insured and independent from his will, e.g. a change of the climate, or a modification of the law.

Under Belgian law, strictly speaking, not all aggravations of risk have an impact on the insurance contract, nor does the law provide for an automatic termination of the contract due to the aggravation of risk. In all insurance branches other than life and health, the law imposes upon the insured the obligation to give notice of the aggravation of risk to the insurer. The insurer has then, according to the degree of fault of the insured, the nature of the

In our view, this approach better allows insurance to play a social role, since it justifies the current practice on the Belgian market to cover intentional faults caused by minors up to a certain age. For an elaborated examination of this issue see the consultation papers submitted by the “Commission des assurances” (“Commissie voor verzekeringen”) (official advisory body to the competent minister, i.e. the minister of economic affairs), *Avis sur les propositions de loi relatives à l’assurance de la responsabilité civile extracontractuelle des mineurs*, DOC C/2011/3, Brussels 10 Novembre 2011, 9; *ibidem*, *Avis sur la proposition de loi modifiant diverses dispositions en vue de couvrir, en matière de responsabilité civile familiale, les fautes intentionnelles des mineurs âgés de moins de 16 ans*, Doc C/2006/16, Brussels, 19 February 2007, 4; *ibidem*, *Avis concernant la couverture de la faute intentionnelle des mineurs au départ de la police responsabilité civile relative à la vie privée*, Doc C/2000/18, Brussels 30 June 2003, 19, www.fsma.be.

aggravation of risk and the risk selection and tariff policy of the insurer, certain legal options, such as termination of the contract or proposing a modification of the contract conditions (Article 26, §§ 1-3 of the ICA 1992). These rules on aggravation of risk tend to discourage the insured from aggravating the risk. Here again, it should be said that technically speaking these discouraging measures are not “preventive measures”, in the sense that they do not aim, at least not directly, at preventing the occurrence of the insured event.

II. Questionnaire

1. The concept and the different sorts of measures of prevention

“General concept: a provision in a law, or a clause in the insurance contract, requiring the policyholder or the insured, before the insured event occurs, to perform or not to perform certain acts to avert or prevent the occurrence of the insured event, to avoid aggravation or extension of the risk or to mitigate loss should the insured event occur.”

(a) Please, give examples, thereby distinguishing:

- Between insurance branches (e-g. life and non-life / property and liability)
- According to the nature and timing of the measures that must be taken (immediately, constantly, successively)

(b) Statutory duty, common law or contractual duty. Give examples, thereby distinguishing between:

- Legislative rules or common law obligations that require an insured to take such preventive measures;
- Contractual provisions (prescribed by the insurer, or by a professional entity)”

1.1. Measures to avert or prevent the occurrence of the insured event (preventive measures)

5. Belgian insurance law does not contain a general provision requiring the insured, before the insured event occurs, to perform or not to perform certain acts to avert or prevent the occurrence of the insured event. Already under the old ICA 1874, its Article 17 was generally interpreted to apply only to measures to prevent and to mitigate the loss after the occurrence of the insured event, and has never been understood as imposing on the insured a duty to take measures to prevent the insured event.¹² Likewise, Article 20 of the ICA 1992 confirms this approach and clearly limits the insured’s duty (to

¹² M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 1975, p. 81, nr. 18; M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 217, nr. 303; p. 218, nr. 305; J. RUTSAERT, “Le débat sur l’article 17 de la loi du 11 juillet 1874. L’obligation pour l’assuré de prévenir le dommage”, *Bull. Ass.* 1984, 44.

take reasonable measures of prevention and mitigation) to “the consequences of the insured event”. Belgian law does not impose upon the insured a general obligation to prevent the insured event from happening.¹³

However, preventive measures can be imposed upon the insured by specific statutes or regulations, e.g. in product liability and safety, traffic or workers accidents insurance.¹⁴ A well-known example exists under Belgian law in the branch of motor vehicle liability insurance, as provided for in the so-called “model policy” on motor vehicle liability insurance, which is laid down in the Royal Decree of 14 December 1992.¹⁵ This model policy prohibits for instance driving under the influence of alcohol or other comparable substances, the participation in unorganized speed - or ability competitions, and imposes the carrying out of technical car control obligations (Article 25, 3° of the Annex to the Royal Decree). It is interesting to note that these obligations are stated as legal grounds for recourse actions by the liability insurer against his own policy holder/insured. Since the prescriptions of the Royal Decree are meant to offer a minimum protection of the insured, susceptible of being improved by contractual clauses in the policy (Article 1 of the Royal Decree), the insurer is allowed to deviate from these provisions by not providing for (one of) these recourse rights. In practice however Belgian insurers do not make use of this legal possibility.¹⁶

6. The preceding introductory remarks have made clear that, as a rule, the existence of insurance does not limit the freedom of action of the insured. And that is indeed part of the “beauty” of the system. But in spite of this, the insurer is justified to require his insured to take certain specific measures to prevent the occurrence of the insured event.

¹³ M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 219, nr. 306.

¹⁴ See e.g. S. VAN CAMP, “Productveiligheid en product recall”, *TBH-RDC* 2010, 462-466; G. JOCQUE, “Zijn de kosten voor de opruiming van een verloren lading reddingskosten”, obs. Cass. 20 April 2007, *TBH-RDC* 2007, 809.

¹⁵ Royal Decree of 14 December 1992, *Belgian State Gazette* 3 February 1993.

¹⁶ See *infra* nr. 23 on the question whether the rule of Article 11 of the ICA 1992 applies in case the insurer exercises a recourse action against his insured.

The form and phrasing of the policy conditions articulating these preventive measures can be quite different.¹⁷ Overall three main methods are applied: clauses defining the insured risk, exclusion clauses and clauses imposing an obligation to take a specific measure. We will expand on these different possibilities further on (see *infra*, nr. 15).

In life insurance contracts, preventive requirements can be imposed that relate to the occupation or behavior of the insured (in the sense of the person at risk), e.g. the prohibition to carry out life threatening dangerous professions or occupations, or requirements that relate to the life style of the person at risk.¹⁸

In non-life insurance clauses imposing such preventive measures are much more frequent. For instance in theft policies, where the installation and maintaining of security-devices (ranging from locks or shutters, to safes or activated alarm systems) or regular occupation of the building will be imposed. Examples in industrial fire insurance are the installation of fire resistant walls or doors, sprinklers, fire alarm devices, in insurance for water damage the obligation to drain off water from the pipes when the building is not heated in winter, in motor vehicle liability insurance the timely replacement of tires, or in accident insurance the obligation to wear a safety helmet or to equip machines with a safety valve.¹⁹

The overall opinion is that the insurer has no obligation to monitor compliance with the imposed measures.²⁰ Nevertheless, some case law and doctrine have defended the idea that the insurer has the obligation, based on good faith, to inform and warn his insured of the consequences of non-compliance

¹⁷ M. FONTAINE, *Droit des Assurances*, Brussels, Larcier, 2010, p. 260-264, nr. 360-362.

¹⁸ Regarding contractual exclusions, see e.g. C. DEVOET, *Les assurances de personnes*, Limal, Anthemis, 2011, p. 180, nr. 490.

¹⁹ See e.g. P. COLLE, *Algemene beginselen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2011, 81-82; J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, Tome 3, Traité pratique de droit commercial, Waterloo, Kluwer, 2011, p. 330-331, nr. 665-667; B. DUBUISSON, "Actualités législatives et jurisprudentielles dans les assurances de choses et de frais", *o.c.*, 150-179.

²⁰ H. DE RODE, "Assurance incendie "risques spéciaux", in C. VERDURE (ed.), *L'assurance incendie*, Liège, Anthemis, 2011, 93.

with the contractually defined preventive measures.²¹ Some courts also decided that the duty of loyalty and good faith obliges the insurer to discuss with the policy holder whether the required measures can be met.²²

7. It is not clear whether, under Belgian law, in the absence of a specific statute or regulation or clause in the insurance contract, the insured is obliged to take certain specific preventive measures. In general, legal doctrine affirms that in certain cases, and also in the absence of any clause or requirement to that effect in the contract, the principle of good faith requires the insured to take certain measures to prevent the insured event from occurring, e.g. in cases where the occurrence of the event is “imminent” (Articles 1134 and 1135 of the Civil Code).²³

As will be discussed further on, if the insured has taken such preventive measures, the insured has to bear the costs himself, even in case the measures are imposed by provisions in the insurance contract. There is however one important exception to this rule: the insured is entitled to recover in principle the full cost of such preventive measures, if at the moment the measures were taken, the danger of the occurrence of the insured event was imminent and provided that the measures taken were urgent and reasonable (see about this rule in Article 52 of the ICA 1992, *infra* nr. 14).

1.2. Measures to avoid aggravation or extension of the risk or to mitigate loss after occurrence of the insured event (mitigation measures)

²¹ B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, *o.c.*, 177-178, 180.

²² Liège 22 June 2005, *RGAR* 2007, 14.290 (regarding a particular alarm device).

²³ J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, *Traité pratique de droit commercial*, Tome 3, Waterloo, Kluwer, 2011, p. 204, nr. 369; M. FONTAINE, *Droit des Assurances*, Brussels, Larcier, 2010, p. 219, nr. 307; H. COUSY, “De rol van de goed trouw in het verzekeringscontract”, in *Liber amicorum Jan Ronse*, Brussels, Story Scientia, 1986, 11-29; P. COLLE and P. VAN LERSBERGHE, “Het verzekeringsrechtelijk kader van de millennium-problematiek”, in X., *Millennium en verzekeringen*, *Bull. Ass.* 1999, Dossier 5, 44, 45; J.L. FAGNART en J. ROGGE, “Les assurances de responsabilité dans la loi du 25 juin 1992”, X., *De Wet van 25 juni 1992 op de landverzekeringsovereenkomst: toepassing in de praktijk*, *Bull. Ass.* 1993, Dossier 1, 115; G. VERNIMMEN, “Obligations de prévention et de sauvetage et prise en charge des frais par l’assurance (article 17 de la loi du 11 juin 1874)”, *RGAR* 1977, 9.743, 7.

8. Belgian 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 ‘duty of salvage’ is imposed by Article 20 of the ICA 1992 and Article 17, 1 of the ICA 1874.²⁴ As mentioned above, these statutory provisions do not impose on the insured any obligation to prevent the insured event from happening. While Article 17 of the ICA 1874 applies to all insurance contracts, the scope of Article 20 of the ICA 1992 seems to be limited to indemnity insurance contracts, excluding insurance contracts for fixed-sum, such as life insurance and certain health insurance contracts. Nonetheless, concerning the latest insurance contracts, doctrine argues that also as regards mitigation measures, the similar obligation derives from Articles 1134 and 1135 of the Civil Code.²⁵ The allocation of costs of these mitigation measures will be discussed *infra*, nr. 13-15.

1.3. “Precautionary measures”

9. With an eye to completeness, and probably thereby transgressing the boundaries of the questionnaire, a brief excursion is here made on a special category of preventive measures, which, in line with French legal terminology, will be called “precautionary measures.”²⁶ The term refers to a special meaning of precaution, i.e. the attitude of prudence that decision makers are expected to adopt when confronted with a situation of “uncertainty”. As was brilliantly explained by François Ewald, a situation of uncertainty occurs when on the basis of the present state of scientific knowledge, it is not possible to determine with scientific certainty whether a situation does or does not create

²⁴ M. FONTAINE, *Droit des assurances*, 2010, Brussels, Larcier, 217-220; F. LATERVEER, “Artikel 52 Wet Landverzekeringsovereenkomst”, in H. COUSY, L. SCHUERMANS, G. JOCQUE and C. VAN SCHOUBROECK (ed.), *Verzekeringen. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Kluwer, 2005, p. 17-18, nr. 31-35.

²⁵ J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux, Traité pratique de droit commercial*, Tome 3, Waterloo, Kluwer, 2011, p. 205, nr. 370; M. FONTAINE, *Droit des Assurances*, Brussels, Larcier, 2010, p. 216, nr. 301, p. 220, nr. 309.

²⁶ See among many others G. VINEY and Ph. KOURILSKY, *Le Principe de précaution, Rapport du Premier Ministre*, 2000, Ed. E. Jacob.

a risk of harm.²⁷ Such situations are frequent and particularly dangerous in the sphere of environmental protection, food safety, medicine and biotechnology. Examples are the uncertainty about the risks created by the use of biotechnology, including the release of GMO'S in open space, the risks related to electromagnetic waves, including microwaves, the risks linked to nanotechnologies, etc.²⁸

Whereas known risks require that preventive measures be taken, situations of uncertainty require a precautionary attitude in accordance with the precautionary principle ("le principe de précaution"). Although this principle has been incorporated in numerous declarations, treaties, supranational and national legislative texts²⁹, legal doctrine and certainly Belgian doctrine³⁰ do not (yet) systematically distinguish between preventive and precautionary measures.

Uncertainties because of insufficient development of scientific knowledge often concern catastrophic risks, that affect human and environmental safety at a planetary safety. Since uncertain risks are unpredictable and incalculable, they are uninsurable. With respect to potential catastrophic scenario's the precautionary principle's function will be to help decision makers decide whether to authorize or not the potentially dangerous activity. Whereas the ecological version of the principle should probably lead to a systematic

²⁷ F. EWALD, "Philosophie politique du principe de précaution", in F. EWALD and N. DE SADELEER (ed.), *Le principe de précaution, Que sais-je?*, puf, 2001, 1-44.

²⁸ For a more elaborate description, see H. COUSY, "Risks and uncertainties in the law of tort", in H. KOZIOL and B. STEININGER (ed.), *European Tort Law 2006*, Vienna, Springer, 2008, 2-26.

²⁹ Special reference should be made to article 191(2) of TFEU, where the "principle of precaution" as next to but distinguished from the "principle of preventive action" is mentioned as one of the basic principles that govern EU environmental policy.

³⁰ See however H. COUSY, "Le principe de précaution et ses relations avec le droit des assurances", in *Mélanges offerts à Marcel Fontaine*, Brussels, 2003, 681, 686; H. COUSY, "A propos de la notion de précaution", *Risques. Les Cahiers de l'Assurance*, 1995, 149; H. COUSY, "The precautionary principle. A status questionis", *The Geneva Papers on Risk and Insurance*, 1996, 158; N. DE SADELEER, "Le statut juridique du principe de précaution", in *Le Principe de Précaution, Que sais-je?*, puf, 2001, 75-103; J.L. FAGNART, "Principe de précaution et responsabilité civile", *Bull. Ass.* 2011, 120-125.

abstinence from action³¹, in most instances decision makers will go forward (i.e. effectively produce the cell phones and the microwave oven, and cultivate GMO's, etc.), at best under the cover of accompanying information, warnings and disclaimers.

There exists however also a "light" version of the theory of uncertainties and precaution where the concept of uncertainty is widened to all situations where there is a "potential risk"³², and where the concept of precaution is widened as to include all situations where there is doubt³³, where decisions must be made under uncertainty. Such situations occur e.g. when a manufacturer withdraws a product from the market at a moment where it is not certain that the product is defective. Here the uncertainty does not originate in the ignorance of the risk, but in the ignorance of the insured event³⁴.

From the viewpoint of insurance, there are mainly two questions: one is whether the non-taking precautionary measures is insurable (the answer of positive); the second question is if and to what extent the costs of precautionary matters must be borne by the insurer.

Without going into any detailed analysis of this last (tricky) problem, it may be sufficient to notice that here again the conceptual distinction between prevention measures (the affair of the insured) and salvation measures (the affair of the insurer) plays a role. The problem is however that precaution measures seem to be located in between those two³⁵.

³¹ "En cas de doute abstiens-toi".

³² Cf. G. COMANDE, "L'assicurazione e la responsabilità civile come strumenti e veicoli del principio di precauzione", in G. COMANDE (ed.), *Gli Strumenti della Precauzione*, Giuffrè Editore, 2006, 39.

³³ L. MAYAUX, "Réflexions sur le principe de précaution et le droit des assurances", *RGDA* 2003, 269, 270. Cf. H. COUSY, "Risks and uncertainties in the law of tort", o.c. where a distinction is made between "the macro precaution of sustainable development" and the micro-level, which includes all situations of decision making under uncertainty.

³⁴ L. MAYAUX, "Réflexions sur le principe de précaution et le droit des assurances", *RGDA* 2003, 279 who considers that precaution is here a sort of "prevention a posteriori".

³⁵ L. MAYAUX, *ibidem*, 275.

2. The ways and degrees of cooperation between insurer and insured

How does the insurer encourage the insured to take the required measures:

- influence on the premium
- payment of the expenses (e.g. by sharing them between the insurer and the insured)
- other

10. Imposing or requiring preventive measures can be seen as being part of one of the insurer's noblest functions, i.e. to contribute to the prevention of accidents and losses. The preventive function of the insurer is one which protects the interests of both parties, the insured and the insurer, and even the interests of third persons and of the community at large.³⁶

The insurer performs his preventive function by general action and initiatives, and by requiring preventive measures from the side of the insured. General action includes such initiatives as advertising campaigns,³⁷ financing of studies and gathering of expertise on safety and prevention issues³⁸, sharing of expertise with the public authorities.³⁹ An interesting question concerns the (moral) responsibility, and (even the legal) liability of the insurer in advising and managing the optimal prevention level that should be pursued.⁴⁰ According to the Belgian association of insurance undertakings (currently known as "Assuralia") "*Prevention is for the insurer a primary human and*

³⁶ Cfr. R. POTE, "Preventie en verzekering", in H. COUSY and H. CLAASSENS (ed.), *Verzekering en consument nu*, Antwerp, Maarten Kluwers International Uitgeversonderneming, 1980, 97.

³⁷ See e.g. in Belgium the support of the yearly BOB-Campaign on preventing drunken driving, M. THIRION, "Bobt uw verzekeringsonderneming ook mee?" *Assurinfo* 11 July 2013, 4.

³⁸ In Belgium e.g. the associations Prevent ((labor) accidents), BIVV and CARA (traffic), Nationale vereniging voor beveiliging tegen brand, ANIPI and Belgian Organisation for Security Certification (fire).

³⁹ See BVVO, *Verzekering en preventie Een oproep, een aanmoediging*, Verzekeringsschieders, Brussels, 2001, 80p.

⁴⁰ R. POTE, *o.c.*, p. 101 who mentions that this question has been the object of judicial litigation in the US, and was discussed at the occasion of the 1978 AIDA World Conference in Madrid. See also on this matter G. VERNIMMEN, "Obligations de prévention et de sauvetage et prise en charge des frais par l'assurance (article 17 de la loi du 11 juin 1874)", *RGAR* 1977, 9.743, 7 and footnote nr. 62.

*social duty*⁴¹, consisting of at least three elements: primary prevention aims to eliminate factors presumably causing damage, secondary prevention aims, after accidents or damages, to prevent recurrence and tertiary prevention aims to reduce the consequences of accidents or claims.⁴²

In the context of the present questionnaire, we limit the focus to the preventive action of the insurer in his relationship toward its policyholders. In this context, the insurer acts by giving advice or sending an inspector, by sharing his expertise, and especially by requiring the policyholder or insured to take a number of specific preventive measures. To make sure that the preventive measures are carried out the insurer can make use of different legal formulas, of different types of sanctions and techniques of implementation (see hereafter sub questions 3 and 4).

11. One key method to encourage the policyholder/insured to take the required measures is by imposing them as a condition for accepting the risk or reducing the premium.⁴³

12. The second key method to encourage the insured to take the required measures is by sharing the payment of certain costs between the insurer and the insured.

As a general rule the policyholder/insured will have to bear the costs of taking the required measures *to avert or prevent the occurrence of the insured event*. Such allocation of costs is in accordance with the prevailing general view on the allocation of tasks and costs in the successive phases of an insurance contract. According to this theory which reflects traditional views on

⁴¹ BVVO, *Verzekering en preventie Een oproep, een aanmoediging*, Verzekeringscahiers, Brussels, 2001, 14.

⁴² BVVO, *Verzekering en preventie Een oproep, een aanmoediging*, Verzekeringscahiers, Brussels, 2001, 16.

⁴³ H. DE RODE, "Assurance incendie "risques spéciaux", in C. VERDURE (ed.), *L'assurance incendie*, Liège, Anthemis, 2011, 93; G. VERNIMMEN, "Obligations de prévention et de sauvetage et prise en charge des frais par l'assurance (article 17 de la loi du 11 juin 1874)", *RGAR* 1977, 9.743, 7verso; cf. L. MAYAUX, "Réflexions sur le principe de précaution et le droit des assurances", *RGDA* 2003, p. 273, nr. 5.

the subject matter, the risk belongs to the domain of the insured, and remains there, but if the insured event takes place, the matter belongs to the insurer. Whereas the costs of the taking of preventive measures that aim at preventing the insured event from occurring must be borne by the policyholder/insured, a different rule or principle applies to the costs of mitigation of the loss once the insured event has occurred (“frais de sauvetage” or “salvage costs”). In accordance with the traditional rule, and with logic, the costs of preventing and mitigating the losses after the occurrence of the insured event are in principle sustained by the insurer. These costs of mitigation are indeed costs that are made in the interest of the insurer, comparable to damage, and it is therefore logical that he is paying them.⁴⁴ In addition the insured’s efforts of mitigation should be encouraged, and this can only be achieved when he does not have to worry about the costs. Common examples of costs of mitigation are costs of fire men or water damage caused by extinguishing fires in fire insurance, or costs of a canvas cover protecting a roof in storm insurance.⁴⁵

13. As was mentioned above, Article 17 of the ICA 1874 as well as Article 20 of the ICA 1992 impose on the insured a duty to take mitigation measures, but they have never been understood as obliging him to take measures to prevent the insured event from happening.

⁴⁴ As was argued in the course of the parliamentary preparation of the ICA 1992, see *Parl. Chamber* 1990-91, nr. 1586/1, 48-49, in H. COUSY and G. SCHOORENS, *De nieuwe wet op de landverzekeringsovereenkomst. Parlementaire voorbereiding van de wet van 25 juni 1992 en van de wijzigende wet van 16 maart 1994*, Deurne, Kluwer Rechtswetenschappen België, 1994, 206; G. VERNIMMEN, “Obligations de prévention et de sauvetage et prise en charge des frais par l’assurance (article 17 de la loi du 11 juin 1874)”, *RGAR* 1977, 9.743, 2verso; cf. L. MAYAUX, “Réflexions sur le principe de précaution et le droit des assurances”, *RGDA* 2003, p. 273, nr. 6. It should be noticed that according to current doctrine, the insurer’s obligation to reimburse these salvage costs cannot be considered as a mere application of the rule in Article 1375 of the Civil Code on “gestion d’affaires” (“zaakwaarneming”), see F. LATERVEER, “Artikel 52 Wet Landverzekeringsovereenkomst”, *o.c.*, 11-12; G. JOCQUE, G. JOCQUE, “Zijn de kosten voor de opruiming van een verloren lading reddingskosten?”, *obs. Cass.* 20 April 2007, *TBH-RDC* 2007, 807.

⁴⁵ See e.g. P. COLLE, *Algemene beginselen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2011, 79; P. COLLE and P. VAN LERSBERGHE, “Het verzekeringsrechtelijk kader van de millennium-problematiek”, in X., *Millennium en verzekeringen*, *Bull. Ass.* 1999, Dossier 5, 42.

However, already under the realm of Article 17 of the ICA 1874, the highest court (*Cour de cassation*), had decided that although the insurer must in principle only bear the costs of loss preventing or loss mitigating measures, taken *after* the occurrence of the insured event, there is one situation where the insurer must compensate the cost of preventive measures taken by the insured, even on his own initiative, *before* the insured event, namely where the insured event is “imminent”, i.e. where the insured event is bound to occur. The case concerned a situation in which an insured had ordered a repairman to straighten up his TV antenna, which was pending in such way as to threaten to fall on the neighbor’s roof! When the insured asked his (home) liability insurer to pay the repairman’s bill, the insurer refused cover. The *Cour de cassation* decided that in this case of imminent (immediately threatening) danger the cost of prevention had to be compensated by the insurer.⁴⁶

14. Under the ICA of 1992, a similar rule is laid down in Article 52. The underlying reasoning is that in these situations of imminent danger of occurrence of the insured event the insured acts also in the interest of the insurer, and that it is thus equitable that the insurer who benefits from them must bear the cost. In addition, non-reimbursement of these costs could tempt the insured to do nothing although the insured event could have been avoided.⁴⁷

This Article 52 governs the so-called “salvage costs” and envisages not only the costs of mitigation measures but also certain costs of measures taken on

⁴⁶ Cass. 22 January 1976, *RGAR* 1977, 9.752; G. VERNIMMEN, “Obligations de prévention et de sauvetage et prise en charge des frais par l’assurance (article 17 de la loi du 11 juin 1874)”, *RGAR* 1977, 9.743; H. COUSY, “Omvang en duur van de waarborg in de (professionele) aansprakelijkheidsverzekering”, in Vlaams Pleitgenootschap bij de Balie te Brussel (ed.), *Verzekeringen en gerechtelijke procedures*, Brussels, Biblo, 1996, 60-62; L. SCHUERMANS, *Grondslagen van het Belgisch Verzekeringsrecht*, Antwerp, Intersentia, 2008, p. 359-363, nr. 503-501; J. RUTSAERT, “Le débat sur l’article 17 de la loi du 11 juillet 1874. L’obligation pour l’assuré de prévenir le dommage”, *Bull. Ass.* 1984, 46, 48-49.

⁴⁷ *Parl. Chamber* 1990-91, nr. 1586/1, 48-49, in H. COUSY and G. SCHOORENS, *De nieuwe wet op de landverzekeringsovereenkomst, o.c.*, 206-207; J.L. FAGNART and J. ROGGE, “Les assurances de responsabilité dans la loi du 25 juin 1992”, *o.c.*, 115.

the initiative of the insured to prevent the occurrence of the insured event.⁴⁸ This Article only applies to “assurances de dommages”, e.g. liability insurance, property insurance or legal aid insurance (Article 1, G of the ICA 1992).

As provided in this Article 52, the insurer is obliged to reimburse the costs deriving from:

- 1) Urgent and reasonable measures taken by the insured on his own initiative *to prevent the insured event, if the danger is imminent* and provided that they are made with the care of a prudent man (bonus pater familias) (regardless of whether the measures were actually successful in containing the damage)⁴⁹;
- 2) Urgent and reasonable measures taken by the insured on his own initiative *to prevent or mitigate the consequences of an insured event that has begun to occur*⁵⁰, provided that they are made with the care of a prudent man (bonus pater familias) (regardless of whether the measures were actually successful in containing the damage);
- 3) measures *asked for by the insurer* to prevent or mitigate the consequences of the insured event that has begun to occur.

In order to encourage the insured to take all the measures that seems appropriate to him, while acting as a bonus pater familias, the rule of this

⁴⁸ See about Article 52 of the ICA 1992, e.g. J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, Traité pratique de droit commercial, Tome 3, Waterloo, Kluwer, 2011, p. 206-208, nr. 372-376; H. DE RODE, “Assurance incendie “risques spéciaux”, in C. VERDURE (ed.), *L’assurance incendie*, Liège, Anthemis, 2011, 100-101; C. VAN SCHOUBROECK, “Enkele aspecten van reddingskosten in Nederlands perspectief”, in C. VAN SCHOUBROECK, W. DEVROE, K. GEENS and J. STUYCK (ed.), *Over Grenzen. Liber amicorum Herman Cousy*, Antwerp, Intersentia, 2011, 315-326; M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, 220-225; F. LATERVEER, “Artikel 52 Wet Landverzekeringsovereenkomst”, o.c., 36p.; B. DUBUISSON, “Les assurances des atteintes à l’environnement: réalités et perspectives d’avenir”, *Bull. Ass.* 1996, 400; G. JOCQUE, “Zijn de kosten voor de opruiming van een verloren lading reddingskosten?”, obs. Cass. 20 April 2007, *TBH-RDC* 2007, 806.

⁴⁹ E.g. replacement of the lock when the thief of the key can identify the owner and his residence, K. HINTJENS, “Assurance vol”, in J. ANDRE-DUMONT e.a. (ed.), *Traité pratique de l’assurance*, Waterloo, Kluwer II.12.6.02, 100.

⁵⁰ See about the interpretation of the concept of “insured event that has begun to occur” (“sinister” – “schadegeval”) in the sense of Article 52 of the ICA 1992, e.g. C. VAN SCHOUBROECK, “Enkele aspecten van reddingskosten in Nederlands perspectief”, o.c., 319.

Article 52 explicitly prescribes that the “salvage costs” made by the insured must be supported by the insurer, even if they appear to have been of no avail. Moreover and even stronger, these costs are reimbursable even if this sum, together with the compensation for the loss, exceeds the sum insured.⁵¹ However, as regards property insurance and liability insurance (with the sole exception of motor vehicle liability insurance), Article 52 gives the Executive the power to derogate from this rule by setting maximum amounts beyond which the insurer will not be liable. In pursuance thereof, the insurer can contractually limit the reimbursement of the salvage costs mentioned under Article 52 above the total sum insured, up to the amounts (guaranteed by a price indexation clause), compulsory imposed by Article 4 of the Royal Decree of 24 December 1992. Consequently, with regard to liability insurance, above the total sum insured, the salvage costs can be limited up to 495.909 euro if the total sum insured is lower or equal to 2.479.544 euro and with a total maximum of 9.918.175 euro, while in case of property insurance they can be limited to a maximum of 18.596.578 euro.⁵²

3. The techniques that are used, or required by law, to implement the preventive measures and

4. The sanctions

- *Declaration of risk, insurance conditions, exclusions, “Obliegenheiten”, warranties, etc.*
- *The question whether there is a requirement of a causal relation between the breach of duty by the insured and the occurrence of the event*
- *Relief from liability of the insurer for the occurred event? Or reduction of the insurance money? Or termination or avoidance of the insurance contract? Other?*
- *Are such sanctions imposed (or prohibited) by law, by the contract, or controlled by the judge?*

15. With the exception of those taken by the insured on his own initiative, when facing imminent danger (see supra, nr. 13-14) and those that are

⁵¹ The same rule is provided in Article 17, 2 of the ICA 1874, but compared to the compulsory rule in Article 52 of the ICA 1992, the former rule is not mandatory.

⁵² See on the application of these provisions, J. BEGEREM, “Commentaires sur l’évolution de la loi du 25 juin 1992”, *RGAR* 1996, 12.614, 4-6verso.

(exceptionally) required by law or (according to some) by the general good faith requirement (see *supra*, nr. 7), the measures of prevention are mostly specific requirements that are imposed by specific clauses of the insurance policy. There are various ways in which these contractual requirements are imposed on the policy holder and/or the insured. It is relevant to distinguish them, because of their different legal regime, in particular regarding the application of the requirements provided in Article 11 of the ICA 1992 and the burden of proof (see *infra*, nr. 19 and nr. 24).

The most clear and straightforward way for the insurer to do so, is to simply formulate them as duties that are imposed on the insured under the contract. We will deal with them further on (see *infra*, nr. 19).

But there are other possibilities to prescribe preventive requirements. The main alternative (be it somewhat hidden) contractual technique to implement the fulfilment of preventive requirements consists in incorporating these requirements into the description of the risk, i.e. more specifically into policy conditions that describe and delimitate the object and extent of the insurance cover. 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 to cover in case 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 the said safety devices.

The description of the extent of cover can also be done by articulating the limits of the cover in a so-called exclusion clause, in our example by stating that certain insured objects will be excluded from cover if they are not equipped with specifically mentioned safety devices.

In addition, it should be mentioned that insurance conditions or exclusion clauses take a particular form when they are part of a contract of liability insurance in which a third party possesses an own right and a direct action against the liability insurer. Under Belgian law this “direct action” exists not

only in motor vehicle liability insurance but, since the ICA 1992, also in all other branches of liability insurance. In all of them, the insurer is also denied the right to oppose certain exceptions or defenses against the claimant (Articles 86 to 88 of the ICA 1992). In such situations the insurer can (and will generally) contractually stipulate that the insurer has a right of recourse against his own policy holder or insured for the amount that he has paid out to the third person - victim (Article 88 of the ICA 1992). If the recourse action of the insurer is based on an exception drawn from the non or ill performance of a preventive or mitigation measure imposed by the contract, the exercise of the recourse action comes down to depriving the insured from (full) cover. A delicate problem arises, with respect to the applicability of Article 11 of the ICA 1992 to this particular type of clauses providing recourse rights (see *infra*, 23).

Finally, the insured's obligation could also be expressed in a pre-contractual declaration of the applicant. Imagine that while fulfilling his duty of disclosure before the conclusion of the contract, and describing the risk to be insured, the applicant declares that he has taken specified preventive measures. The absence of them will be considered as a violation of the pre-contractual duty of disclosure. The sanction of such violation will be governed by the specific rules that sanction non or faulty disclosure. Under Article 5 to 7 of the ICA 1992, such rules provide for a proportional sanction, i.e. a reduction of the indemnification or payment in proportion to the degree of fault of the applicant and the presumed attitude of the insurer. Only in case of an intentional shortcoming of the applicant with the intention to deceive the insurer, the nullity sanction applies. This hypothesis will not be further developed.

16. The question has been raised about the position of Belgian law toward the use of the so-called "warranties", that are so well-known to English insurance practice.⁵³ In a "warranty as to past and present facts", the applicant

⁵³ They can be considered as one of the specific particularities of English insurance practice in comparison with European continental insurance. Following the suggestions of the English and Scottish Law Commissions the Consumer Insurance (Disclosure and Representations) Act 2012 (Royal Assent on 8 March 2012) has

guarantees at the time of the contract the existence of certain factual situations. A typical example would be the assertion by the applicant that certain preventive measures or requirements have been taken. Since such assertions are declared to form “the basis of the contract”, all facts and situations that do not correspond to the “warranted” ones remain outside the cover. Although the use of such clauses remained very little frequent in Belgian insurance practice, the warranty clause is probably to be considered as valid under the realm of the old Belgian ICA 1874. At present however, the practice must be considered to be incompatible with the ICA 1992 which contains mandatory rules on the disclosure of risks at the time of the contract which cannot be set aside by so-called warranty clauses.⁵⁴ As far as “promissory warranties” are concerned, i.e. warranties comprising guaranteed promises by the insured, they are in our opinion equally invalid under the ICA 1992, since such warranties are incompatible with the prescription of Article 11 of the ICA 1992 which links forfeiture of rights to strict conditions (see *infra*, nr. 19).

17. Under the ICA 1992, the use of the sanction of “loss of right” or “loss of entitlement to cover”, or “forfeiture” (“la déchéance de la garantie” – “verval van dekking”) is regulated in a mandatory way and the strict conditions under which this sanction may be applied are the object of Article 11 of the ICA 1992.⁵⁵

Before enactment of the ICA 1992, there was a time that the sanction of “loss of entitlement to cover” was used in many insurance policy clauses as a sanction for nearly every shortcoming or failure of the insured to fulfill any legal or a contractual obligation, e.g. for non-compliance of the required

introduced, as regards consumer insurance, a regime which is very much closer to the one that prevails on the continent. As regards business insurance, a reform of the insurance contract law is being prepared, whereby the law of warranties will be changed.

⁵⁴ We subscribe to the opinion of M. FONTAINE, *Droits des assurances*, Brussels, Larcier, 2010, p. 186, nr. 260, p. 219, nr. 307 and B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, *o.c.*, 174, who are one of the few authors who have expressed themselves on the matter.

⁵⁵ See e.g. M. FONTAINE, *Droits des assurances*, Brussels, Larcier, 2010, p. 258, nr. 357.

mitigation measures or non-timely reporting a claim. Following a tendency that appears to be rather widespread in recent legislations of EU Member States on insurance contract, and that is also present in the Principles of European Insurance Contract Law (Article 4:103 of the PEICL)⁵⁶, the Belgian ICA 1992 has introduced legislation that submitted the validity of forfeiture clauses to strict conditions.⁵⁷

18. Besides, as regards certain specific shortcomings, the legislator himself prescribes the sanction which may (or may not) be less radical than forfeiture. A clear example of such a “softer” sanction is found in the mandatory rule that when the insured does not take the required mitigation measures as imposed by Article 20 of the ICA, the insured has a right to be compensated for the loss caused to him by the insured’s shortcoming, unless the insured acted with deceit, in which case the insurer has the right to refuse to cover the insured event (Article 21 of the ICA 1992).

19. At a general level, Article 11 of the ICA 1992 provides that contractual clauses that impose duties that are sanctioned by total or partial loss of entitlement to cover are null and void, if they do not fulfill the following two conditions:

- 1) the clause defines a specific obligation
- 2) the existence of a causal relation between the shortcoming and the occurrence of the insured event (Article 11 of the ICA 1992).

If those two conditions, and even of one of them, are not fulfilled the insurer cannot invoke the sanction of forfeiture.

Case law has given a strict interpretation to both conditions. Wordings such as “all measures to prevent damage to underground pipes” are not specific enough and do not allow the insurer to apply the sanction.⁵⁸ The insurer has

⁵⁶ See J. BASEDOW, J. BIRDS, M. CLARKE, H. COUSY and H. HEISS, *Principles of European Insurance Contract Law (PEICL)*, Munich, Sellier, 2009, 176-180.

⁵⁷ This legal rule confirms former case law, see M. FONTAINE, *Droits des assurances*, Brussels, Larcier, 2010, p. 257-258, nr. 356.

⁵⁸ Cass. 12 January 2007, *Arr. Cass.* 2007, 60; *NJW* 2007, 845, obs. G. JOCQUE; *TBH-RDC* 2007, 786, obs. C. VAN SCHOU BROECK; M. FONTAINE, *Droits des assurances*, Brussels, Larcier, 2010, p. 258, nr. 357; J.L. FAGNART and C. PARIS, “Actualités législatives et jurisprudentielles dans les assurances en général”, *o.c.*, 58.

to prove not only the existence of the shortcoming but also of the causal relationship (see also *infra*, nr. 24 and 26).⁵⁹

20. Exclusions, forfeitures and qualification problems.

Because of the severity with which Article 11 of the ICA 1992 treats the validity of the “forfeiture clauses”, insurers may feel inclined to look for other ways to sanction or to avert and prevent shortcomings of the insured, i.e. by using clauses that describe the risk or by using exclusion clauses.

Understandably enough, several problems of delimitation, interpretation and of qualification arise between the three sorts of clauses.

A first problem concerns the difference between the clauses that describe the risk and the extent of cover in a positive manner (saying what is covered), and the so-called exclusion clauses that describe the “holes” in the cover (“les trous dans l’objet du contrat”).⁶⁰ Some elements of the risk are not covered because they are situated outside the cover as it is defined in the policy. Elements that are the object of exclusion clauses are equally left without cover, because although normally belonging to the object of the insurance cover, they are withdrawn from it. It is quite clear that the question which risks normally belong to the covered risk is highly delicate. And it is often unclear whether parties have intended to use the one description or the other (exclusion) approach to delimitate the object of the cover.

A second problem, the one that has caused most difficulties in the recent development of Belgian insurance law, concerns the line between exclusion clauses and forfeiture clauses. As was just said, exclusion clauses concern the description of the insured risk and the delimitation of the risk. Forfeiture clauses are sanctions which punishes a shortcoming of the insured to one of

It is not required that the sanction is stated immediately after the obligation: Cass. 2 June 2005, *Bull. Ass.* 2006, 96, obs. C. EYBEN.

⁵⁹ Cass. 12 October 2007, *NjW* 2008, 120, obs. G. JOCQUE; H. DE RODE, “Assurance incendie “risques spéciaux”, in C. VERDURE (ed.), *L’assurance incendie*, Liège, Anthemis, 2011, 93; Brussels, 20 September 2011, *RGAR* 2012, 14.826; Liège 22 June 2005, *RGAR* 2007, 14.290; Brussels 10 November 2003, *RGAR* 2004, 13.940.

⁶⁰ M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 247, nr. 346, referring to Y. LAMBERT-FAIVRE.

his contractual duties. They refer to behavior of the insured after the conclusion of the contract, more specifically to his non-performance of a specific duty. Both clauses, exclusion and forfeiture, may lead to the same result, namely that the claim remains uncovered. However, there is a major difference: an exclusion clause results in an “absence of cover” for a claim that falls under the clause, while forfeiture is a “withdrawal” of a “normally” existing cover.⁶¹

21. An examination of Belgian case law shows that in the policy conditions preventive measures are laid down in different types of clauses, in other words, that preventive measures appear under different physiognomies. In principle, the parties are free to decide on the type and the wording of the clause.

However, there may be problems of interpretation, e.g. when it is not clear whether in the mind of the parties the clause defines a forfeiture or an exclusion. It will be up to the judge to solve these issues on the basis of the general rules of interpretation, without being bound by the formulation of the parties. The interpretation will be sometimes highly delicate. How to interpret e.g. a clause in a theft insurance policy stating that the theft of the car is not covered if the car is left behind unlocked, or declares uncovered the car that is not equipped with a (working) alarm system.⁶²

There is no need to insist on the importance of a precise qualification of such clauses. Indeed, if the clause must be interpreted as a forfeiture clause, the insurer can only invoke forfeiture when the above mentioned two conditions of Article 11 of the ICA 1992 are fulfilled.

⁶¹ M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 248, nr. 347, with extensive references.

⁶² On the extensive case law, see e.g. J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, *Traité pratique de droit commercial*, Tome 3, Waterloo, Kluwer, 2011, p. 322, nr. 647; J.L. FAGNART and C. PARIS, “Actualités législatives et jurisprudentielles dans les assurances en général”, *o.c.*, 88-89; B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, *o.c.*, 172-177; C. VAN SCHOUBROECK, G. JOCQUE, A. DE GRAEVE, M. DE GRAEVE and H. COUSY, “Overzicht van rechtspraak. Wet op de landverzekeringsovereenkomst (1992-2003)”, *o.c.*, p. 1862-1864, nr. 21.2.

22. Because of the different regime that applies to exclusion clauses on the one hand and forfeiture clauses on the other hand, insurers may be tempted to phrase a forfeiture clause as an exclusion clause. The question arises whether the judge has the power to “re-qualify” an exclusion clause into one that falls under the stricter regime of Article 11 of the ICA 1992. Belgian case law as well as legal doctrine used to be heavily divided over the issue. Whereas some courts state that Article 11 does not impose an obligation to opt for a forfeiture clause where the same result (absence of cover) can be reached otherwise, e.g. by the use of an exclusion clause, other courts and authors decided differently.⁶³ The last ones argue, inter alia on the basis of the mandatory character of the rule in Article 11 of the ICA 1992, that compulsory legal rules do not only prohibit all derogation, and that they also have a positive aspect, in the sense of imposing upon the parties certain obligations that must be fulfilled.⁶⁴ Trying to escape from a compulsory legal rule on the validity conditions of forfeiture clauses by using the formula of an exclusion clause seems indeed to come down to an unacceptable evasion of a mandatory norm, which is equivalent to its violation.

We are of the opinion that just recently this controversy has been decided upon and indeed solved by the judgment of the *Cour de cassation* of 20 September 2012.⁶⁵ In this case, a theft insurance contract of a car provided that “*the insurance company does not insure: [...] - Theft or attempted theft if the essential precautions had not been taken, namely: [...]*”

⁶³ See J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, Traité pratique de droit commercial, Tome 3, Waterloo, Kluwer, 2011, p. 330-332, nr. 666-667; B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, o.c., 171, 179; L. SCHUERMANS, *Grondslagen van het Belgisch Verzekeringsrecht*, Antwerp, Intersentia, 2008, p. 638, nr. 869; P. HENRY, obs. Mons 18 April 2006, *Form. ass.* 2007, 45; C. VAN SCHOUBROECK, G. JOCQUE, A. DE GRAEVE, M. DE GRAEVE and H. COUSY, “Overzicht van rechtspraak. Wet op de landverzekeringsovereenkomst (1992-2003)”, o.c., p. 1864-1866, nr. 21.3.

⁶⁴ M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 261-261, nr. 361-362, referring to A. MEEUS in *RCJB* 1988, 514; *Contra*: J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, Traité pratique de droit commercial, Tome 3, Waterloo, Kluwer, 2011, p. 320, nr. 642.

⁶⁵ Cass. 20 September 2012, concl. J. GENICOT; *NjW* 2013, 266, obs. G. JOCQUE; *Pas.* 2012, 1704. See also Cass. 25 January 2002, *RGAR* 2003, 13.757.

- *If the key to start the engine was left behind in or on the vehicle*".⁶⁶ The insured did not deny that she had left her spare key in a suitcase in the trunk of the car. The court of appeal qualified the contract provision as an exclusion clause and rejected the insured's claim. The *Cour de cassation* however annulled this decision. This Court stated that: "*Since as appears from Article 3 of the ICA 1992, the rule in Article 11 of the ICA 1992 is compulsory one, the judge must verify whether the clause in the insurance contract that is worded in a different way, is not in reality a forfeiture clause. The clause on the ground of which the insurer can refuse cover for non-compliance by the insured of contractual obligations, is a forfeiture clause in the sense of Article 11. (...) Where the court of appeal decides that "the contract clause concerned is an exclusion clause and not a forfeiture clause" and "that there is no basis to determine whether the fact that the spare key was left in the trunk stands in causal connection with the theft", violates Article 11 of the ICA 1992*".⁶⁷ It follows from this very important decision that a judge has the responsibility to verify the exact meaning and content of a contract clause and re-qualify this as a forfeiture clause whenever it in fact sanctions a non-compliance with a contractual obligation.⁶⁸ On the basis of this judgment one can argue that whenever a policy clause envisages a refuse of cover for non-compliance by the insured of a contractual obligation, no matter which name or place such clause is given in the policy, such clause must be considered as a forfeiture clause which must comply to the conditions defined in Article 11 of the ICA 1992.

⁶⁶ The clause in het policy states: "*De maatschappij verzekert niet: [...] – de diefstal of poging tot diefstal indien de onmisbare voorzorgsmaatregelen niet zijn genomen, namelijk: [...] – indien de sleutel waarmee de motor kan gestart worden in of op het voertuig achtergelaten werd*".

⁶⁷ The Court states: "*Aangezien die bepaling van dwingend recht is, krachtens artikel 3 wet van 25 juni 1992, dient de rechter na te gaan of een clausule van de verzekeringsovereenkomst die op een andere manier wordt verwoord geen vervalbeding is. Het beding op grond waarvan de verzekeraar zijn dekking kan weigeren wegens de niet-nakoming door de verzekerde van zijn contractuele verbintenissen vormt een vervalbeding in de zin van voormeld artikel 11. (...) Het arrest dat oordeelt dat "[voormeld] beding een uitsluitingsbeding en geen vervalbeding is" en dat "er geen grond bestaat om na te gaan of [de niet betwiste omstandigheid dat het dubbel van de sleutels van de eiseres in de bagageruimte van haar auto zat] in oorzakelijk verband staat met het schadegeval" schendt voormeld artikel 11*".

⁶⁸ Cf. G. JOCQUE, "Uitsluitingsbeding of vervalbeding", *NjW* 2013, 268-269.

23. A delicate problem arises with respect to the applicability of Article 11 of the ICA 1992 to certain particular type of clauses providing recourse rights, in particular to the recourse rights that are prescribed in the model policy on motor vehicle liability insurance that is laid down in the Royal Decree of 14 December 1992 (see *supra*, nr. 5). The key question is indeed whether the causality requirement of Article 11 of the ICA 1992 does also apply to that situation. For example, according to Article 25, 3° of the model policy, the insurer has a recourse action against the policy holder or the insured when at the time of the accident the driver did not have a valid driver's license, or when the fixed maximum of allowed passengers was exceeded. The aforementioned Article implies that a violation of these obligations is sanctioned by loss of entitlement to full cover. Whether nonetheless, the causality requirement of Article 11 applies also in these situations is still heavily debated in case law and doctrine. One position is that these clauses prescribe recourse rights and not a forfeiture, and can therefore be exercised without any proof of a causal relationship between the shortcoming and the loss. They argue in addition that possession of a valid driver's licenses is an obligation imposed by penal law and not by the insurance contract as the phrasing of Article 11 of the ICA 1992 seems to require. The other approach is that the exercise by an insurer of his right of recourse can be considered as an implementation of the sanction (in this case loss of right to compensation) because of non-compliance with a contractual obligation. Moreover, it is pointed out that although the penal code enforces the possession of a valid license, no law or regulation states that a valid driver's license is a prerequisite for insurance cover for the driver. Under this approach, the conclusion is that these recourse provisions are in reality implying a forfeiture and that the corresponding clauses in the contract must therefore comply to the rule of Article 11 of the ICA 1992. Although the majority of the doctrine adheres to this second approach⁶⁹, the *Cour de cassation* has recently

⁶⁹ See e.g. B. DUBUISSON and V. CALLEWAERT, "Le contrat-type à la croisée des chemins", in B. DUBUSSION and P. JADOUL (ed.), *Du neuf en assurance R.C. automobile*, p. 232-233, nr. 72, 74, p. 236, nr. 77; M. WASTIAU, "Het recht in ademnood: de goede trouw reanimeert", in *Liber Amicorum Hubert Claassens*, Antwerp, Maklu, 1998, 286; J. SELICAERTS, *De modelovereenkomst '92 Auto*,

confirmed the first approach in two decisions⁷⁰, which however are vehemently criticized by the said majority of legal writers.⁷¹

5. Burden of proof

- Does the insured have to prove that he has fulfilled his duty; or
- Does the insurer have to prove breach by the insured?

24. The question who bears the burden of proof about the (non) compliance with the required prevention and mitigation measures, is a complex one. The question is complex because the answer differs according to the formula that was chosen by the parties, and also because the chosen qualification, and with it the legal consequences thereof, including the allocation of the burden of proof, are subject to potential requalification and change by the judge.

Among the three most common qualifications, positive description of the rest, the exclusion from cover and the forfeiture of right for non-fulfillment of a specific contractual duty, especially the last two ones give rise to delicate discussions as regards the issue of the burden of proof.

Under the first one of the three qualifications, the uncontested answer to the question who has to prove that the claim falls (or not) inside the objet and the extent of the cover, as described in the contract, is that it is up to the claimant

Deurne, Kluwer, 73; P. HENRY and J. TINANT, "Déchéances ou exclusion: de Charybide en Scylla ?", in B. DUBUISSON and P. JADOUL (ed.), *La loi du 25 juin 1992 sur le contrat d'assurance terrestre. Dix années d'application*, Brussels, Academia-Bruylant, 2003, 85. See also A. RONDAO ALFACE, "L'action récursoire en RC auto est-elle une déchéance de garantie ?", *Forum ass.* 2012, 130-134; D. CLESSE, "L'assureur qui exerce l'action récursoire doit-il démontrer le lien causal entre l'absence de permis valable et l'accident?", *VAV-CRA* 2012, 118-119.

⁷⁰ Cass. 19 June 2009, *TBH-RDC* 2010, 66, obs. C. VAN SCHOU BROECK (driver's license); Cass. 19 February 2009, *JLMB* 2011, 2049, obs. B. DUBUISSON (driver's license; amount of passengers).

⁷¹ See B. DUBUISSON and V. CALLEWAERT, "Les recours de l'assureur après indemnisation", in B. DUBUISSON and V. CALLEWAERT (ed.), *La loi sur le contrat d'assurance terrestre. Bilan et perspective après 20 années d'application*, Brussels, Bruylant, 2012, p. 206-209, nr. 84-85; D. WUYTS, "De rol van de modelovereenkomst in het verhaal van de WAM-verzekeraar tegen de verzekerde en de toepassing van art. 25, 3^ob modelovereenkomst", obs. Cass. 18 January 2010, *RW* 2010-11, 1134-1135; C. VAN SCHOU BROECK, "Verhaal van de WAM-verzekeraar en artikel 11 WLVO", *TBH-RDC* 2010, 69-74; Pol. Nivelte 11 June 2012, *RGAR* 2012, 14.917; *T. Pol.* 2013, 21, obs. D. VAN TRIMPONT.

(insured or beneficiary) to do so.⁷² The legal basis for this is found in the “actori incumbit probatio” rule, i.e. the well-known general principle of procedural law, which in Belgium is expressed in Article 1315, 1 of the Civil Code (which is or at least originally, a copy of the French Napoleonic Civil Code), as well as in Article 870 of the Code of Civil Procedure of 1967 (each party has to prove the facts which he/she alleges).⁷³ When the insurance contract states that cover is only extended to houses with a tile roof (in fire insurance), or to cars equipped with an alarm system (in theft insurance), it is up to the insured to prove that the said preventive requirements are fulfilled.

Even so, it is generally accepted by case law and doctrine that, on the basis of Article 1315, 2 of the Civil Code, that the conditions for forfeiture of rights must be proven by the insurer.⁷⁴ Accordingly, the insurer who claims forfeiture due to non-compliance of the preventive and mitigation measures, has to prove that the two conditions of the rule in Article 11 of the ICA 1992 are met with.⁷⁵

25. It should be added that, as has been clearly decided by the *Cour de cassation*, the insurer bears the burden of proof that the intentional fault in the sense of Article 8, 1 of the ICA 1992 caused the insured event (see supra,

⁷² M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 251-252, nr. 352 and references.

⁷³ Article 1315 of the Civil Code states:

“Celui qui réclame l'exécution d'une obligation, doit la prouver.

Réciproquement, celui qui se prétend libéré, doit justifier le paiement ou le fait qui a produit l'extinction de son obligation”;

“Hij die de uitvoering van een verbintenis vordert, moet het bestaan daarvan bewijzen.

Omgekeerd moet hij die beweert bevrijd te zijn, het bewijs leveren van de betaling of van het feit dat het tenietgaan van zijn verbintenis heeft teweeggebracht”.

Article 870 of the Code of Civil Procedure states:

“Chacune des parties a la charge de prouver les faits qu'elle allègue”;

“Iedere partij moet het bewijs leveren van de feiten die zij aanvoert”.

⁷⁴ See e.g. J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, *Traité pratique de droit commercial*, Tome 3, Waterloo, Kluwer, 2011, p. 317, nr. 636; M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 251-252, nr. 352.

⁷⁵ See e.g. P. COLLE, *Algemene beginselen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2011, p. 82, nr. 99

point 3).⁷⁶ Likewise, the insurer has to prove the existence of the causal relationship between the “faute grave” in the sense of Article 8, 2 of the ICA 1992 (see supra, point 3) and the loss.⁷⁷

26. In the context of this report, it is important to notice that the *Cour de cassation* decided that this rule of evidence concerning the proof of causal relationship is based on Article 8, 2 juncto Article 11 of the ICA 1992. We think that this decision can only be interpreted in the sense that according to the *Cour de cassation* the ICA 1992 contains a particular rule on the burden of proof.⁷⁸ Since the rule of Article 11 of the ICA 1992 is a mandatory one, the insurer has the burden of proving the existence of the causal relationship, even if the contract clause would provide otherwise. A contract clause that installs a rebuttable presumption of such causal relationship violates this mandatory rule of evidence.⁷⁹

27. The answer as to the question who bears the burden of proof about the (non) compliance with the required prevention and mitigation measures, is even more delicate when we deal with exclusion clauses, even with true exclusion clauses, i.e. clauses that exclude from cover situations that fall under the normal extent of coverage (see supra, nr. 20).

⁷⁶ Cass. 7 June 2001, *RW* 2001-2002, 890, obs. G. JOCQUE; Cass. 18 January 2002, *RCJB* 2003, 51-72, obs. M. FONTAINE; Cass. 2 April 2004, *TBH-RDC* 2005, 854; Cass. 12 October 2007, *TBH-RDC* 2008, 767; B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, o.c., 149 (argues that no contractual derogation is allowed); *contra*: P. COLLE, “Opzet en bewijs van het recht op verzekeringsprestatie”, in C. VAN SCHOU BROECK, W. DEVROE, K. GEENS and J. STUYCK (ed.), *Over Grenzen. Liber amicorum Herman Cousy*, Antwerp, Intersentia, 2011, 406.

⁷⁷ Cass. 12 October 2007, *NjW* 2008, 120, obs. G. JOCQUE; Cass. 13 September 2010, *JT* 2010, 737, obs. J. KIRKPATRICK; B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, in C. PARIS and B. DUBUISSON (ed.), *Actualités en droit des assurances*, Liège, Anthemis, 2008, 151-152, 182 (argues that no contractual derogation is allowed).

⁷⁸ Cf. G. JOCQUE, obs. Cass. 12 October 2007, *NjW* 2008, 123; B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, o.c., p. 169, nr. 53, footnote 130.

⁷⁹ Cass. 12 October 2007, *NjW* 2008, 120, obs. G. JOCQUE; Cf. M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 261, nr. 361; P. HENRY and J. TINANT, “Déchéances ou exclusion: de Charybide en Scylla?”, in B. DUBUISSON and P. JADOUL (ed.), *La loi du 25 juin 1992 sur le contrat d’assurance terrestre. Dix années d’application*, Brussels, Academia-Bruylant, 2003, 85.

As to the question who bears the burden of proof concerning exclusions, two approaches seem to be possible. The first one takes a substantive law approach and considers that the same rule must apply no matter whether the extent of cover is described in a positive way or in a negative way, i.e. by way of exclusion clauses. The person who claims to benefit from the insurance cover has to prove that he fulfills all the conditions: he must prove that he falls under the description of what is covered and that he is not excluded from it by the exclusion clauses. At some stage in a relatively recent past, the highest court of Belgium seemed to adhere to this theory. Indeed, in a decision of 5 January 1995, the *Cour de cassation* put the burden of proof as regards the non-fulfillment of exclusion on the insured (*“the insured must prove that the event falls under the cover and is not excluded from it”*).⁸⁰

Following doctrinal protest against this decision, the Court has apparently changed its approach, while abandoning the “substantive law” approach of its 1995-decision, and looking for an answer to the burden of proof issue in the general “actori incumbit probatio”-rule of procedural law, as defined in Article 1315, 2 of the Civil Code and Article 870 of the Code of Civil Procedure.⁸¹ Under this rule it is up to the insurer to prove that the claim, although falling inside the “normal” extent of the cover, is nevertheless excluded by virtue of an exclusion clause.

⁸⁰ Cass. 5 January 1995, *Arr. Cass.* 1995, 19; *Bull. Ass.* 1996, 605, obs.

⁸¹ See M. FONTAINE, *Droit des assurances*, Brussels, Larcier, 2010, p. 252-255, nr. 353-353 with extensive references to case law and doctrine; B. DUBUISSON, “Actualités législatives et jurisprudentielles dans les assurances de choses et de frais”, *o.c.*, 170-171; *Contra*: J.L. FAGNART, *Droit privé des assurances terrestres. Principes généraux*, *Traité pratique de droit commercial*, Tome 3, Waterloo, Kluwer, 2011, p. 315-332, nr. 635-667 and in particular p. 327, nr. 659 referring to the “school of Liège”; *Nuanced*: C. DEVOET, *Les assurances de personnes*, Limal, Anthemis, 2011, p. 184, nr. 501, p. 188, nr. 509.