

Total loss of brand goods

The insurer's rights and obligations in the case of total loss of brand goods

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Deadline for submission: (September/01/2006)

Number of words: 17,985

Date of submission: (August /31/2006)

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1 Introduction

1.1 The goal

The aim of this paper is to describe and analyse two main topics: The concept of total loss with special focus on brand products, and the insurer's rights and obligations once compensation for a total loss is paid. This paper will analyse how the topics are regulated in Norway and Denmark. Furthermore, I will analyse in what way trademark regulation can limit the insurer's disposal of damaged brand goods.

1.2 Presentation of issues to be addressed

The carriage of goods is a risky business. During carriage, the goods are exposed to perils of various kinds. Furthermore, the goods are often of high value. In order to protect their value from the perils, insurance is taken out.

The insurer and the insured are the parties involved in the insurance agreement. For the sake of simplicity, I will only focus on the situation in which the seller in an underlying sales contract is the insured and covered entity. When the insured has an insurance agreement, the insurer will compensate the insured on certain conditions.¹ I will limit this paper to analyse only insurance of goods during carriage, the so-called cargo insurance. This insurance agreement maintains that the insurer compensates the insured, if the goods are damaged during a voyage.

The value of the goods for the seller is the interest covered.

When goods are damaged, the insurer is liable to compensate the insured. As a main rule, the insurer compensates the insured for his recovering costs for the lost qualities of the goods. But, if the goods are damaged so heavily that they cannot be recovered, a so called total loss occurs. There is a total loss if the central qualities of the goods are lost.²

¹ See chapter 3

In this paper two concepts are used side by side. Brand goods and brand products. The two concepts cover the same, namely: well-known products which gain their value and status by representing specific qualities;³ for example solidness, exclusiveness and conscience.

The branded product suffers a total loss if the specific quality of the brand is lost. Even more so, the damage on the specific brand product does not only affect the value and functionality of brand product itself: but the reputation of the brand suffers tremendously if the brand product is sold in a damaged condition.

Consequently, there is a risk that brand products suffer a total loss from damages in situations, which would not cause a total loss in “no-name” products.

Compensation for total loss ensures that a fixed compensation is paid and that the ownership of the damaged goods is transferred to the insurer.⁴ The insured has given up the control of the damaged goods and instead he is given compensation. In order to lower the costs the insurer sells the damaged goods. This might be in conflict with the interests of the insured, especially in matters of brand products: The insured will might argue that the brand will be damaged, if the damaged brand products are sold. Thus, the insured tries to prevent the insurer from selling the damaged brand goods.⁵

The insured has a problem if damaged brand products suffer a total loss earlier than “no-name” products if the insured. For instance, in cases where the insured, in addition, is able to prevent resale of the same damaged brand product in order to protect his brand.

This paper sets out to discover when the insured is interested to protect his branded goods, in situations where the ownership of the damaged brand goods is transferred to the insurer. This paper likewise examine how the insured can interfere or prevent the

² See chapter 6

³ See chapter 5

⁴ See chapter 7.2

⁵ See chapter 7.5

insurer's future disposal of the damaged brand goods and at the same time avoid to compensate the insurer this non-disposal of the damaged brand goods..

Cargo insurance is regulated by public statutory rules, but to a great extent it is left for the parties alone to regulate their insurance agreement. Consequently, it is very interesting to see how practice have chosen to solve the problems, in cases with total loss of goods and the insurer's right and obligations once compensation for total loss of goods is paid by the insurer to the insured.

As a last topic, I will touch upon the trademark regulation, which provides protection of the insured's brand.⁶

1.3 Motivation

I chose to analyse the aforementioned topics for several reasons.

First and foremost, I find it challenging that so little is written about the insurer's right and obligations in situations where the insured claims a total loss of branded goods. I believe this area needs further research.

Secondly, the lack of focus seems surprising to me, since both the insurers and the insured think that total loss is a complex topic. This shared interest is illustrated by the fact that the insurers' disposal of damaged brand goods was one of the main topics on an insurance conference held in Copenhagen January 2006.

Thirdly, the topic of this paper has given me the opportunity to work together with both insurers in practice and academics. An experience I found very interesting.

1.4 Theoretical approach

To find the state of law I have used dogmatic legal methodology.⁷ As such, I have tried to identify myself with a judge seeking the state of law. As aforementioned very little is written on this topic. Moreover, the regulation is rather vague and leaves it to the practice to find suitable solutions.

⁶ See chapter 8

⁷ Blume pg. 150

In order to find the state of law in this area, the judge would search for the solution using policy considerations. In this paper policy considerations are for example used to interpret whether the insured can protect his brand by preventing resale of the damaged brand goods and still receive the full compensation without deduction of the remaining market value of the damaged brand goods. Furthermore, a judge would look at tendencies in practice. Common tendencies in practice are often seen as trade practice and used in decisions made by the judge.

The judge uses a legal approach similar to *de lege ferenda*, if the wording of the regulation is so vague, or missing, that policy consideration gets decisive. This is the case several times in this paper.

In general, *de lege lata* means that the aim is to describe the state of law as it is at the current time. *De lege ferenda* means in short how the rules should- or could- be. The legislators often use a *de lege ferenda* approach when they need to change the present rules into a new direction. Furthermore *de lege ferenda* is used to describe how the state of law could be, the rules being unclear or missing. The latter is the case in this paper.

2 Legal framework ⁸

2.1 Marine insurance regulations

2.1.1 Introduction

As mentioned in the introduction, I will analyse how the question of total loss and the insurer's rights and obligations are solved in a comparative analysis between Norway and Denmark. Thus, it is important to know where to locate the rules on marine insurance within the different states.

Marine insurance contracts are covered by public acts in Denmark and Norway. These acts are, as a main point, not mandatory, so it is up to the parties on the insurance

⁸ See Jantzen pg. 15- 22

market to stipulate the rules.⁹ A mandatory rule means that it cannot be set aside to the detriment of the protected party.¹⁰ As it is shown in the following section, the private regulation is very detailed. The public rules are therefore of little or no relevance.

Thus, I focus on how the insurers and insured have regulated the marine insurance.

The parties have regulated the marine insurance by agreed documents and unilateral conditions. Agreed documents are standard conditions negotiated and agreed by the parties involved in the insurance market, and therefore represent a compromise between the parties. On the other hand, we find the unilateral conditions. These conditions, contrary to the agreed documents, do not reflect a compromise between the involved parties.

2.1.2 Marine insurance regulation in Denmark

In Denmark, we find the public rules concerning contracts of insurance in the Danish Insurance Contract Act, dated April 15, 1930 (DICA). The DICA applies for domestic and international cargo insurance contracts.

The parties¹¹ agreed on the Danish Maritime Insurance Convention (DC), dated April 2 1850, amended April 2. 1934. DC has not undergone any major amendments since.¹² The DC regulates marine insurance in detail and in accordance with the mandatory rules of DICA.

Later, the Danish Central Union of Marine Underwriters made the Danish Conditions to regulate more detailed on cargo insurance.¹³ When drafting the Danish Conditions, focus was held on the English marine insurance regulation, and the outcome of the Danish Conditions was quite similar to the English Institute Cargo Clauses (ICC) 1983. For a short introduction of English marine insurance, see chapter 2.1.4

⁹ Marius 242 pg. 19

¹⁰ Lynge Andersen pg. 22

¹¹ DC is thus not a traditional convention made by and binding states, but a private agreed document. See Jantzen pg. 17

¹² Marius 242 pg. 20-21

¹³ The Extended Danish Conditions (UDB) and the Limited Danish Conditions (BDB) both dated the 1. July, 1989

The Danish Conditions are based on DC. The DC is an agreed document. However, the Danish Conditions are drafted only by the insurers and for getting uniformity with the English clauses that were drafted solely by the insurers. The Danish Conditions are thus a set of unilateral conditions and cannot be interpreted as an agreed document.

2.1.3 Marine insurance regulation in Norway

The Norwegian Insurance Contract Act dated June 16, 1989 (NICA), applies for all insurance contracts except international carriage of goods cf. the NICA § 1-3.

The Plan for Insurance for the Carriage of Goods was made in 1967. In 1990, substantial amendments were made in accordance with the mandatory rules of the NICA. Some of these amendments were mandatory for international contracts of carriage because a common set of rules was needed.¹⁴ Later, the Conditions relating to Insurance for the Carriage of Goods dated October 1995, Cefor¹⁵ Form nr. 252. The so-called Norwegian Cargo Clauses (NCC) was born. A committee consisting of a professor from Oslo University and representatives from both the insurers and the transport users developed NCC.¹⁶ The latest amendment of NCC was made in 2004. Only few amendments were made and mostly by Hans Jakob Bull, the leader of the revision group.¹⁷

NCC, DC and the Danish Conditions apply only if the parties have referred to them in their agreement. But, the regulations are often used; they represent a well known and detailed set of regulation, which is wise to follow.

2.1.4 Marine insurance regulation in the United Kingdom

Denmark and Norway used the English marine insurance regulation as a model when they drafted their marine insurance regulation. Thus, the Scandinavian regulation on marine insurance was quite similar at the beginning. Because the Scandinavian

¹⁴ Daler pg. 12

¹⁵ The Central Union of Marine Underwriters Norway

¹⁶ See the introduction to the NCC comments pg. II

¹⁷ Introduction to the NCC comments pg. I

regulation is influenced by the English regulation, these rules are used as interpretation if the understanding and meaning of the Scandinavian rules are hard.¹⁸

In short, the marine insurance in UK is regulated in the following way. The Marine Insurance Act (MIA) of 1906 regulates marine insurance contracts. In the early 1980's, it was hard to get an overview of the insurance agreement. For this reason, the new Institute Cargo Clauses of London Underwriters (A), (B) and (C) were drafted in 1982. (ICC 1982) ICC 1982 is unilateral conditions drafted by the Joint Cargo Committee, consisting of Lloyd's and the Institute of London Underwriters, both representing insurer's interests.¹⁹

2.1.5 Summary

The DC and the NCC were rather similar.²⁰ However, due to the NCC 1990 amendments²¹ the regulation is not so uniform anymore.

By comparing the Norwegian and the Danish detailed private regulation on cargo insurance, one finds differences in the birth and substance of the two regulations.

NCC is an agreed document, which reflects the compromise of different interests in the insurance market. This is contrary to the Danish Conditions, which are developed solely by the insurers. As such, the NCC document is probably more cargo owner friendly than the Danish Conditions.²²

2.2 Preparatory work and commentaries

As mentioned in the last chapter, marine insurance is mainly based on private marine insurance regulation. In order to be able to understand and interpret the meaning of these rules, the stipulators have made comments on their work. These commentaries are so-called preparatory work or motives. In other cases, third parties that have not participated in the legislative work, produce commentaries on the rules. These

¹⁸ See Svante pg. 55-57

¹⁹ Hudson pg. 3 and interview on the 5 July 2006 with Jens Peter Tranberg (Vice president of Danish Central Union of Marine Underwriters and member of the Danish Maritime Committee)

²⁰ Svante pg. 44.

²¹ Jantzen pg. 21, Marius 242 pg. 21

²² Interview 5 July 2006 with Jens Peter Tranberg

comments are so-called expert opinions that are used for interpretation of the rules. In the hierarchy of legal sources, the preparatory work and motives rank over expert opinions.²³

The commentaries of the NCC are more than preparatory works done by the stipulators. The NCC commentaries were presented for- and negotiated among- the parties involved.²⁴ Furthermore, the text of the NCC commentaries is printed within the text of the NCC. This gives the NCC commentaries a stronger interpretative value than regular preparatory works which are not negotiated upon.²⁵

Average adjuster Niels Tybjerg commented the DC.²⁶ Tybjerg made the drafts for the convention. The DC commentaries are less detailed and thorough than the NCC commentaries. The foreword of the DC does not tell us whether the commentaries have been negotiated upon, but this is unlikely due to the size and quality of the commentaries.

2.3 Case law

Case law is a very important source of law²⁷ because it serves as guidance on how to interpret the rules.

Unfortunately for the predictability, the problems concerning a total loss of goods and the insurer's rights and obligations are very seldom put before a judge.²⁸ Consequently, the tendencies have to be analysed mainly through theory and supplemented by solutions in practice. I revert to practice in chapter 6.4 and 7.5.

2.4 Literature

In the hierarchy of legal sources, the wording, the commentaries and the case law are the highest ranking. If it is hard to understand a legal area, legal literature can be enlightening. However, it must be remembered that legal literature is the writers own

²³ Evald pg. 16

²⁴ NCC commentaries 1996 version 2002 pg. 19

²⁵ Eckhoff pg. 64

²⁶ Jantzen pg. 17, see Tybjerg 1963

²⁷ Hans Jakob Bull pg. 11

²⁸ Svante pg. 43

interpretation of the regulation. Legal literature is therefore by no means a perfect source of law.

In this dissertation, I use literature from Denmark, Norway, Sweden and England. The theorists are both practitioners, such as lawyer Henrik Thal Jantzen from Denmark, and university representatives, such as Professor Svante O. Johansson from Sweden and Hans Jakob Bull from Norway. These writers have a great knowledge on marine insurance law. Most of the time, due to the international scope of insurance of goods²⁹, they use comparative analysis to solve the problems. Thus, the comments and views of these writers are essential for this dissertation.

2.5 Practice

Due to the lack of case law and since the parties are free to negotiate their own conditions, it is necessary to see how the insurers and the cargo owners have solved the problems in practice, and what considerations that lies behind.³⁰ Often, the parties use insurance clauses and compromises in order to regulate their rights and obligations. The solutions in practice are most often a result due to commercial considerations more than legal rights. I will discuss these tendencies in practice, based on interviews with some of the leading insurance companies and cargo owners in Norway and Denmark. Whether or not conclusions can be drawn from these interviews, depend on how uniform the answers of the interviewed persons are and the expertise of the person and the quantity of interviewed persons. Nonetheless, the interviews made serve as empirical data, which can supplement the pure legal analysis.

3 Scope of cover

In this following chapter, I will analyse the scope of cover. The scope of cover decides whether damage is covered by the insurance or not. The scope of cover determines what perils and losses that are covered and the causal link necessary.

²⁹ Jantzen pg. 7, Svante pg. 43-45

³⁰ Svante pg. 43

3.1 Perils insured against

It is essential that the interest covered is lost by a peril covered by the insurance. Otherwise, the insured is left without protection from the insurance. In this paper, the interest is the value of the carried goods.

The insurance³¹ cover depends on what kind of coverage level the insured have chosen. Three levels (A, B and C) are available according to the NCC. The Danish Conditions only have two options: Extended Conditions (UDB) and Limited Conditions (BDB)

The best protection is given in accordance with the UDB and NCC § 3 (A) These are “all risk insurances”, covering every peril, as long as the peril is not explicitly excepted from cover.³² It is possible to divide the exceptions in three groups. The first group contains the losses caused by a peril outside the control of the carrier or any other person (war, confiscation, nuclear out lead and terror actions). The second group includes losses deriving from a peril within the control of the carrier (carriage on deck³³, unseaworthiness of the vessel and delay). The third group consists of losses caused by a peril within the control of the insured (the nature of the goods, wrongful packing³⁴ and illegal purpose).

All perils not included in these exceptions are covered. For instance robbery and damage due to accidents and damage due to a break down of the temperature equipment.

Less protection is given in accordance with BDB, NCC § 4 (B) and NCC § 5 (C).

These conditions only cover perils that are explicitly mentioned. The perils mentioned are typical traffic accident injuries³⁵ and nature perils such as thunderstorms and earth crakes.³⁶

³¹ Svante pg. 135-163, Jønsson pg. 217- 232, Hans Jakob Bull pg. 457

³² Cf. NCC §§ 17-19 and UDB §§ 4-5

³³ Cf. NCC § 17 This exception does not apply according to UDB

³⁴ Cf. BDB § 4.4 Differently see NCC § 23, where this wrongful packing is characterized as a matter of due care

³⁵ Cf. BDB

³⁶ Cf. NCC §§ 4 (B) -5 (C)

In UfR 2003.414 S, a cargo of insulin was damaged due to storage at a temperature too low. The insurer was not liable for the damage because the peril, wrongful storage, was excepted from cover.

The covered peril must have struck the goods in the insurance period.³⁷ A closer evaluation and discussion of when the perils have struck and when the damage occurs is not made in this dissertation.³⁸

3.2 Loss covered

In the previous chapters, I have analysed what perils that are covered. Damage can result in multiple losses. The insurance, however, will only cover the losses mentioned in the police. The covered losses are the ones stemming from damages to the goods³⁹ and not the consequent losses such as liability in tort and disbenefits within the market.

The insurance covers the loss of the qualities in the goods. These qualities define the nature and usage of the goods. If the quality lost is less important for the nature of the goods, the loss is less substantial. If the goods cannot be used for its original purpose, because the central qualities are lost, the goods have suffered a total loss. Let me exemplify: A fence made of steel is carelessly handled and gets several hard knocks. The paint begins to peel off and repainting must be done. The loss of the paint is a loss of the fence' qualities, but after the repainting the fence can be used for its original purpose. Another fence is dropped to the sea bed and salvaged after a while. Consequently, the steel is rusting and cannot be used as a fence anymore due to the weakening of the construction. The fact, that the fence cannot be used for its original purpose constitutes a total loss. The concept of total loss is analysed in detail in chapter 6.

The primary focus in this paper is the total loss of brand goods. The insurance covers the loss on the brand product it-self, but as I discuss later in chapter 5.3 the insurance also indirectly covers losses of value of the brand. This is mainly because the risk of

³⁷ Cf. DC § 39, § 181, BDB § 7 and NCC §§14-16

³⁸ See Jønsson pg. 165-174 and Hans Jakob Bull pg. 456-457.

³⁹ Svante pg. 208 and Jantzen pg. 226

damage to the brand can be decisive for the evaluation of the damage to the brand goods.

3.3 Causation

As in every case of compensation, the loss stays where it hits unless someone is held responsible for the loss. No one can be held responsible for the loss unless there is a link between the action or omission and the loss. This is called causation. In insurance cases, there must be a causal link between the peril insured against and the insured event and thereafter between the insured event and the economical loss.⁴⁰ I will not go further into details with causation due to the length of this paper.

4 Compensation

The compensation is calculated on different terms depending on whether there is damage or total loss. In short, the insurer has to cover the repair cost when compensation for damage is paid, whereas the compensation for a total loss is a fixed amount without connection to the actual costs.

4.1 Compensation for damage

In Norway, the insurer is entitled to claim that the damage is repaired. The insurer hereafter compensates for the repair costs.⁴¹ The insured, in case of damage, keeps the ownership of the damaged goods.⁴² No repair has to be made, if repair lead to unreasonable loss or inconvenience for the insured.⁴³ This would be the case if high quality products are repaired, amounting to a lower sales price, risk of damage liability, or a brand damaged by bad reputation. In case of no repair, compensation is paid according to a damage percentage.⁴⁴ In cases where the insurer cannot demand repair of the damaged goods, the insured very often in addition claim a total loss cf. NCC § 35 nos. 4. The reason is the following: The insured will deny repair in order to preserve the special guaranteed qualities of the goods and claim a total loss. For the same reason the

⁴⁰ Cf. DC § 50, UDB § 1 and NCC § 7

⁴¹ Cf. NCC § 37

⁴² Antagonism from NCC § 52 first section concerning total loss

⁴³ Cf. NCC § 37 first section

⁴⁴ Cf. NCC § 37 second section

damaged goods are destroyed in their nature and usage due to the fact of the lacking qualities. I further discuss when the goods are destroyed in its nature and usage in chapter 6.1.2.

In Denmark, the regulation is slightly different.

Compensation for damage follows both from DC § 194 and the Danish Conditions § 10. According to DC § 194 a damage percentage is used when a partial damage has happened. This could be the case when a part of a cargo of grain is damaged. In this case, repair is not possible. If recovering is possible the compensation is based on the repair costs according to the Danish Conditions § 10.⁴⁵ In practice, the insurance agreement has reference to both the Danish Conditions and the DC.

4.2 Compensation for total loss

There is a total loss if recovery of the goods is impossible by either salvage or repair. Recovery can be impossible for several reasons. Repair is impossible due to the actual circumstances if the goods are lying on the seabed. On the other hand the impossibility can be financially founded. In this situation, the repair of the goods exceeds the value of the goods after repair. If compensation for damage cannot be calculated because repair is impossible, compensation for a total loss is paid. Total loss compensation is therefore subsidiary to the damage compensation. The total loss is analysed in chapter 6.

As aforementioned, the compensation is not calculated according to the actual loss, but according to a fixed amount agreed upon in the insurance contract.

Even if the goods cannot be recovered, the damaged goods are not always without market value. Consequently, the insurer gains the insured's rights and obligations of the damaged goods in order to realize the remaining values in the damaged goods.⁴⁶ The transfer in ownership is one of the essential aspects in the concept of total loss and is further analysed in chapter 7.

⁴⁵ Jantzen pg. 239 cf. UDB § 10 and BDB § 10

⁴⁶ Cf. DC § 72 and NCC § 52 first section

5 The concept of brand products

In this chapter, I define the concept of brand products. Furthermore, I analyse cases with damaged brand products and the consequent damage to the reputation of the brand. As it will follow from my discussion the nature of brand products are quite different from “no-name” products.

5.1 Characteristics of brand products

As a main rule, a brand product is expensive and well known for its uniform and continual qualities. A reputation of the brand is built up stating that the brand products represent special qualities. These qualities define the brand product, as other qualities define no-name products. The consumer willingly pays the purchase sum in order to receive these qualities.

It is important to mention that the brand products are representatives for the brand and not just as a no-name product which defy its own value by its qualities. I will revert to this in chapter 5.3

It is interesting to define what qualities that brand products represent. I have decided to focus on three groups of brands, each group with its own valuable characteristics and qualities.

The first group of brands has an image of being better than others because of their practical usage. The brands’ qualities are to be robust. See for example tents from “Helsport”⁴⁷ or shoes from “Caterpillar”⁴⁸. By using these products, the consumer signifies a rough lifestyle. I name these kinds of brands “practical brands”.

A second group defines its value according to the expensiveness of the products. The product is expensive because the brand has managed to convince the consumers that this brand is special for a reason. Most of the time, the only thing special about the product, is the price. The product it-self does not have to have certain qualities, except for the fact that it must be the original product without damages. Thus, the customers signify

⁴⁷ www.helsport.no

⁴⁸ www.caterpillar.com

exclusiveness and wealth when buying these products. An example from this second group could be products from “Gucci”.⁴⁹ I call these brands “exclusive brands.”

Within the third group, these products gain their value by the responsible ecological and environmental way the products are produced; say cosmetics from “The Body Shop” or “Max Havelaar Fair Trade”.⁵⁰ When the consumer is buying bananas from Max Havelaar Fair Trade he signifies that he is a conscientious person who wants to secure a fair trade. Likewise, a customer from The Body Shop buys its cosmetics in order to secure animal rights. Arguably, a good name for these brands is “conscientious brands”.

The characteristics- and listings- of different brands are very rough and do not pretend to be exhaustive. Moreover, a mixture between the different brand characteristics is often the case. Exclusiveness is a characteristic found in various brands, as one factor out of many defining the brand.

5.2 Damage to brand products

Common for the brands is that their consumers want to identify with a specific lifestyle and image. The brand products and its brand is a guaranty factor for this image. The value of the brand products and the brand depends on whether the brand product has the promised qualities. The brand product has to live up to the criteria of perfection at all time and cannot bear be damaged.

However, damage to the brand products occurs for different reasons depending on what kind of brand product discussed.

The practical brand product suffers damage if the brand product is not as strong as promised. One possibility is that the tent cloth is destroyed by the lightest wind or rain. This dysfunction of the tent can be the result from wrongful storage during a carriage exposing the tents to water and moulding.

The exclusive brand product suffers great losses if the brand product is sold too cheap. This could be the case if the seller of “Gucci” bags gave discount because the bags had

⁴⁹ www.cucci.com

small stains. The value of the brand product depends on the costumers wish for a unique and expensive product that is not for everyone to buy. However, if the producer sells the brand products too cheap he might profit from a new group of consumers, but the brand has no longer any value for the old consumers. For instance, the brand Lewis faced this problem in Denmark in the 1990's. In the beginning, jeans from Lewis could only be bought in Lewis's concept stores and were thereby exclusive. However, big grocery chains started to import Lewis jeans from the Far East at a very low price only to sell them cheaper than the price in the concept stores of Lewis. A larger and broader group of people had now money enough to buy the jeans at the reduced price. The Lewis jeans thereby lost its quality as being exclusive.

The conscientious brand product suffers damage for other reasons. In general, a conscientious brand product is characterized by the way it is produced, used and destroyed. Thus, focus is on the entire life cycles of the brand product. For example, conscientious brand product suffers damage if brand products that should not include chemicals, turns out to be cleaned with chemicals after an accident; even so, if the chemicals do not form a health danger to the consumer. The brand product is no longer ecological and the chemical used can be associated with destruction of the nature.

5.3 Damage to the reputation of the brand

As we saw in the chapters above, brand products are damaged if the qualities that characterise the brand product are missing. The missing qualities moreover affect the value of the brand itself. A brand has gained its reputation because its products always fulfil the quality requirements. If the brand product cannot fulfil the promised qualities, the reputation will suffer from this. The brand is no longer trustworthy and the consumer stops buying the brand products.

It is a part of the damage evaluation for the single brand product, that the brand suffers damage, if the brand product is sold damaged. The consequential damage to the brand is the nature of brand products: If there is a risk that the brand suffers loss due to a lacking quality in a brand product, this lack of quality constitutes damage. Consequently, the

⁵⁰ www.maxharvelaar.dk

brand product and the brand are not two standards that can be separated, but rather one entity depending on each other.

The possible damage to the brand's reputation triggers, therefore, a more restrictive damage evaluation for the brand products.

An illustrative case is the Norwegian "Heroin chewing gum" case⁵¹. In the case, a drug addict had been living in a truck that contained branded chewing gum. Two used needles were found stabbed into the boxes. Likewise, three empty containers from needles were found and on some of the boxes traces of blood and heroin. The court held that the chewing gum risked traces of heroin and blood pollution and the brand product was clarified as unsafe according to the Norwegian food law § 16. In this case, the court held:

"Realizing the damaging potential from the damaged goods, this would have lead to massive negative affect on the market for Nadir, Wrigley and the brand Hubba Bubba and Extra, both domestically and internationally." (Read, my translation)

As it follows from the verdict the brand goods were damaged and if the damaging potential were realized the producers' brand would suffer massively. In this case, the brand Hubba Bubba, as one of the brands represented has the reputation of selling harmless chewing gum without pollution for children. The fact that the branded chewing gum had been in an environment with heroin and blood was damaging for the brand Hubba Bubba. Candy for children and narcotics were not a combination that gained markets shares for the brand.

6 Total loss of goods

Total loss is a fact, if recovery of the goods is impossible, by either salvage or repair. In one end of the scale, the actual loss is placed; here the goods are physically removed from the surface. In the other end of the scale, you find the total loss according to a control clause that gives the insured the sole authority to claim a total loss irregardless

⁵¹ 9. January 2006 case number 05-096877TVI-FOLL

of the actual damage. Between these two poles, a number of different ways to construct the total loss is found. This is the topic for this chapter.

In the next main chapter, I will analyse the insurer's rights and obligations once compensation for total loss is paid.

6.1 Actual total loss⁵²

6.1.1 Goods lost

As a main rule, there is an actual total loss once the goods have been annihilated, cannot be salvaged or are removed from the insured's control.⁵³ When the goods are lost in the present meaning of "lost", it no longer represents a value and no profit can be gained from the goods. This paper focuses on the insurer's disposal of the damaged goods in order to realize the remaining value in the damaged goods. Thus, the situation in which the goods are lost has only little relevance.

The more interesting situation occurs, when the goods are destroyed in its original nature and usage, but still represent an objective market value. This is the case in some of the examples in the following chapter.

6.1.2 Loss of the original nature

In addition to the actual total loss characterized by the fact, that the goods have lost its value for everyone; say the insured, the insurer and consumers, there is an actual total loss when the goods are destroyed in the shape in which the goods were insured. This is due to the fact that the qualities that define the goods are lost, and as a result the damaged goods cannot be sold. Consequently, there is no more value in the damaged goods for the insured party.

However, in some situations the damaged goods are able to represent a market value for the insurer. The realization of this value is analysed in chapter 7.

⁵² I will in the following chapter not make comments on all kinds of total losses listed in the DC and the NCC. Focus is on the total loss situations with special relation to brand goods.

In Norway the goods are lost in its original purpose and shape for which the insurance was taken out, when goods are lost or have lost 90 % of their value according to NCC § 35 nos. 4. The question of the original purpose of the damaged goods was tried in the Norwegian Supreme Court case referred in ND1913.59. In this case, the insurer had to pay compensation for total loss because steel wire was destroyed and no longer could be used for its original purpose.

One can argue that NCC § 35 nos. 4 is a rule stating a constructive loss.⁵⁴ The precise definition on how to calculate the loss as an actual or constructive total loss is not so important; there is no clear borderline between the two ways to construe a total loss. I revert to the compromised loss in chapter 6.4.2.

In Denmark the question is regulated in DC § 191 nos. 3. The wording is: “**Varene er ødelagt i væsen og brugbarhed**”.

According to DC § 191 nos. 3 the actual total loss depends of the goods’ nature and usage. Let me exemplify: The yearly contribution of second hand clothing, collected by the Salvation Army in Denmark, is on its way to Africa.⁵⁵ The nature of the cargo is second hand clothing and a premium is paid in accordance to this. Reaching the rough sea at Biscay, a storm hits the vessel. The cargo is exposed to seawater and gets irremovable stains. Despite the stains, the clothing still exists in its nature as second hand clothing and is used in accordance with this concept. Meanwhile in China, a cargo of Lewis jeans⁵⁶ is shipped to Europe from the factory. The nature of cargo is new Lewis jeans and premium is paid in accordance to this. The storm at Biscay hits this shipment as well, and the jeans get irremovable stains from the seawater. The Lewis jeans cannot be sold as new jeans because of the stains. The cargo of Lewis jeans is therefore lost in its nature and usage for which the insurance were taken out and consequently suffers a total loss.

⁵³ Cf. DC § 191 nos. 1, 2 and 4 and NCC § 35 nos. 1-2.

⁵⁴ Svante pg. 431, I will return to the content of a constructive total loss in chapter 6.3

⁵⁵ www.frelsens-haer.dk

⁵⁶ www.us.levi.com

In the Danish case, UfR 2004.335H, an incinerator construction was damaged on its way to Cairo. It was argued, that there was a possible risk for the construction to be affected with hidden damages, and as such would make it impossible to sell being an incinerator construction. The court held, that due to the possible damage involved, the construction was destroyed in its original nature and usage, and a total loss had incurred according to DC § 191 nos. 3.

I will in the following section, give examples of typical sceneries, in which the goods are destroyed in their original nature and usage.

6.1.2.1 Public restrictions

The classic example in which the goods are destroyed in the nature and usage, for which the premium is calculated, is a cargo of grain insured as human food. The cargo gets polluted by oil or other chemicals, which afterwards makes it illegal to sell the grain as human food according to the public food regulations. Thus, the nature of the grain for which it was insured has changed: The grain is no longer human food and a total loss has occurred. It is important to notice, that it is not the public regulations that determine whether the goods are lost in its original nature and when a total loss has occurred. The loss of nature and consequently total loss follows from the insurance agreement. The total loss is a fact because public regulations prevent the goods to be sold in accordance to their original purpose. However, the damaged grain is likely to have a remaining market value for the insurer if he manages to sell the damaged cargo as animal food or the like.

Other products such as drugs, food, toys for children and alarms are exposed to public authorization and control in order to be sold. These products are changed and damaged in their nature for which the insurance is taken out if they are not approved by the control. In these cases the damaged goods seldom represent a remaining market value for the insurer.

In the “Heroin Chewing gum” case referred to in chapter 5.3, a cargo of chewing gum was polluted from blood and heroin. The chewing gum was insured in its nature as candy for humans. The cargo of chewing gum could not be sold as candy or human food because of the verdict. Consequently, the cargo as a whole had lost its nature and usage

for which the insurance was taken out. Thus, a total loss according to the insurance contract had occurred, even though only 12 out of 32 kolli were affected, and only 219 boxes out of 17,280 were missing.

6.1.2.2 Guarantee and trust

For some products, the insured party guarantees a certain performance.⁵⁷ It is essential for the insured to provide a product that satisfies these requirements. If the insured is not able to fulfil the guarantee, the product loses its entire value and total loss is a fact. The car industry serves as a good example. The fact, that the value is lost for the insured does not mean that the insurer is unable to sell the cars on markets with less focus on safety.

For other products, it is essential that the consumers can trust them; the consumers' lives depend on the products. The usage and nature of the product demands the product to be perfect every time. Pharmaceutical products such as insulin represent this group. For these products, the mere risk for damage is sufficient to construe a total loss, due to the life saving functions. In U.2003.414S, a cargo of insulin was damaged while stored at a temperature too low. The cargo suffered a total loss for that reason.

When pharmaceutical are damaged they seldom represent a value for the insurer.

6.1.2.3 Brand products

In the two sub chapters above, I stated that goods lost their original nature for which they were insured, due to public restrictions preventing sale and due to missing guaranteed -or necessary- qualities. Consequently, the products suffered total loss: the products could no longer be sold as the same products for which they were insured. If the same obstacles appear in connection with brand products, the brand products also suffer a total loss. In that respect, damage to brand products does not differ from damage to no- name products.

Nevertheless, brand products lose their original nature for which they were insured for other reasons than no-name products.

According to chapter 5.3, brand products are damaged due to a combination of the actual damage on the brand products' qualities and the possible damage to the brand. The brand product qualities analysed were solidness, exclusiveness and consciousness.

Consequently, the protection of the brand will affect the total loss evaluation when there is doubt concerning the size of the damage to the brand product. The insurer is obliged to compensate a total loss if the brand product are so damaged that there is a risk that the damaged brand product damages the reputation of brand. The result is based on the fact, that the protection of the brand's reputation is part of the nature of the brand product. Furthermore, there is a risk that damage to the brand's reputation will result in damage, much greater than compensation for the sole cargo of damaged brand products.

There is an ongoing conflict concerning a cargo of branded grain.⁵⁸ In this case, a dead cat was found in the grain. The surveyor claimed that there was no chance, that the cargo could be damaged or infected because of the dead cat. Despite this argument, the insured claimed a total loss because of his reputation as a provider of first-class quality grain for human food. If the branded grain was sold and the story came out in public, the situation could severely damage his brand because the branded grain was no longer the holder of the qualities promised. Thus, the possible damage on the brand constituted a total loss of the brand product, according to the insured.

A polluted product can be cleaned, and in theory, the cleansing can ensure the product to be sold. I will revert to the question of disposal in chapter 7.4. However, the consumer's disfavour of the chemicals used in the cleaning process and the mere risk that the pollution is not removed entirely has a damaging affect on the brand product: The brand product no longer is considered untouched, and the bad reputation consequently damages the brand, especially the conscientious brand.

In the "Heroin Chewing gum" case, the damaging effect on the brand was important for the evaluation of the damage on the brand product:

⁵⁷ Svante pg. 484

“The court also points out that Nidar’s and Wrigley’s products presumable would suffer a massive reduced faith in the market, if it was announced that these companies were selling food that had been in an environment with risk of infection from heroin or infectious blood.” (Read, my translation)

The court held in the case that the branded chewing gum no longer had the promised and expected qualities being an untouched product once the chewing gum had been exposed to heroin and blood had. The mere risk that the brand product was polluted would have massive effect on the brand if the brand products were not destroyed.

Consequently, disputed damages on a brand product can create a total loss. This would not have been the case for no-name products, having their focus on the damage to the product it self and not on the presumable damages to a brand.

6.2 Partial total loss

If parts of the cargo that clearly can be separated from the rest, suffers total loss, the rules of total loss applies for the damaged part cf. DC § 194 and NCC § 36. This could be the case if a number of cars transported by ships are washed over board due to heavy weather.

Difficulties can arise in the area between a total loss cf. NCC § 35 evaluated according to NCC § 37 cf. NCC § 47 as discussed in chapter 4.1 and the partial total loss according to NCC § 36.⁵⁹ These questions are not discussed in this text.

6.3 Constructive loss

There is no clear borderline between the actual loss and the constructive loss. Some theorists even claim that there is only one definition of a total loss of goods.⁶⁰ As a main rule, the actual total loss is based on the impossibility of technical repair whereas the constructive total loss is based on the impossibility of economical repair.

A constructive loss of goods cf. DC § 192 appears if the goods cannot be recovered for a reasonable amount. This would not be case if the repair costs exceed the benefit of the goods after repair.

⁵⁸ Interview with lawyers at DLA-Nordic, Oslo June 2006

⁵⁹ NCC commentaries pg. 51

⁶⁰ Lindquist pg. 161 cf. Svante pg. 429 note 44

The NCC § 35, nos. 4, contrary to DC § 192, emphasises the value lost and not the repair costs. There is a total loss, if the value of the product loses more than 90 % of its original value. The repair cost does not necessarily amount to the same size as the value lost. An illustration: A construction machine falls to the ground and is damaged due to an accident. Some parts of the machine are damaged and replaced. The repair costs are 100,000 NOK. However, the value lost is higher if the seller of the machine is forced to give a discount on 200,000 NOK because the buyer is unhappy with the fact that he does not get a brand new machine.

The differences in the DC and the NCC in how to calculate a constructive loss might stem from the fact that DC § 192 concerns goods that are influenced by DC § 129. DC § 129 concerns vessels⁶¹, whereas NCC has undergone change so that it now focuses on the special issues on goods.⁶²

Vessels are not sales objects in the same way as branded goods. Damaged vessels need to be repaired because the owner or charterer depends on its transportation capacity. Furthermore, big sums are involved, and thus focus is on how to save these values instead of scrapping them. Recovering is the goal, thus, focus is on the repair costs.

The purpose of goods is different. Goods are designed to be sold. The relevant question is then, whether the goods can be sold for the original usage and for more than 10 % of the original value. If that is not the case, the goods suffer a total loss, even though the goods still maintain an objective market value.

6.4 Practice

In the following subchapters I will analyse how practice constitutes a total loss. The subchapters are based upon interviews with people working in the insurance business.⁶³ The persons interviewed are all experienced workers with special knowledge of the way branded goods are dealt with in case of total loss. The answers given were quite similar for the whole group. Consequently, I believe that I can draw conclusions and interpretation from the answers.

⁶¹ Jantzen pg. 229

⁶² Jantzen pg. 21

⁶³ See list of references in chapter 10

Subchapter 7.5.1 to 7.5.3, will analyse how practice sets the limits for the insurer's disposal. These chapters are also based upon the interviews.

6.4.1 Control clauses

Marine insurance are regulated by standard agreed documents such as the DC and the NCC and standard unilateral conditions such as the Danish Conditions. Moreover, the parties are free to negotiate concrete conditions in their insurance contract on a case-to-case basis. This is done by insurance clauses.

Novo Nordisk⁶⁴, being the insured, very often uses a “**control of damaged merchandise clause**”, the so called control clause.⁶⁵

The control clause gives the insured a sole right to claim a total loss if there is any doubt of the soundness of the insured brand products as a result of a covered damage. This is theme in the present chapter. Furthermore, Novo Nordisk is entitled to have the damaged brand goods destroyed. This is discussed in sub chapter 7.5.2.

Novo Nordisk can decide whether there is a total loss or not, regardless of the actual size of the damage.

The control clause is an insured friendly clause: It gives the insured many benefits.

The insurer on the other hand is placed in a bad position when using this clause. The insurer is liable to pay total loss compensation solely decided by the insured on a discretionary basis. Consequently, there is a risk that the insured often claims a total loss in many cases, and thereby increase the costs for the insurer.

However, this is not the case. The fact is that Novo Nordisk has supplemented the control clause with a seven-digit initial loss clause. The initial loss clause means that Novo Nordisk has to cover the losses, which do not exceed the amount stated in the clause.

⁶⁴ www.novonordisk.com

Moreover, the loss covered by the insurance is calculated on the production costs of the damaged brand products, which does not include a profit. Consequently, the insurer is seldom put in a situation where he has to pay compensation to the insured, despite of many cases with total loss.

However, the content of the control clause and the price of having the clause, depend on the parties' commercial strength and commercial agenda. Commercial considerations furthermore have major influence on the calculation of the total loss if there is no insurance clause, and the total loss in principle had to be evaluated in accordance with the DC and the NCC. This is analysed in the following subchapter. Moreover, commercial considerations are relevant when the insured wants to limit the insurer's disposal of the goods. This will follow from chapter 7.5.

6.4.2 Compromised total loss

The essence of this chapter is that the insurer pays a compromised total loss in order to protect his commercial interests.

The compromise very often has the following outline: The insurer compensates a total loss, deducted the market value remaining in the damaged goods, and the insured keeps the ownership of the damaged goods.

The compromised total loss is based on a cost-benefit analysis. The main components in the analysis are the compensation and the relationship to the insurer's clients, seen from the view of the insurer.

The insured on the other hand, gains protection of his brand against a reduced compensation. I will revert to the question on ownership and protection of the insured's brand in chapter 7.5.3.

The size of the compensation has to be seen in relation to the fact, that if a compromise is not reached, the insurer probably loses the insured as client. This means that the future premiums from the client must exceed the compensation for total loss within

⁶⁵ See annex 1

reasonable time to make it profitable to pay the compensation. Other factors, such as the mere interest in having the insured as client, can also be decisive.

Furthermore the insurer compensates a total loss due to the fact, that he is not interested in having a reputation of being unfair in the insurance market, when it comes to compensation. A bad reputation could have the affect that the insurer cannot attract new clients. The danger of a bad reputation, furthermore, prevents trials on the question of total loss.

A compromise is very often the case when it comes to total loss of brand products. The damage evaluation is based on soft measurements such as the consumer's trust and protection of the insured's brand. This makes the evaluation rather difficult and costly. By having the compromised total loss the exact evaluation of the damage is not necessary. Consequently, the parties save time and money on costly surveys.

The compromised total loss is in spite of these elements not perfect. The insurer runs the risk of either paying too much or paying with out being legally bound to do so. The reason for this, could be that the origin and the size of the damage is unclear, but has not been investigated properly in order to save time and money. However, unclear damage leads to unsatisfactory situations for the insurer in his regress proceedings against the tort feisor.

The question of regress was tried in the "Heroin Chewing gum" case. In this case, the insurer paid compensation to the insured and simultaneously sued the carrier for recourse. The problem for the insurer was that he had paid out compensation, based on total loss for the insured, but the carrier did not agree with the insurer that a total loss had occurred.

6.5 Summary

The definition of total loss appears to be easy, at first glance. The value of the goods must be lost. Looking closer, though, the loss of value is reached in a variety of ways.

In one end of the scale, we find the cargo of electronic, in an open container, lying on the seabed unable to be salvaged, obviously a total loss. In the other end of the scale the

product still exists. These products suffer a total loss whenever the central qualities of the products are lost. This goes for both brand products and no-name products. The brand product qualities that I have focussed on in this paper are solidness, exclusiveness and consciousness.

However, the brand product and the reputation of the brand have to be seen as one entity. Consequently, the brand's reputation suffers damage if the damaged brand product is sold without the promised qualities. This fact has to be taken into consideration- and can be decisive- in a case of doubt in the total loss evaluation of the single brand product. Consequently, the insurer can be liable to compensate total loss in cases of doubt to the size of damage to brand products.

In practice, the parties often constitute a total loss based on a control clause or a compromise in stead of using the standard conditions given in DC § 191 and NCC § 35.

When the parties use the control clause, the insured is entitled to declare a total loss regardless of the actual size of the damage. In return for this possibility, the insured has a very high deductible and the compensation is calculated according to the production cost. The premium paid can be rather high however, this depends on the commercial strength of the parties.

The compromised total loss is based on a cost-benefit analysis. The cost-benefit analysis weighs the size of the compensation against the insurer's client relationships. The compromised total loss is especially used in relation to brand products in which the definition of total loss is difficult.

7 The insurer's rights and obligations

7.1 Introduction

When the insurer has compensated a total loss or partial total loss⁶⁶, he can choose to step into the shoes of the insured and take ownership of the damaged goods.⁶⁷ The insurer can be limited in his action because he has to take care of the insured's interests. This conflict is the topic of this chapter.

By stepping into the shoes of the insured, the insurer becomes the possessor of the insured's rights and obligations of the damaged goods. It is not the duty of the insurer to take over the damaged goods⁶⁸ but it seems to be a duty to reject ownership if the insurer does not want to do this.⁶⁹

The possibility to enter into the rights and obligations of the insured is based on the rules of abandon and subrogation.⁷⁰ In short, these rules transfer the rights attached to the goods to the person who has paid compensation, in accordance with the amount paid. The rights exist in both the Scandinavian states and UK.⁷¹ In chapter 7.2 I will analyse the principles of abandon and in chapter 7.3, subrogation.

The possibility to take over the damaged goods is part of the insurance agreement and the premium is calculated in accordance with this.

In practice, the insurer has mainly three different ways in which he tries to sell the damaged brand product. I will give an analysis of the disposals in chapter 7.4. Whether this disposal is allowed or not depends on the rules that regulate the disposal in the insurance agreement. The limitations on the insurer's disposal will be analysed in chapter 7.5.

⁶⁶ Cf. NCC § 35 and DC §§ 191-192

⁶⁷ Cf. NCC § 52 and DC § 72

⁶⁸ Jantzen pg. 231

⁶⁹ Cf. NCC § 52 first section. Hans Jakob Bull pg. 511, NCC commentaries pg. 71. Differently, see Jantzen pg. 231

⁷⁰ Svante pg. 477, Tybjerg 1952 pg. 183. There are differences between the English and the Scandinavian rules on abandon and subrogation. These differences are not discussed in this dissertation. Focus will be on the Scandinavian rules.

⁷¹ Svante pg. 479

7.2 Abandon

As aforementioned, the insurer steps into the ownership according to the rules of abandon. In short, abandon deals with the insurer's right to the damaged goods.

The rules of abandon have developed in the marine history.⁷² The rules gave the owner of an interest the possibility to receive the value of the interest from a third person. If this offer is accepted, the person having paid the value is going to have the ownership transferred in accordance with the amount paid.⁷³

Nowadays, the rules of abandon is found in NCC § 52 and DC § 72. This means that the insurer gains the rights of the damaged goods, for which he has paid the full insurance sum, deductible deducted, if any. In other words, the insurer has paid the insurance sum, which coincides with the value for the damaged goods. For this reason, the insurer takes over the ownership of the damaged goods and thereby receives the remaining value assessed with the damaged goods, if any. The insured, on the other hand, receives the full insurance sum without deduction of the rest value of the damaged goods. Problems occur if the goods are underinsured. In this case, the insurer pays pro rata compensation and the parties will have a joint venture on the damaged goods afterwards. This problem is not discussed further in this paper and in the following, I resume that the damaged goods were fully insured.⁷⁴

The insurer's rights include the right to dispose over the damaged goods and to collect the profit.⁷⁵ As the insurer gains the full ownership of the damaged goods, he is free to keep the profit even though the amount exceeds the compensation he has paid the insured.

As aforementioned, the insurer gains the full ownership of the damaged goods once total loss compensation is paid. The insurer's rights concerns the damaged goods as such. The insurer must observe all the rules regulating the disposal of the damaged goods when he pursues his rights. Especially the rules on trademark acts have to be

⁷² Tybjerg 1952 pg. 183

⁷³ NCC commentaries pg. 71

⁷⁴ See Svante pg. 480

⁷⁵ Jantzen pg. 231, Svante pg. 481

taken into account. In the Danish case UfR 2003.1343 “1. Quality tomatoes”, the insurer’s disposal of the damaged goods was limited, not because of the insurance contract or insurance regulation but according to the trademark act. I revert to this case and the details about trademark acts in chapter 8.

On the other side, the insurer has the owner’s obligations, once he has paid compensation for a total loss and has not rejected ownership.⁷⁶ The obligations are of various kinds. Some obligations are more related to the insurer’s disposal of the damaged goods than others are.

First of all the insurer takes over the obligations that comes with the damaged goods at the time as the insurer compensates for a total loss. Such obligations could be taxes and other fees for which the relevant authority has taken security for in the damaged goods. This obligation is special, it means that the insurer has not yet disposed of the damaged goods, but is still liable to pay according to the fee or have the damaged goods arrested by the authority according to their lien in the damaged goods.

Secondly, the insurer is liable to pay for the removal of the damaged goods, since he is the rightful owner.

Thirdly, the insurer is liable as a seller if he puts the damaged products on the market. The insurer is therefore liable for wrongful delivery and other kinds of contract breaches. Furthermore, the insurer is in this situation responsible for damage in tort for product liability. The threat of product liability often makes the insurer hesitant about taking over the ownership.⁷⁷ The reason for the insurer’s obligations in these situations is that the insurer himself has signed the contracts, and thus liable according to normal contract law and principles.

The insurer is on the other hand not liable according to an original sales contract between the insured, who has been paid compensation for a total loss, and his buyer. It is necessary to stress that in some sales contracts the buyer is the insured part even though the seller is the person taken out the insurance. That would be the case in a CIF

⁷⁶ Svante pg. 483

sale. However, as I have pointed out in chapter 1.2 the seller is the insured part in this paper. The buyer has negotiated a sales contract with the insured. The insurer has negotiated an insurance contract in order to secure the value of the goods. Two individual contracts are made that both concerns the goods. The buyer wants the goods delivered and therefore has a claim toward the insured. In situations where the goods are damaged, the insured has a claim against the insurer. Thus, the buyer cannot claim to be satisfied by the insurer in accordance with the sales contract. This is the case even though the insurer has taken over the ownership according to the insurance.

7.3 Subrogation

The insurer's rights are likewise reflected in the rules on subrogation or recourse. In short, these rules deal with the insurer's (insurer 1) right toward the tortfeasor or other insurers (insurer 2). Recourse and subrogation includes many aspects, which this paper cannot cover, so I will only discuss a few.⁷⁸

The rules of subrogation or recourse are based on the principle that the claimant can choose whether he wants compensation from the tortfeasor or the insurer. If the insurer pays compensation, he can raise a recourse claim against the tortfeasor if certain conditions are met.

The rules of subrogation in cargo insurance are found in DC § 71 and NCC § 53. All Scandinavian states and UK have quite similar rules on subrogation.⁷⁹ This principle is most likely a general principle in tort law. As a main rule, insurer 1 does not receive more rights than the insured. This follows from the wording of NCC § 53,

“Kan forsikrede forlange at tredjemann erstatter tapet, inntreer selskapet ved utbetaling av erstatningen i sikredes rett mot tredjemann.”

No recourse is possible if the tortfeasor or insurer 2 have valid objections towards their responsibility. For instance, insurer 2 could claim that the insured was responsible for the damage. The insured is on the other hand free to waive his rights against the tort

⁷⁷ See chapter 7.5.3 concerning compromised disposal

⁷⁸ For a detailed discussion see Svante pg. 486-495

⁷⁹ Svante pg. 487

feasor or insurer 2. In this case, insurer 1 has the right to limit his compensation in accordance to the lack of recourse action.⁸⁰

The insurer's recourse action is not based on the fact, that he was obliged to pay.⁸¹ Even if the insurer pays ex gratia,⁸² he still has the same claims as the insured toward the tortfeasor or insurer 2.

The problem of recourse was tried in the "Heroin Chewing gum" case. As aforementioned, the insurer paid compensation for total loss to the insured and tried recourse actions against the carrier who was the tortfeasor. However, the insurer had the same rights against the carrier as the insured.

In ND1927.388, the insurer compensated a shortage of cement sacks. The sacks were missing due to wrongful delivery and therefore not covered by the insurance. The insurer had anyhow recourse access toward the carrier because of subrogation.

7.4 Resale of damaged brand goods and the damaging effect

I have chosen to analyse three different ways the insurer can sell the damaged brand products. I will analyse in what way the disposals have a damage potential to the practical brand, the exclusive brand and the conscientious brand analysed in chapter 5.1. Just to summarize, the brands would suffer a loss if the brand product did not live up to the criteria of perfection, and thereby meet the expectations of the consumers.

7.4.1 Sale at different commercial markets

First of all, the insurer can make it clear for the consumer, that the damaged brand goods are no longer the holder of the brand characteristics in order to avoid future disappointment. One way to do this is by marketing the damaged brand product as second hand brand products and sell them at outlets.

However, the second hand marketing most likely damages the exclusive brand because the lower price attracts a larger group of consumers. The conscientious brand is damaged if the pollution that triggered the total loss in the first case is still present in the brand product. The practical brand is also damaged by the second hand sale. Once the

⁸⁰ Cf. NCC § 54 and DC § 71 second section

⁸¹ Jantzen pg. 278

damaged practical brand product is in circulation, the users of the practical brand are not able to distinguish between the cheaper and damaged second hand brand product and the undamaged brand product. In time, the practical brand is not considered trustworthy and consequently loses its value.

7.4.2 Sale at different geographical markets

Secondly, the insurer can sell the damaged brand products in a different geographical market than the one of brand. This means in practice that the damaged brand products are sold in a region in which the brand is not represented. Sale of the damaged brand goods on these markets does not harm the brand as long as the markets are not mixed together by parallel import. The problems that might arise in the waters of parallel import are too big and massive to be commented on in this dissertation.⁸³ I will revert to protection according to trademark acts in chapter 8.

There is a chance that marketing of damaged brand products in a different geographical market does not have the same damage potential as the second hand marketing. However, the risk of damaging the brand is still present and difficult to predict.

7.4.3 Sale of the brand product as no-name product

A third way to dispose of the damaged brand products is to remove the link between the damaged brand product and the brand and sell the damaged brand product as a no-name product. This can be done by removing the brand label from the damaged brand product. Classical examples are when the brand label is removed from the shirts or branded and vegetables are repacked.

Whether it is possible to remove the labels or characteristics from the brand products depends on the nature of these brand products. Some of them will have a certain shape and appearance, which cannot be hidden or removed. In these cases, the insurer is not able to make a resale without damaging the brand.

In cases of conscientious brands it is even harder to resale the damaged brand product. As described in chapter 5.1, the conscientious brand has its value because of the consumers trust in the responsible way the brand product is produced, used and destroyed. Consequently, when branded grain is polluted by chemicals and therefore

⁸² Svante pg. 488

⁸³ See Koktvedgaard pg. 341 for a further discussion

sold as animal food, this act can give the brand a very bad reputation among its consumers if the new usage is published.

7.4.4 Summary

All of the disposals had damage potential for the brands mentioned in chapter 5.1. However, the damage potential depends on the combination of the chosen disposal and the specific brand.

7.5 Limitations for the insurer's disposal

The insurer's disposal of the damaged brand goods is limited in accordance with the rules the parties have chosen to regulate their insurance agreement. If the insured believes that a certain disposal is damaging for his brand, the insurer must seek protection. The different ways to seek protection is analysed in the following subchapters.

7.5.1 Trademark clauses

As mentioned in chapter 6.4 the following three subchapters are based on interviews with people working in the insurance business.⁸⁴

If the insured wants to protect his brand a trademark clause can be included in the insurance agreement. The trademark clause regulates the disposal of damaged goods carrying or representing the insured's brand. Trademark clauses are used both in Denmark and in Norway.

The Danish insurance company CNA Insurance⁸⁵ uses the following trademark clause. The content of this clause is quite similar to the ones used by most insurers and can therefore be seen as trade practice:

“To protect the insured's brand, resale of the damaged goods must be approved by the insured. If the insured does not approve resale of the damaged goods, a deduction on 10 % of the insurance sum is made.”

⁸⁴ See list of references in chapter 10

⁸⁵ www.cna.com

It follows from the wording, that only the brand is protected. The purpose of the clause is to protect the brand. Thus, no protection is given because of mere market speculations on whether the damaged brand goods are in competition with the undamaged brand products or not.

According to the wording, the insured is protected against resale. Resale is the case whenever the insurer gives up the ownership and receives compensation for doing so. Consequently, the insurer is entitled to lease the goods to third parties or give away the damaged brand goods the employees. However, the purpose of the clause is to protect the brand. The leasing and give away of the damaged brand product can damage the brand's reputation, because the damaged brand product in reality is in circulation. But the wording only covers resale. This raises the classical question, whether two professional parties should be given protection according to the wording of their contract: Nothing more or less. I will not go into this discussion because of the size of these problems and the little practical importance the question has in real life.

If the insured prevents resale, he must pay the insurer compensation on 10 % of the insurance sum. Consequently, the insured bears the loss from the non-disposal according to fixed amount.

The insured must decide whether he wants to approve the insurer's resale as described in chapter 7.4. As it follows from my previous analysis, the disposal of the damaged brand goods had a damage potential to the brands. The insured has to compensate the insurer if the protection constitutes economical loss for the insurer. Consequently, the insured have to make a cost-benefit analysis to see whether the protection is profitable.

7.5.2 Control clauses

Another kind of insurance clause is the control clause⁸⁶ from Novo Nordisk. This clause not only regulates the question of total loss as analysed in chapter 6.4.1 above. The control clause regulates in addition the insurer's disposal of the damaged brand products.

⁸⁶ See annex 1

Novo Nordisk is entitled to claim that the products are destroyed, whenever Novo Nordisk determines that the brand products are damaged. Alternatively, the products must be sent back to the producer with the risk and at the expense of the insurer, to see whether or not they are suitable to be sold as the insured's name products.

When the parties use a control clause, the insurer does not gain the ownership of the damaged brand products. Thus, the insurer is not entitled to dispose of the damaged brand products in any way. The insurer is not compensated for the non-disposal directly, but insurance with a control clause can be rather costly.

7.5.3 Compromised disposal

As aforementioned in chapter 6.4.2 the insurer and the insured can agree on a compromised total loss.

To recap, the parties will make the following compromise: The insured keeps the ownership of the damaged brand products and receives a total loss compensation deducted the remaining objective market value in the goods. Consequently, the insurer is not entitled to dispose of the damaged brand products, but is compensated in stead.

The insurer is willing to make the compromise for several reasons. First, he is interested in having a good relationship with the insured, and therefore treats the damaged brand products in a way that fits the insured. Secondly, the insurer is not interested in the struggle with selling the damaged brand goods. Thirdly, and rather importantly, the insurer does not want to risk a product liability. The risk of being met by a product liability is something that concerns the insurers a lot due to the uncertainty of the size of the possible compensations.

The insured on the other hand, is willing to make the compromise because the insurer's disposal of the damaged brand products would damage the reputation of the brand. The insured has in this case weighed the lower compensation for total loss against the possible damage to the brand's reputation and agreed upon a suitable compromise.

7.5.4 Marine insurance regulation

7.5.4.1 Norway

In Norway we find the rules that protects the insured from the insurer's disposal of the damaged goods in NCC § 52 second section,

“Ved disponering av de varer som selskabet har overtatt retten til etter første led, plikter selskabet å ta tilbørlig hensyn til sikredes interesser.”

The core of the cited rule is the wording “tilbørlig hensyn til sikredes interesser” which means “proper attention on the insured's interests.”

The protected interest must be an economical interest cf. NCC § 1. However, from the wording of NCC § 52 second section it is not clear what interest that is protected. In principle, it is possible that all economical interests are protected. However, the scope of protected interests should be discussed in the light of the insurance system as a whole. The insurer is through the rules of abandon⁸⁷ given the full ownership of the damaged goods once compensation for total loss is paid. The insurer can sell the damaged goods as he pleases. For that reason, pure market losses are not protected interest because of the fact that the damaged goods are competing with the insured's goods⁸⁸

It follows from the commentaries that the protected interests are the insured's name and brand.⁸⁹ Consequently, the insured can seek protection in NCC § 52 second section from the insurer's disposal analysed in chapter 7.4

The protection has to be “proper”. The precise extension is hard to define. Some different aspects must be looked at.

The natural understanding of the wording “proper” is that the protection is not unlimited. If the protection was unlimited the wording would have been different, like for instance, “pay attention to the insured's interests in all manners.”

⁸⁷ Cf. DC § 72 and NCC § 52

⁸⁸ NCC comments pg. 72

⁸⁹ NCC comments pg. 71

Secondly, it is presumed that the parties want balance between the obligations and rights on both sides.⁹⁰ In this case, there is a conflict of interests between the insurer and the insured: The more protection the insured is given, the more likely is it that the insurer suffers a loss. Proper attention is thus a compromise between the parties' interests, in which the starting point is that the parties must be protected equally if the opposite is not explicitly stated.

Thirdly, the purpose of this section is to make sure that the insurer takes care of the insured. Focus is on the insured's protection. This section reflects the general principle of loyalty in contracts⁹¹: The parties have to take proper care of the other party during the fulfilment of the contract. However, the proper care must be without detriment for the obliged party.

Fourthly, the commentaries of NCC states that the protection must be ensured without economical detriment for the insurer,

“Selskapet plikter imidlertid å ta tilbørlig hensyn til sikredes interesser hvis dette kan gjøres uten at selskapet påføres et økonomisk tap.”⁹²

It is worth noticing that if the wording is to be taken literally, it means that the insurer should bear no loss at all.

The insurance system is based on the principle of cover for the interest insured. The interest insured is the value of the goods. Another principle is that the insurer is given access to the remaining value of the goods once compensation for a total loss is paid according to the rules of abandon. These two principles are the basis for the premium calculated.

If the insured prevents resale in order to protect his brand, this will lead to a loss for the insurer. The insurer has compensated the insured's loss of goods, according to the

⁹⁰ Lyng Andersen pg. 379

⁹¹ Lyng Andersen pg. 406 and Gomard pg. 46

⁹² NCC comments pg. 71

premium and insurance sum. The insurer should not bear the extra loss from the non-disposal.

The analysis of proper attention tells us that the insurer is not going to suffer an economical loss because of the protection of the insured's brand.

However, the fact that the insurer must not suffer economical loss when he is protecting the insured's brand does not limit the insurer's obligations to pay proper attention to the insured's brand. A reasonable interpretation of NCC § 52 second section, which is supported by the solutions in practice,⁹³ is that the insurer must be compensated for his loss, when he is protecting the insured's interests. The insured must bear the costs of non-disposal, but the insurer must take actions to protect the insured's brand.

Once again the insured has to compensate the insurer for the non-disposal in order to protect the insured's brand.

The wording and the purpose of NCC § 52, leaves it rather open whether there is a transfer of ownership in accordance with the rules of abandon. I will argue that if the stipulators of the NCC wanted the insured to keep the ownership this would have been stated in the regulation, similar to the regulation found in DC § 85 which is the topic for the next chapter.

7.5.4.2 Denmark

In Denmark, we do not find a similar protection of the insured's rights.

The insurer's rights are found in DC § 72. As a main rule the insurer can dispose of the damaged goods as he pleases. However, contrary to NCC § 52 second section, DC § 72 does not have a modification to this main rule. The insurer is allowed to dispose freely, also to the detriment of the insured, according to the wording of DC § 72, which coincide with the rules of abandon. The insured is paid compensation in order to give control of the damaged goods.

⁹³ See chapter 7.5.1 and chapter 7.5.3 concerning trademark clauses and compromised disposal

The insured is not left, however, without protection of his interests. As I point put below, the insured can choose compensation according to the rules of a partial loss cf. DC § 85⁹⁴:

”At den forsikrede har ret til erstatning som for totaltab udelukker ham ikke fra i stedet at kræve erstatning efter reglerne om partiel skade. Sådan erstatning kan dog ikke overstige erstatning som for totaltab, heri fradraget værdien af hvad der måtte være i behold af den forsikrede genstand.”

By applying DC § 85 the insured consequently keeps the ownership of the damaged goods as if compensation was paid according to the rules on damage.⁹⁵ Consequently, the insurer is not entitled to dispose. Furthermore, the insurer pays compensation with deduction of the value left in the damaged goods.⁹⁶ DC § 85 is a modification to the rules of abandon in order to protect the insured’s brand.

The essential point in DC § 85 is that the remaining value in the damaged goods has to be deducted in the compensation. Consequently, the compensation cannot exceed the compensation paid for total loss.

The definition of the value is not clear. Two contradicting interests are present. On the one hand, the insurer might claim that the value deducted is the objective market value left in the goods according to the rules on abandon, as described in chapter 7.2. On the other hand, the insured might claim that the damaged goods no longer represent any value to him and consequently there is no value to deduct. The latter would result from the fact that the insured can protect his brand and still receive full compensation for the detriment of the insurer. This is not the idea of DC § 85.

According to the natural understanding of the wording and the purpose of DC§ 85 it is clear that some amount has to be deducted.

⁹⁴ A similar rule is not found in NCC

⁹⁵ See chapter 4.1 concerning compensation for damage

⁹⁶ Tybjerg 1952 pg. 182

Secondly, the purpose of DC § 85 is to protect the insured's brand, nothing more.⁹⁷ Consequently, the insured should not also make a profit in the compensation from choosing DC § 85.

Thirdly, DC § 85 is a modification to the rules on abandon and the compensation according to DC § 72. The ownership of the damaged goods is not transferred and the insured must compensate the insurer. This compensation must logically be the objective market value of the damaged goods that the insurer could have gained according to the main rule, which is abandon, and transference of the ownership.

Fourthly, the focus of DC § 85 is a constructual total loss.⁹⁸ A constructual total loss means that it is economical impossible to repair the goods. The damaged goods, however, still exist in some shape. The damaged goods represent an objective value, meaning that they can and must be sold as another product than the one that was insured in the first place, in order to lower the loss.

Further, DC § 85 applies both for goods and vessel. Unfortunately there is, as I see it, very little case law on how to calculate the deductible value according to DC § 85. It is therefore useful to look on case law concerning vessels to clarify the area for goods. In the Danish case referred to in ND53.170 the question tried was how to calculate the value of the vessel. The court held (pg. 207) that the value of the vessel for the insurer, was the value on the open market. The fact, that the ship owner had repaired the vessel in order to bring the vessel in its original shape, was of no importance for the insurers rights. Thus, importance was placed on the value for the insurer because of his access and right to sell the vessel after compensation for total loss was paid.

Fifthly, the solutions in practice can be used. According to practice the value deducted is the objective market value on the hands of the insurer.⁹⁹

⁹⁷ Tybjerg 1963 pg. 97

⁹⁸ Tybjerg 1952 pg. 183

⁹⁹See chapter 7.5.3 concerning compromised disposal

7.5.5 Summary

As a main rule the insurer is given the ownership of the damaged goods once compensation for a total loss is paid. This follows from the rules of abandon and is applied in marine insurance regulation in Denmark and Norway and by practice

In order to realize the remaining value of the damaged brand products the insurer is allowed to sell the damaged brand goods. In this paper, I have chosen to focus on three different ways to sell the damaged brand products: Sale on different commercial markets and different geographical markets and sale of the damaged brand product as a no-name product.

All of the disposals had a damage potential to the brands as analysed in chapter 5.1.

As a consequence of the damage potential from the disposal, the insured eventually tries to protect his brand. The protection of the insured's brand very often prevents the insurer's disposal and causes a loss to the insurer. The insured is obliged to compensate the insurer this loss, because the insurer has the right to dispose of the goods in order to realize the remaining value of the damaged brand goods.

Consequently, the insured must do a cost-benefit analysis weighing the damage potential from the insurer's disposal on the insured's brand against the compensation for non-disposal. Based on the cost-benefit analysis the insured chooses the way to be protected.

The content of the different kind of protections varies, especially in two ways:

Firstly, in the way- and how much- the insurer is compensated. The compensation given is in case of a trademark clause fixed at 10 % of the insurance sum. By applying a compromise, NCC § 52 second section and DC § 85 the compensation equals the remaining market value in the damaged goods. If a control clause is chosen the compensation is hidden according to a higher premium and deductibles. However, the amount is very often settled according to the commercial strength of the parties.

Secondly, the ownership of the damaged goods depends on the protection chosen.

The insured keeps the ownership of the damaged brand products if he chooses to be protected by a control clause, a compromised disposal, or according to DC § 85.

If the insured chooses to be protected in accordance with a trademark clause or NCC § 52 second section the insurer is given the ownership of the damaged goods in order to dispose. In these cases, the insured must protect his brand and therefore prevent that the damaged brand products from being sold. In these cases the insured has to be active in order to protect his brand. The active protection might result in conflicts which would be avoided by choosing a protection in which the ownership was kept on the insured's hand.

The protection of the insured's brand can be characterised as a contractual protection: The insured is protected if the insurer is compensated.

In connection to the protection from the DC and the NCC it is worth noticing that the insured is not given protection automatically if DC § 72 is applied. The insured must choose to be compensated according to DC § 85 in order to receive protection. This is not the case when the NCC is applied. According to NCC § 52 second section the insurer's right to dispose is limited in order to pay proper attention to the insured's interests.

8 Trademark regulation

8.1 Introduction

In the chapters above, I discussed how the insured is protected by insurance clauses, compromises and private insurance regulation. In these regulations, focus was on the insurance agreement. But as it follows, the insured is protected according to other rules. These rules will have their focus on the brand itself and not on the insurance at all. I will give a very brief introduction of the protection according to trademark regulation.

We find the rules on trade marks in the Norwegian Trademark Act (NTA) dated March 3, 1961 no. 4, and in the Danish Trademark Act (DTA) dated August 30, 2001 no. 782.

In the EU and the EEA the rules on trademarks have been harmonised.¹⁰⁰ As a consequence, the trademark regulation in Norway and Denmark are quite similar.¹⁰¹ In the following chapter, I will only refer to the DTA.

The DTA gives the insured, who is also the holder of the brand, an exclusive right to use the brand for commercial purposes. In short, the word “holder of the brand” refers to the one that has invented and or registered a specific brand.

As a main rule, the holder of the brand keeps this right until the holder of the brand puts out the branded goods on the market. As a main rule, the exclusive right to put brand labels on the products is never lost.

8.2 The right to use of a brand

As a main rule only the holder of the brand is allowed to use the brand for commercial purposes according to DTA § 4 first section.

However, it is necessary to explain the word “use”. The most “holy usage”¹⁰² is to connect the goods with the brand, label wise. This is an exclusive right for the brand holder, which is not lost due to “consumption.” The concept of consumption is further explained in the next chapter.¹⁰³

Only the holder of the brand is entitled to label the goods. The following situation can occur: A cargo of medicine is damaged due to sea water. The packing is destroyed and it is not proven that the medicine is damaged. The insured fears that the medicine is damaged and does not want to keep and sell the goods. Thus, compensation for total loss is paid. The insurer is entitled to sell the medicine: No public regulations prevent him from doing so. In order to sell the goods, the brand and the packing must be similar to the original. In this case, the insured, who is also the holder of the brand, is entitled to refuse the insurer to re-label the damaged goods with the original brand. Thus, the insurer is not able to sell the medicine even though it probably was undamaged. In

¹⁰⁰ See First Council Directive of 21 December 1988 (89/104/EEC)

¹⁰¹ Lassen pg. 9

¹⁰² Koftvedgaard pg. 341

practice, this situation very seldom occurs because the parties will use a control clause.¹⁰⁴

A less holy activity is to make a mere reference to the brand without re labelling. This is the case for unoriginal spare parts in the car industry. In order to sell the spare parts it is essential for the spare parts producers that they are allowed to refer to the original product for which the spare part is made cf. DTA § 5 third section. If reference was not allowed, the consumers would not know which cars that use what spare parts.

Once the goods have been circulated according to DTA § 6, the owner of the goods, not being the holder of the brand, is entitled to use the brand. This subject is further discussed in the following chapter.

8.3 Consumption of brand rights

As a starting point the exclusive right to use the brand is consumed (lost) as soon as the holder of the brand has sold the branded product cf. DTA § 6 first section.¹⁰⁵ The first sale is called “circulation in the market.”¹⁰⁶ Once the product is brought in circulation, the branded product can be sold and used by others. This disposal does not violate the brand holder’s rights.¹⁰⁷ Relabelling is though, still an exclusive right for the holder of the brand. As such, the insurer is able to sell the goods by using the original brand in his commercials of the goods.

The starting point is modified when the goods are damaged, changed or used after circulation. In this situation, the holder of the brand, is still entitled to prevent the usage of the brand despite circulation, as long as the consumer is not made aware of this fact cf. DTA § 6 second section: If the customer finds out that damaged or used products are falsely marketed as new and original,¹⁰⁸ the holder of the brand will eventually suffer from future profits.

¹⁰³ The clear rule does not count for medicine when certain conditions are applied see EC Court C-427

¹⁰⁴ See chapter 7.5.2

¹⁰⁵ Lassen pg. 415 and Koktvedgaard pg. 339

¹⁰⁶ Koktvedgaard pg. 30

¹⁰⁷ Lassen pg. 413

¹⁰⁸ Koktvedgaard pg. 344

The practice that triggered the rule in DTA § 6, was the “Singer practice”: Very old Singer sewing machines were sold and falsely marketed as good second hand machines, but as it turned out, the machines had worthless spare parts¹⁰⁹ that did not live up to the high Singer standards. This practice was stopped by DTA § 6 second section.

8.4 Case law

The following case enlightens the area concerns cargo insurance and trademark protection. The case concerns the rights for the insurer to use the insured’s brand for goods not put in circulation.

In UfR 2003.1343 S “1.Quality tomatoes”, 42 tons of tomatoes were destroyed due to rain, while stored in the brand holder’s storage building. Thus, the tomatoes were not yet brought in circulation when the peril struck the goods. The insurer paid compensation for a total loss and sold the tomatoes in Denmark despite the insured’s objections. Furthermore, the insurer used the insured’s brand and stated that the tomatoes were best quality. By doing so, the court held that the insurer violated DTA § 4.

The court argued that one of the reasons DTA § 4 was violated, was because the tomatoes were sold in Denmark without any accept from the insured. The court does not explain why the holder of the brand should have accepted resale in Denmark. The prohibition to sell the tomatoes in Denmark was probably due to the fact that the branded goods were not circulated yet, and therefore a violation of DTA § 4. Furthermore, the tomatoes were heavily damaged and could damage the brand if they were sold as being 1-quality products, and therefore a violation against DTA § 6 second section.

The court furthermore argued that the Danish Insurance Contract Act § 73 (which coincide with DC § 72) did not give the insurer the right to use the brand. In other words, DC § 72 does not give the insurer the right to use the brand in the same way as the insured. Thus, there is a modification to the principle of abandon. Protection of the brand according to the trademark acts should be applied.

¹⁰⁹ Koftvedgaard pg 344

Within the scope of UfR 2003.1343 S, the insurer is not entitled to use the insured's brand when the damaged brand product is not consumed by market circulation. Moreover, in the case a violation of DTA § 6 second section took place. The insurer did not inform the consumers that the goods were damaged and therefore no longer 1-quality products.

8.5 Summary

The insurer is not entitled to use the brand without acceptance from the brand holder before the branded goods are circulated. Once the branded goods are circulated, the insurer is free to use the brand in a loyal way, as long as the holder of the brand does not have reasonable interests in preventing this. Examples of reasonable interests are if branded product are used or amended after circulation and if in fact the consumers do not realise this when they buy the product.

9 Closing remarks and summary

The goal for this paper was to make a comparative analysis of the regulation in Norway and Denmark by focussing on three topics;¹¹⁰

- The concept of total loss with special focus on brand products
- The insurer's rights and obligations in case of total loss of brand goods
- Protection of the brand according to trademark regulation

9.1 The concept of total loss

As I have discussed in this paper, total loss of goods occurs if the central qualities and the original nature of the goods, for which they were insured, are lost. This is due to the fact that the insured no longer can sell the damaged product in its original nature and usage. This goes for both brand products and no-name products.

However, when it comes to brand products a total loss occurs even in situations with minor damages. In this paper, I have focussed on three kinds of brands characterised and named according to their special qualities. I have categorised these brands as: Practical brands, exclusive brands and conscientious brands. If the qualities of the brand products are lost, they no longer have any value for the insured.

The brand product and the reputation of the brand must be seen as one entity, they depend on each other. When the brand product is damaged, it results in severe and unpredictable damages to the brand's reputation. Consequently, the insurer is then liable to compensate a total loss of brand goods even in cases with doubt about the size of the damage.

In practice, the total loss evaluation is based on a cost-benefit analysis weighing the size of the compensation against the value of present and future client relationships.

¹¹⁰ See chapter 1.1

The regulation on marine insurance such as DC § 191 and NCC § 35 guides the decisions for a total loss, but the concrete evaluation is based on case-to-case commercial considerations. Consequently, it is difficult to predict or decide in advance when there is a total loss of brand goods.

9.2 The insurer's rights and obligations

When the insured is compensated for a total loss, the ownership of the damaged goods is transferred to the insurer who is entitled to dispose of the damaged goods. This principle applies both in Denmark and in Norway according to the DC, the NCC and practice.

Consequently, the insurer is allowed sell the damaged brand products. However, in practice the insurer's possibilities for resale are limited even within different commercial markets and geographical markets or as second hand products. The reason for this is, that every kind of disposal represents a damage potential to the insured's brand reputation. Although, the damage potential depends on the nature of the brand and the disposal performed.

As a consequence of the damage potential from the disposal, the insured might want to seek protection of his brand. Through this protection, the insurer's disposal can be limited and therefore cause a loss to the insurer. And, because the insurer has the right to dispose over the goods in order to realize the remaining value of the damaged brand goods, the insured must compensate for the profits loss of the insurer.

The protection of the insured's brand is consequently based on a cost-benefit analysis weighing the potential damage to the brand and the compensation to the insurer and must be chosen and paid for by the insured.

The different ways the insurer can be protected vary in the way-and how much- the insurer is compensated and in the ownership of the damaged goods.

In order to avoid conflict and save time the best way to be protected is to search a compromise, agree on a control clause or apply DC § 85. In these cases the ownership

of the damaged brand goods belongs to the insured. If NCC § 52 second section or a trademark clause is chosen in order to protect the insured's brand, the insured has to protect his brand in an active way. According to the trademark clause the insured must approve resale. According to NCC § 52 second section the insurer must dispose of the damaged brand goods in a way that pays proper attention to the insured's interests.

The active protection of the insured's brand can be both costly and time consuming.

It seems reasonable, that the insured that needs the protection of his brand, must compensate the insurer in order to have this protection. If the insurance automatically contains a protection of the insured's brand, it will eventually lead to a higher premium for the insurance.

The marine insurance regulation in Denmark and Norway is quite similar when it comes to protection of the insured's brand. One of the differences between them is that the insured according to the Danish rules has to choose DC § 85 compensation in order to seek protection from the insurer's disposal. In Norway the insurer's disposal is automatically limited in order to protect the insured.

9.3 Protection of the brand according to trademark regulation

According to the trademark regulation the insurer is entitled to use the brand after its circulation on the market. This main rule applies as long as the consumer has been made informed about the damage of the brand product, and that the holder of the brand does not have reasonable interests in preventing the use of the brand.

However, in practice the insurer is prevented from selling the damaged brand product if he is using the brand. This is due to the logical fact, that the brand product is damaged and the insured for that reason has reasonable interests in preventing the use.

Consequently, the main rule of the insured's use of the brand is modification in practice.

The rules on trademark regulation supplement the protection according to the insurance regulation. Consequently, the legal grey zones between cargo insurance of brand products and trademark protection are multiple and difficult. Unfortunately, the length of this paper does not allow me to go into further details.

However, one issue can be mentioned:

The brand is protected according to the trademark regulation regardless of the insurance agreement. Consequently, the insured can choose to have compensation according to DC § 72, receive full compensation and have the brand protected according to the trademark regulation. Contrary to the insurance regulation, trademark regulation gives protection on a non-contractual basis and there is no possible way for the insured to claim compensation for the non-disposal.

By looking at the increasing focus on trademarks regulation and intellectual property rights, I foresee that several conflicts will rise in the years to come. These conflicts are costly both for insurers and insured and must be avoided.

A successful way to prevent future conflicts is for the parties to make sure that the insured keeps the ownership of the damaged brand goods so that, the insurer is prevented his disposal of the damaged brand goods. The insured's brand and its reputation is thereby protected.

10 List of references

In order analyse practice, I have interviewed the following reference persons

Dag Stene Jensen	Nemi Insurance, Norway	www.nemiasa.no
Sverre Dahr	Vesta Insurance, Norway	www.vesta.no
John Olesen	TRYG Insurance, Denmark	www.tryg.dk
Ib Simonsen	Codan Insurance, Denmark	www.codan.dk
Aage Sørensen	CNA Insurance, Denmark	www.cna-insurance.dk
Stina Lindstrøm	Novo Nordisk, Denmark	www.novonordisk.com
Jens Peter Tranberg	Central Union of Marine Underwriters, Denmark	
Anette Tofteng	Danish Patent and Trademark Office	www.dkpto.dk

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1906 21 December the Marine Insurance Act (MIA)

1930	15 April	the Danish Insurance Contract (DICA)
1961	3 March	the Norwegian Trademark Act (NTA)
1982	1 January	the English Institute Cargo Clauses (ICC)
1986	1 July	the Extended Danish Conditions (UDB) the Limited Danish Conditions (BDB)
1988	21 December	First Council Directive (89/104/EEC)
1989	16 July	the Norwegian Contract Act (NICA)
1995	October	Conditions relating to Insurance for the Carriage of Goods (NCC)
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14 Annex

14.1 Control of damaged merchandise clause, Novo Nordisk 2006