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CONCURRENT CAUSATION AND PROPORTIONAL LIABILITY IN CHINESE INSURANCE LAW

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Concurrent causation and proportional liability in Chinese insurance law

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This paper provides a comparative analysis of the approach adopted in Chinese and English law to the issue of concurrent causation in insurance law. The paper notes that the Chinese courts adopt a proportional liability regime to hold insurers liable if one of the proximate causes is an insured risk, and argues that this regime ignores other proximate causes as uninsured risks or excluded risks and therefore violates the real intention of parties to insurance contracts. The paper concludes that the proportional liability regime is not an appropriate approach for determining the insurer's liability in the circumstance of concurrent causation and that the resolution of this issue should rather depend upon the construction of the insurance contract.

Keywords: Insurance law, concurrent causation, proportional liability, insured, uninsured and excluded risks, Chinese and English law.

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1 Introduction

It is a general principle of Chinese insurance law that the insurer will only be liable for losses proximately caused by the perils covered by the policy. Therefore, in insurance claims the insured must prove that, amongst other things, its loss was caused by a peril insured under the policy as the proximate cause. This is the requirement of causation between losses and insured perils. The proximate cause is required where multiple causes give rise to an incident which causes a loss of the insured. Where there is more than one proximate cause and one cause is an insured peril, one question of causation arises if the other cause is excluded from cover of the policy. The other question arises if the other cause is uninsured in the policy. Chinese statutes do not have answers to those questions. Chinese courts apply a proportional liability regime in judicial practice. In a special circumstance where there is more than one proximate cause and one of the causes is inherent vice, Chinese courts do not consider it as concurrent causation but consider inherent vice as a sole proximate cause, and the insurer is therefore exempted from liability.

2 Chinese insurance law and judicial practice

The statutes governing insurance contracts in China are the Insurance Law of the People's Republic of China 1995, as amended in 2002, 2009, 2014 and 2015 (Chinese Insurance Law)[1] and the Maritime Code of the People's Republic of China 1992 (Chinese Maritime Code).[2] The

[1] Insurance Law of the People's Republic of China (Adopted at the 14th session of the Standing Committee of the Eighth National People's Congress on 30 June 1995; amended for the first time at the 30th session of the Standing Committee of the Ninth National People's Congress on 28 October 2002, according to the Decision on Amending the Insurance Law of the People's Republic of China; revised at the 7th session of the Standing Committee of the Eleventh National People's Congress on 28 February 2009; amended for the second time at the 10th session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014, according to the Decision of the Standing Committee of the National People's Congress on Amending Five Laws Including the Insurance Law of the People's Republic of China; and amended for the third time in accordance with the Decision on Amending Five Laws Including the Metrology Law of the People's Republic of China adopted at the 14th Session of the Standing Committee of the Twelfth National People's Congress on 24 April 2015); English text available at <http://en.pkulaw.cn/display.aspx?cgid=fcd28ac98601200fbdfb&lib=law> (accessed 22 October 2019).

[2] Maritime Code of the People's Republic of China (Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on 7 November 1992); English text available at <http://english.court.gov.cn/2016-04/14/content_24532980.htm> (accessed 22 October 2019).

Chinese Insurance Law is a general law for contracts of both life insurance and non-life insurance.[3] The Chinese Maritime Code is a special law for contracts of marine insurance.[4] The concept of causation is regulated by both the Chinese Insurance Law and the Chinese Maritime Code. Under the Chinese Insurance Law, the insurer bears an obligation to pay the policy holder indemnified against property loss caused by the occurrence of a contingent event as agreed upon in the contract, or pay insurance benefits when the insured dies, is injured or disabled, suffers illness or reaches the age limit, time limit or any other condition agreed upon in the contract.[5] Under the Chinese Maritime Code, the insurer undertakes, as agreed, to indemnify the loss of the subject-matter insured and the liability of the insured caused by perils covered by the insurance.[6] From the concept of causation in Chinese law, it can be seen that the insurer's liability is for a loss or damage caused by the perils covered by the insurance contract only. In other words, the insurer will not be liable if a loss or damage is caused by uninsured perils or excluded perils in the insurance contract. Therefore, the cause for insurance liability in Chinese law means the proximate cause although Chinese statutes do not expressly use the phrase 'proximate cause'.[7]

In Chinese judicial practice, the concept of proximate cause has been applied in insurance disputes.[8] China does not have the precedent rule and therefore judgments are not a source of law in China. However, judgments from the superior courts, in particular the appellate courts and the Supreme People's Court (SPC) are always considered in the judicial practice of Chinese courts. Chinese courts keep their judgments consistent with previous decisions to avoid different judgments for the same or similar types of dispute and to avoid the

3 The Chinese Insurance Law also regulates the matters of insurance company, insurance business, insurance intermediates and supervision and administration over the insurance industry in China.

4 See Chapter XII, Contract of Marine Insurance, in the Chinese Maritime Code.

5 Chinese Insurance Law, art 2.

6 The covered perils mean any maritime perils agreed upon between the insurer and the insured, including perils occurring in inland rivers or on land which is related to a maritime adventure. Chinese Maritime Code, art 216.

7 Cf the Marine Insurance Act 1906 (UK), s 55(1).

8 *Fuqing Hengyao Real Estate Development Co Ltd v China Life Property & Casualty Insurance Co Ltd Fuzhou Central Branch* (2014) MSZ No 1007 (SPC, Retrial). Proximate causation is also applied in tortious disputes in China, eg *China Life Insurance Co Ltd Chengdu Branch v Sichuan Hualong Investment Consulting Co Ltd* (2004) MEZZ No 137 (SPC, Second Instance).

consequence that their judgments are overruled in appeals to the superior courts.[9] Therefore, Chinese judgments from the superior courts, in particular the SPC, are always authoritative for the decisions of Chinese judges although they are not cited as authorities for judgments. An examination of Chinese judgments reveals the application of the concept of proximate cause for determining the insurer's liability in insurance disputes in Chinese judicial practice.

3 Concurrent causation in judicial interpretations

When there are a number of contributing causes, the initial approach is to determine whether one of the causes is plainly the proximate cause of the loss as the dominant cause of the loss. This is not a question of law, but a question of fact.[10] If more than one cause is the proximate cause, they will be regarded as concurrent proximate causes (concurrent causes). Under English common law, where one proximate cause is covered and one is not covered but is not excluded, the insurers are liable.[11] Where one proximate cause is an insured peril and one is expressly excluded, the insurers are not liable.[12] Chinese courts, however, apply a different approach in these circumstances. The different approach is reflected in the judicial interpretations of Chinese courts. In China, the main source of law is the statutes. However, the superior courts, including the SPC, formulate their judicial interpretations on the specific application of law for the trials of Chinese courts. These judicial interpretations, in particular the interpretations from the SPC, are legally effective for the implementation of statutes.[13] They apply as quasi-legislation in Chinese judicial practice.

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9 In Chinese judicial practice, a local court may not consider previous judgments from the superior courts which are not appellate courts of the local court. That is one of the reasons why different courts in China make inconsistent judgements for the same or similar type of disputes.

10 Eg *Fenghua Xikou Road Transportation Co Ltd v China Pacific Property Insurance Co Ltd Fenghua Branch* (2015) YFSCZ No 637 (Zhejiang Fenghua People's Court, First Instance) (liability insurance); *Jiaxing Longyu Dyestuffs Co Ltd v PICC Property & Casualty Co Ltd Jiaxing Xiuzhou Branch* (2014) ZSSCZ No 329 (Zhejiang Shaoxing Intermediate People's Court, Second Instance) (vehicle insurance); *Taizhou Changxin Transportation Co Ltd v Yong An Property Insurance Co Ltd Taizhou Central Branch* **(**2017) ZGFMZ 269 (SPC, Retrial) (hull insurance).

11 *The Miss Jay Jay* [1987] 1 Lloyd's Rep 32 (CA).

12 *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1974] QB 57 (CA).

13 Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation 2007, arts 3 and 4 (No 12 [2007] of the Supreme People's Court, 23 March 2007; English text available at <http://en.pkulaw.cn/display.aspx?cgid=89508&lib=law> (accessed 22 October 2019)).

The main difference in judicial interpretations of Chinese courts lies in the apportionment of the insurer's liability. In the judicial interpretations of the High People's Courts in Shandong and Guangdong Provinces of China, where there are multiple proximate causes, Chinese courts will examine whether one of the proximate causes of loss is covered by the insurance. If it is covered, the insurer will be liable for the loss even if other proximate causes are excluded or uncovered.[14] The insurer in this circumstance will be liable for loss or damage according to the proportion of the insured peril in all proximate causes.[15] This proportional liability regime has been applied in judicial practice of courts in Shandong and Guangdong Provinces in China, but has not been expressly accepted by the High People's Courts in other provinces of China.[16] Judicial interpretations from High People's Courts apply only within the jurisdictional areas of those High People' Courts. Only juridical interpretations from the SPC apply nationwide in all Chinese courts.

The SPC has harmonised the rules of the proportional liability regime by promulgation of judicial interpretations. In 2012 the SPC published the Interpretation on Certain Issues Concerning the Application of the Insurance Law of the People's Republic of China (II) (Draft for Comments) 2012 (Insurance Law Interpretation II Draft). Article 22 of the Insurance Law Interpretation II Draft provides that, if the damage to any subject-matter of insurance is caused by more than one reason, including both insured risks and uninsured risks, and it is difficult to decide the causal relationship between the insured risks and the damage, the People's Court may determine the insurer's insurance liabilities according to the proportion or level of the insured risks in the causes of the accident. This is the first time that the SPC has tried to harmonise the proportional liability regime regarding concurrent causation. The problem with this draft article is the difficulty in determining the causal relationship between the insured risks and the damage. Difficulty is not a legal issue but a question of fact. The relation must be decided no matter how difficult it is. Otherwise, there is no basis for

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14 Opinions of the Shandong High People's Court on Several Issues about the Trial of Cases Concerning Insurance Contract Disputes (Trial) 2011, art 14.

15 Guiding Opinions of the Guangdong High People's Court on Several Issues about the Trial of Cases Concerning Insurance Contract Disputes 2011, art 17.

16 Eg in Guiding Opinions of the Beijing High People's Court on Several Issues about the Trial of Cases Concerning Insurance Contract Disputes (Trial) 2005; Guiding Opinions of the Zhejiang High People's Court on Several Issues about the Trial of Cases Concerning Insurance Contract Disputes 2009; and Minutes of Discussion of the Jiangsu High People's Court on Several Issues about the Trial of Cases Concerning Insurance Contract Disputes 2011.

determining the insurer's liability. In other words, if there is such causation, the insurer will be liable in proportion; otherwise, the insurer will not be liable. Such causation will be determined according to the possibility of its occurrence, even if it is difficult to decide that possibility. The proportion of liability should be based on the existence of the insured risk as one of the proximate causes, but not the difficulty in determining the causation between the insured risk and the loss. However, this draft article was neither revised nor accepted in the final version of the Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the 'Insurance Law of the People's Republic of China' (II) 2013.[17] The reason for this is unknown.

In 2014 the SPC published the Interpretation of the Supreme People's Court on Several Issues concerning the Application of the Insurance Law of the People's Republic of China (III) (Draft for Comments) 2014 (Insurance Law Interpretation III Draft). Article 45 of the Insurance Law Interpretation III Draft entitled 'principles for handling multiple causes with one result' provides that, where the causes for the damage to the subject-matter insured involve both the insured accident and exempted reasons and the insured or the beneficiary requires the insurer to compensate for the damage according to the proportion of the insured accident in the incident causes, the People's Court shall uphold such a request. This newly drafted article looks similar to the previous provision in the Insurance Law Interpretation II Draft. There are, however, two outstanding differences. First, the proportional liability regime in the Insurance Law Interpretation II Draft applies to the concurrent causes of insured risks and uninsured risks but not excluded risks, whereas the proportional liability regime in the Insurance Law Interpretation III Draft applies to the concurrent causes of insured risks and excluded risks, although the insurer's liability in the two different circumstances may be the same because only the insured risks are considered for the proportional liability of insurers. Secondly, the condition of the proportional liability regime in the Insurance Law Interpretation II Draft is that of the uncertainty of the causal relationship between the insured risks and the damages. This condition was removed from the Insurance Law Interpretation III Draft. The new proportional liability regime seems preferable to that of the Insurance Law Interpretation II Draft. If the cause of uninsured risk is added to the proportional liability regime in the

[17] English text available at <http://www.lawinfochina.com/display.aspx?id=13556&lib=law> (accessed 22 October 2019).

Insurance Law Interpretation III Draft, it looks similar to the regime accepted by the High People's Courts in Shandong and Guangdong Provinces of China. If art 45 of the Insurance Law Interpretation III Draft could be so revised and accepted, the proportional liability regime regarding the insurer's liability in concurrent causation would be harmonised in China. However, this did not happen.

In 2015 the SPC promulgated the Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China (III) (Insurance Law Interpretation III). Article 25 of the Insurance Law Interpretation III provides that, where it is difficult to determine whether the loss suffered by the insured is caused by an insured event, an uninsured event or an exempted event, the People's Court may uphold the claim of a party concerned for the payment of insurance benefits by the insurer concerned according to the corresponding proportion. The proportional liability regime in the Insurance Law Interpretation III is framed in similar terms as the proportional liability regime in the Insurance Law Interpretation II Draft. The same issue is addressed; namely, how to determine the proportion of liability if it is difficult to decide which, and what type of, risk caused the loss or damage. It can be inferred that the proportional liability regime in the Insurance Law Interpretation III is based on article 22 of the Insurance Law Interpretation II Draft. From the draft history of the proportional liability regime, it seems that the SPC intended to apply the proportional liability regime if both the insured risk and the uninsured and/or the excluded risk concurrently caused the loss of subject matter insured. Unfortunately, the SPC did not state it in these terms. If this assumption is correct, the insured will be liable as long as one of the proximate causes is an insured risk and the proportion is determined according to the influence of the insured risk in the totality of the proximate causes.

The purpose of the proportional liability regime in the Insurance Law Interpretation III is to avoid a harsh result for the insured when an excluded peril exempts the insurer's whole liability. [18] In Chinese judicial practice before the promulgation of the Insurance Law Interpretation III, insurers were exempted from the whole liability once the excluded risk was one of the proximate causes. In *Juan Gao v China Life Insurance Dongying Branch*,[19] the policy

[18] Zhenyu Liu, *Life Insurance Law and Practice* (Law Press 2012) 28.

[19] Discussed ibid.

provided that 'the insurer shall not be liable for the insured's death … which is caused by driving a vehicle after drinking alcohol, without a valid driving licence or without vehicle registration'. The insured died in a traffic accident with another vehicle. Although the other driver's fault as one proximate cause was covered by the insurance, the insured's fault in driving the car after drinking alcohol without a valid driving licence as the other proximate cause was excluded. It was held that the insured was entitled to an exemption from liability. It is suggested that it would be fair if the insurer were held partially liable according to the corresponding proportion on the basis of the degree of each party's fault in the accident.[20] The proportional liability regime in the Insurance Law Interpretation III has been accepted in Chinese judicial practice regarding life insurance.[21] However, the proportional liability regime in the Insurance Law Interpretation III was drafted for life insurance rather than non-life insurance.[22] All reported cases for the application of the proportional liability regime in the Insurance Law Interpretation III are life insurance disputes.[23] There are no reported cases of non-life insurance from Chinese courts in which the proportional liability regime in the Insurance Law Interpretation III is applied. Nonetheless, Chinese courts have applied the proportional liability regime to non-life insurance disputes although the Insurance Law Interpretation III was not cited as authority for the determination of insurers' liability regarding concurrent causation.

4 Concurrent causes of insured peril and excluded peril

Where a loss is concurrently caused by both an insured risk and an uninsured risk, Chinese courts apply the proportional liability regime. In *Wenzhou Hongda Marine Shipping Co Ltd v Sunshine Property & Casualty Insurance Co Ltd Wenzhou Central Branch* (*The 'Hong Da*

20 Ibid.

21 *PICC Property & Casualty Co Ltd Pan'an Branch v Yang Yongtian and Others* (2015) ZJMZZ No 129 (Jinhua Intermediate People's Court, Second Instance).

22 Wanhua Du et al, *Explanation and Application of the SPC's Insurance Law Judicial Interpretation III* (People's Court Press 2015) 12–13.

23 Ibid 587–588. See also Jing Wang, *The Collection of Judicial Views of Insurance Cases* (Law Press 2016) 199–200.

158'),[24] the vessel was insured by the insurer against all risks in coastal and inland waters in China. Clause 1 of the insurance policy provided that the insurer was liable for the total loss of the vessel as a result of collision or contact of the vessel. Clause 3 provided that the insurer was not liable for any loss, liability or cost caused by unseaworthiness including the technical status, manning and loading of the vessel. The vessel overloaded goods and commenced voyages with one qualified master and five unqualified crew members. When the vessel sailed under a bridge, the master did not know the hydrological status of the water and chose the wrong channel under the bridge piers. Consequently, the vessel collided with the anti-collision pier in the channel and sank soon after the collision. After investigation, the local maritime authority reported that the direct cause of the accident was the improper navigation of the master sailing through the wrong channel under the bridge, and the indirect causes were the overloading of the goods and the negligence of the crew members in the salvage of the vessel.

It could be concluded that the proximate causes of the loss of the vessel were the collision due to the master's fault in navigation and the unseaworthiness of the vessel due to the overloading of the goods and the unqualified crew members. According to the policy in this case, the collision due to the master's fault in navigation was a covered risk in the insurance. The unseaworthiness of the vessel was an excluded risk in the insurance. In the first trial of *The 'Hong Da 158'*, the insurer contended that the cause of unseaworthiness was excluded by the insurance policy. The Ningbo Maritime Court accepted this contention and held that the insurer was not liable for the loss of the vessel.[25] The trial court did not discuss whether the excepted cause prevailed over the insured cause. In fact the trial court, when deciding the insurer's liability, did not consider the cause of the collision, although the loss caused by collision due to the master's fault was not excluded but was covered by the insurance policy. It is unknown whether the Ningbo Maritime Court agreed that the excepted cause should prevail over the insured cause, but the result was the same that would have been reached at English common law. The insured appealed to the Zhejiang High People's Court.

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24 (2016) Z72MC 1585 (Ningbo Maritime Court, First Instance); (2017) ZMZ 89 (Zhejiang High People's Court, Second Instance); (2017) ZGFMS 4824 (SPC, Retrial).

25 *The 'Hong Da 158'* (2016) Z72MC 1585 (Ningbo Maritime Court, First Instance).

The appellate court took a different view on the insurer's liability. First, the appellate court pointed out that there was no agreement in the insurance policy regarding the insurer's liability in the concurrent causation situation and the insurer did not prove how the excluded risk could prevail over the covered risk. It can thus be seen that the Zhejiang High People's Court recognised the issue of priority between the excepted cause and the insured cause. Because there was no answer to this question in any statute, it became the burden of proof of the insurer who intended to exempt its liability upon the excluded cause. It seems that, unless the insurance contract provides otherwise, the concurrent excepted cause and insured cause should be considered equally. This provides a logical basis for determining the insurer's liability according to the degree of influence of the causes, namely the effect of the causes on the loss. Secondly, the appellate court considered the report from the local maritime authority and determined that the insurer should be liable for 70 per cent of the loss of the vessel.[26] The appellate court did not explain how it determined the percentage of the loss as the insurer's liability. The insurer applied to the SPC for a retrial of the case.

The SPC in the retrial upheld the decision of the appellate court and explained the reason for its decision. First, the insurer was entitled to exclude its liability according to the exclusion clause in the contract. However, the extent of exclusion should be determined according to the degree of causation between the excluded risk and the loss thereby caused, namely the unseaworthiness and the sinking of the vessel. Secondly, according to the report from the authority, the unseaworthiness was an indirect reason and the master's fault which causing the collision was the direct reason. In the view of the SPC, the main and decisive reason to the accident was not the unseaworthiness but the master's fault. In this circumstance, the insurer could be partially exempted from liability for the unseaworthiness reason. Therefore, it was reasonable for the appellate court to have calculated 70 per cent of the loss as the insurer's liability.[27]

It can be seen from the judgments of the appellate court and the SPC in *The 'Hong Da 158'* that, where a loss is concurrently caused by an insured peril and an excluded peril, Chinese courts will hold the insurer partially liable based on the insured peril in the policy and exclude

[26] *The 'Hong Da 158'* (2017) ZMZ 89 (Zhejiang High People's Court, Second Instance).
[27] *The 'Hong Da 158'* (2017) ZGFMS 4824 (SPC, Retrial).

the insurer's partial liability based on the excluded perils in the policy. However, the Chinese courts did not explain the rationale behind this proportion of liability. As the appellate court found, there is no agreement in the insurance policy for the insurer's liability in the concurrent causation situation. Therefore, it is not an appropriate construction of the insurance contract that it was the intention of parties to hold the insurer partially liable in this circumstance. If the Insurance Law Interpretation III applied to this case, it might be within the discretion of Chinese judges to decide the proportional liability of the insurer. However, Chinese judges did not apply the Insurance Law Interpretation III to this case. This means that the judgments lack express authorities for the proportional liability of the insurer. It is true that the insurer will be liable for the loss caused by the insured peril and excluded from liability for the loss caused by the excluded peril. However, the loss of the *Hong Da 158* was caused concurrently but not separately by the two causes. The two causes are not proportional as proximate causes to the loss. Therefore, once a proximate cause is excluded, it should exclude all liability no matter the degree of the causation between the excluded risk and the loss. When the liability is wholly exempted, there is no issue of the degree of influence from the excluded risks.[28]

5 Concurrent causes of insured peril and uninsured peril

The proportional liability regime also applies to the insurer's liability where a loss is concurrently caused by an insured peril and an uninsured peril which is not excluded by insurance. This situation can be seen in *Qu Rongmo v China Continent Property & Casualty Insurance Co Ltd Weihai Branch & Shidao Branch* (*The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'*).[29] In this case, the claimant shipowner had two fishing vessels *M/V Lu Rong Yu 1813* and *M/V Lu Rong Yu 1814* insured by the defendant insurer. Clause 2 of the insurance policy provided that the insurance covered loss or damage caused to the vessels by natural disasters and accidents including storms, typhoons; additionally, the negligence of the master and crews were also covered. Clause 3 provided that in no case shall the insurance cover loss,

[28] If this is accepted, the decision of the Ningbo Maritime Court in *The 'Hong Da 158'* should be correct, namely, no liability of the insurer when one of the concurrent proximate cause is an excluded risk.

[29] (2012) QHFHSCZ No 240 (Qingdao Maritime Court, First Instance); (2016) LMZ 1542 (Shandong High People's Court, Second Instance); (2017) ZGFMZ 413 (SPC, Retrial); reported in [2019] 3 Chinese Maritime and Commercial Law Reports 10.

damage, liability or expense caused by unseaworthiness of the insured vessels and negligence of the shipowner. During the insurance period, the insured vessels navigated with insufficient crews and were affected by storms and a typhoon. The crews were negligent in their management of the vessels during the storms and typhoon. This resulted in the vessels ultimately being stranded and lost.

The shipowner filed a claim against the insurer to indemnify the loss of the vessels. In the trial at first instance, the Qingdao Maritime Court found that the typhoon was the proximate cause of the loss of vessels, which was one of the insured perils of the insurance, and held that insurer was liable for the whole loss of the vessels.[30] The Shandong High People's Court as the appellate court found that the shipowner's negligence in providing insufficient crews was the other proximate cause of the loss and the loss would not have happened without any of the two causes, namely the typhoon and the shipowner's negligence. In the appellate court's view, it was difficult to decide which cause was more direct, effective or decisive to the loss. Therefore, the appellate court held that the insurer should indemnify the insured for 50 per cent of the loss.[31]

The shipowner applied to the SPC for a retrial of the case. Before discussion of the facts in this case, the SPC summarised the general rules for determining the insurer's liability. The SPC pointed out that the determination of the insurer's liability mainly involves the identification of the causes of the accident, the scope of the insurance coverage, (contractual and statutory) exclusions of insurance liability and the degree of influence from insured risks. For the questions whether an insurer should be liable for a loss and the extent of liability (if any), it is necessary to examine: first, whether the proximate causes are covered risks of the insurance; and, secondly, whether the exclusions of liability are valid and the insurer is therefore exempted from liability based on contractual or statutory exclusions. Thirdly, the extent of liability should finally be determined according to the degree of influence from the insured risks.[32] In the retrial of this case, the SPC found that the concurrent proximate causes of the

30 [2019] 3 Chinese Maritime and Commercial Law Reports 12.
31 Ibid 13–14.
32 Ibid 16.

loss were the typhoon, the shipowner's negligence and the crews' negligence in management of the vessels.

According to the insurance contract, the typhoon and the crews' negligence were covered risks, but the shipowner's negligence was an excluded risk of the insurance. This situation seems similar to that of *The 'Hong Da 158'*. However, the SPC found that the insurer did not explain the exclusions of the insurance to the insured when the contract was concluded. Such exclusions are null and void according to the Chinese Insurance Law.[33] Therefore, the question in *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'* was the insurer's liability for the loss concurrently caused by the insured perils and uninsured perils. The SPC found that the typhoon had a direct and significant influence on the loss of the vessels, and the negligence of the shipowner and the crews had a certain influence. Therefore, the typhoon was the main proximate cause of the loss. The SPC held that the insurer should be liable for 75 per cent of the loss because, in the view of the SPC, the typhoon was the main cause of the loss.[34]

The SPC in *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'* raised two questions regarding the general rules; namely, whether the proximate risk was insured and whether it was excluded. The SPC did not identify the insurer's liability based on the answers to these two questions but continued to investigate the extent of liability. The SPC seemed to assume that the insurer had liability regardless of whether the proximate cause was excluded. Otherwise, there would be no question of the extent of liability if a valid exclusion clause could exempt the insurer's liability. The solution in this circumstance is the proportion of liability, like the situation in *The 'Hong Da 158'*. However, as there was no excluded risk as a proximate cause in *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'*, the SPC therefore asked the last question regarding the extent of liability and considered the uninsured risk to relieve the insurer from the whole liability. In fact, there is a logical gap between the first two questions and the last question in the general rules summarised by the SPC in *The 'Lu Rong Yu 1813' and The 'Lu*

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33 See Chinese Insurance Law, art 17 para 2, which provides that, for those clauses that exempt the insurer from liability in the insurance contract, the insurer shall make sufficient warning to the policy holder of those clauses in the insurance application form, the insurance policy or any other insurance certificate, and expressly explain the contents of those clauses to the policy holder in writing or orally; if the insurer fails to make a warning or explicit explanation thereof, those clauses shall not be effective.

34 [2019] 3 Chinese Maritime and Commercial Law Reports 18.

Rong Yu 1814'. Unless otherwise agreed by parties, once the proximate causes are identified, it should be a question of 'yes or no' for the insurer's liability, rather than a question of 'more or less' as proportional liability. If an uninsured risk can partially exempt the insurer's liability, the result should be the same as the excluded risk in *The 'Hong Da 158'*. But in fact, it is not.[35] An uninsured risk does not affect the insurer's liability and should not be an excuse to exempt the insurer's liability. Therefore, the insurer should be wholly liable for the loss caused by the insured risk. Otherwise, uninsured risks will become an excuse for the apportionment of liability between the insurer and the insured. Obviously, unless this is expressly stated, it does not reflect the real intention of parties to insurance contracts.

6 Problems of the proportional liability regime

First, there is no proportional liability regime in either Chinese Insurance Law for general insurance or the Chinese Maritime Code for marine insurance, although the SPC adopts this regime in its judicial interpretations and Chinese courts adopt this regime in judicial practice. In other words, there is no legal authority for either the judicial interpretation or the judicial practice of Chinese courts in adopting a proportional liability regime. A local Chinese court applied the principle of fairness and the principle of utmost good faith to hold the insurer proportionally liable in a motor vehicle insurance case.[36] However, the application of these principles was denied by its appellate courts.[37] In theory, the proportional liability regime may rely upon the principle of proportionality. This principle originated from public law in order to confirm that the intervention of state power in fundamental civil rights should not surpass the limits of necessity. For this purpose, the principle of proportionality consists of three secondary principles, which are the principle of necessity, the principle of suitability, as well as the principle of balancing. It is believed that the applicability of the principle to civil law is

35 The SPC judges in *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'* described the excluded risks as uninsured risks. It is unknown whether the judges intended to say that the excluded risks are not insured risks. However, uninsured risks are not the same as excluded risks in both literature and law.

36 *Zaozhuang City Junpeng Motor Transport Co Ltd v AnBang Property & Casualty Insurance Co Ltd Zaozhuang Central Branch* (2016) L0406MC 831 (Zaozhuang City Shanting District People's Court, First Instance).

37 (2017) L04MZ 67 (Zaozhuang Intermediate People's Court, Second Instance).

not only feasible, but also valuable both theoretically and practically.[38] However, it is not proven that the principle of proportionality can apply to the apportionment of liability between the insurer and the insured in the circumstance of concurrent causation. In fact, when the liability issue can be solved by the construction of insurance contract, there is no necessary or suitable intervention by any power into the freedom of contract. Furthermore, the liabilities of the insurer and the insured can be balanced by insurance law and the insurance contract. There is no need to apply the principle of proportionality to rebalance liabilities between parties. At least, the Chinese courts did not expressly cite the principle of proportionality as the legal basis for the proportional liability regime adopted in *The 'Hong Da 158'* and *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'*.

Secondly, although the SPC adopted a proportional liability regime in *The 'Hong Da 158'* and *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'*, the methods of determination of the proportions differed in the two cases. In *The 'Hong Da 158'*, the loss was concurrently caused by an insured risk and an excluded risk. The SPC determined the proportion of liability according to the degree of influence from the excluded risks. By contrast, in *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'*, the loss was concurrently caused by an insured risk and an uninsured risk. The SPC determined the extent of liability according to the degree of influence from the insured risks. Neither of these methods is logical or reasonable. The fact of more than one proximate cause is the reason for the determination of the proportion of the insurer's liability in Chinese judicial practice. However, the concurrent causes have an effect on the loss with each other. They are not proportional as the causes to the loss. They have effect concurrently and cannot be divided in proportion. Therefore, the proportional liability of the insurer is not a reasonable answer to the insurer's liability for such concurrent causation.

Thirdly, when Chinese judges decide the proportion at their discretion, that proportion is always subjective. In *The 'Hong Da 158'*, the SPC concluded that the master's fault was the main cause of the loss according to the authority's report. However, the master's fault in the report was the direct reason for the accident. The direct reason for the accident is not the

[38] Xiaojian Zheng, Application and Development of the Principle of Proportionality in Civil Law (2016) 2 *China Legal Science* 143–165.

same as the main proximate cause of the loss. Whether a cause is a main cause depends on its effect on the loss, not on the direct or indirect relation to the accident. A direct reason might be a main cause of a loss, but it may not automatically or inevitably be the main cause. In fact, there are no standard criteria for categorising reasons for insurance accidents in Chinese judicial practice.[39] From the discretion of Chinese judges in *The 'Hong Da 158'* and *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'*, it may be possible to infer that the direct reasons are always considered as the main and significant causes of loss in insurance claims. It may also be possible to infer that the external events are the direct reasons which are considered as main causes of loss, eg, a typhoon. When there is no external cause, the human factors are direct reasons, eg, negligence, and the objective factors are indirect reasons, eg, unseaworthiness. However, it is unknown whether those inferences will be followed in future trials of insurance disputes by Chinese courts. So far, the SPC has not provided clear criteria regarding the proportion of the insurer's liability. Chinese judges' discretion regarding this issue is still uncertain and unpredictable. As stated by the appellate court in *The 'Lu Rong Yu 1813' and The 'Lu Rong Yu 1814'*, it is difficult to decide which cause was more direct, effective or decisive to the loss. In fact, it is unknown how two causes would be weighed and balanced for the proportion of liability in judicial practice.

7 Comparison with English law

English common law adopts a different approach to the apportionment of liability in respect of concurrent causation in insurance law. First, if there two proximate causes, and one of them is within the general words and would render the insurers liable and the other is within the exception and would exempt them from liability, the insurers can rely on the exception clause. In the marine insurance case of *Board of Trade v Hain Steamship Co Ltd*,[40] there was a loss which was the product of two joint and simultaneous causes and loss due to one of the

[39] In *Zheng Songhai v Yong An Property Insurance Co Ltd Maoming Central Branch* (2013) GHFCZ No 706 (Guangzhou Maritime Court, First Instance); (2014) YGFMSZZ No 168 (Guangdong High People's Court, Second Instance), it was found that inherent vice of the subject-matter insured was the direct reason of the accident, the bad weather on the sea was the objective reason and the unseaworthiness of the vessel was the main reason. It was thus held that the direct reason was not the main reason.

[40] [1929] 29 Lloyd's Rep 197 (CA).

causes was exempt, being 'warranted free'. The insurers were held not liable. The reasoning was that if the insurers were held liable for loss, they would not be 'free' of it. Seeing that they had stipulated for freedom, the only way of giving effect to this stipulation was by exempting them altogether. More importantly, the loss was not apportionable. Hence no part of it could fall under the policy.[41] In the non-marine insurance case of *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd*,[42] the Court of Appeal considered what should happen when there were two causes which were equal or nearly equal in their efficiency in bringing about the damage, one being under the general words so as to make the insurers liable and the other within the exception so as to exempt them from liability. All three judges agreed that the exception applied. It was argued that the phrase 'warranted free' in a marine insurance policy had a different effect from an exception in a non-marine policy. Lord Denning concluded that it did not. It was simply a different mode of expression.[43] Roskill LJ pointed out that the effect of the exception clause depended upon whether it is preceded by the traditional words — one might almost say traditional jargon — in a marine insurance policy 'warranted free', or the less romantic and more mundane words of a non-marine policy.[44] Therefore, the insurer was not liable, as one of the proximate causes fell within an exception in the policy.

Secondly, where there are two proximate causes, one that is covered and one that is not covered but is also not excluded, the insurers are liable. In *The Miss Jay Jay*,[45] the marine policy provided that no claim shall be allowed in respect of any loss or expenditure incurred solely in the event of damage resulting from faulty design. Evidence proved that, but for a combination of unseaworthiness due to design defects and an adverse sea, the loss would not have been sustained. Therefore, both the sea conditions and the unseaworthiness due to the design defects of the vessel were the proximate causes of the damage to the vessel. Since the marine policy in dispute contained no relevant exception relating to loss caused by

41 Ibid 200.
42 [1973] 2 Lloyd's Rep 237 (CA).
43 Ibid 241.
44 Ibid 245.
45 [1987] 1 Lloyd's Rep 32.

unseaworthiness of the vessel, the *Wayne Tank* case could not apply to the situation in this case. The Court of Appeal applied different principles set out in *Halsbury's Laws of England*:[46]

> It seems that there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy; the assured will be entitled to recover.

Because no authority had been cited to suggest that the above passage incorrectly stated the relevant law relating to marine insurance policies, it incorporated the principle applicable to this case. *The Miss Jay Jay* thus becomes the authority instead of *Halsbury's Laws of England* for the issue of the insurers' liability for damage caused by concurrent causes including insured risks and uninsured risks.

It can be seen that English common law adopts the construction of contract approach to answer the question of insurer's liability for loss caused by concurrent causes. For example, in the *Wayne Tank* case, Lord Denning interpreted the relation between the risk clause and exception clause in the policy. In respect of the insurer's liability for the loss caused by both an insured risk and an excluded risk, he said: [47]

> The result is that, although this accident comes within the general words at the opening of the policy, nevertheless seeing that there is a particular exception, the exception takes priority over the general words. General words always have to give way to particular provisions. In the present case one of the causes which was efficient to produce the damage was the nature of the goods supplied by the insured. The insurers are exempt from liability for it. Their exemption is not taken away by the fact that there was another cause equally efficient also operating to cause the loss.

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46 *Halsbury's Laws of England* (4th ed Butterworth 1978) vol 25 par 181.

47 *Wayne Tank & Pump Co Ltd v Employers' Liability Assurance Corp Ltd* [1973] 2 Lloyd's Rep 237, 241.

Cairns LJ also interpreted the policy as follows: [48]

> [I]f one cause is within the words of the policy and the other comes within an exception in the policy, it must be taken that the loss cannot be recovered under the policy. The effect of an exception is to save the insurer from liability for a loss which but for the exception would be covered. The effect of the cover is not to impose on the insurer liability for something which is within the exception.

By contrast, Chinese courts adopt the principle of proportionality to apportion the liability between the insurer and the insured. The construction of contractual clauses aims to find the intention of parties to the insurance contract which may reflect the real purpose of parties regarding the insurer's liability in respect of concurrent causation. However, the application of the principle of proportionality may not reflect the intention of the parties to the insurance contract. Parties may agree on proportional liability in the insurance contract based on freedom of contract. If there is no such agreement, it may not be appropriate for Chinese courts to intervene in the insurance contract by applying the principle of proportionality if the insurer only agrees to indemnify the insured or the insurer is only excepted from liability in certain circumstances. Apportionment of liability is always attractive to settle disputes between insurers and insureds, but it lacks a clear and reasonable legal basis. The principle of proportionality may apply to insurance disputes provided that the parties have such an agreement for their liabilities. If there is no such agreement but the insured risk clause and the exclusion clause are clear enough to define the insurer's liability, the construction of contract approach should rather be adopted.

8 Special excluded causes: inherent vice etc

In the Chinese Maritime Code, there are statutory exclusions of the insurer's liability for marine insurance. For marine cargo insurance, unless otherwise agreed in the insurance contract, the insurer shall not be liable for loss or damage to the insured goods arising from

[48] Ibid.

any of the following causes: (1) delay in the voyage or in the delivery of goods or change of market price; (2) fair wear and tear, inherent vice or nature of the goods; and (3) improper packing.[49] For hull insurance, unless otherwise agreed in the insurance contract, the insurer shall not be liable for loss or damage to the insured ship arising from any of the following causes: (1) unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has no knowledge thereof; and (2) wear and tear or corrosion of the ship. The statutory exception of hull insurance applies mutatis mutandis to the insurance of marine freight.[50] However, the Chinese Maritime Code does not provide for the insurer's liability for a loss caused by concurrent causes, one of which is a statutory exclusion of marine insurance. If the proportional liability regime under the principle of proportionality applies, the insurer's liability for such a loss should depend on the degree of influence from the statutory excluded risk on the whole loss of the subject matter insured. However, Chinese courts have not applied the proportional liability regime to this type of loss.

In *Zheng Songhai v Yong An Property Insurance Co Ltd Maoming Central Branch* (*Zheng Songhai v Yong An*),[51] the loss of the vessel was caused by three concurrent causes including the inherent vice of the goods, an adverse sea and unseaworthiness due to the lack of competent crews. The insurer denied its liability, relying on the exclusion clause in the policy which provided that the insurer was not liable for any loss caused by fair wear and tear, inherent vice of the goods, and improper packing. The courts found that the exclusion clause was null and void because of a breach of the Chinese Insurance Law.[52] However, the courts pointed out that the insurer was entitled to the statutory exclusion in the Chinese Maritime Code although the contractual exclusion clause was null and void. Because the insurer should not be liable for loss or damage to the insured goods arising from inherent vice of the goods, the insurer was held not liable for the loss of the goods. The circumstance of concurrent causation in *Zheng Songhai v Yong An* is similar to that in *The 'Hong Da 158'***.** The only difference is the excluded risk, ie, inherent vice of goods in the latter case, which is not only a contractual exclusion but also a statutory exclusion, whereas the exclusion in the former

49 Chinese Maritime Code, art 243.

50 Ibid, art 244.

51 (2013) GHFCZ No 706 (Guangzhou Maritime Court, First Instance); (2014) YGFMSZZ 168 (Guangdong High People's Court, Second Instance).

52 Chinese Insurance Law, art 17 para 2.

case is only a contractual exclusion. In fact, the courts in *Zheng Songhai v Yong An* neither considered the other two concurrent causes nor applied the proportional liability regime.

It seems that the Chinese courts consider the statutory exclusion, ie, inherent vice of goods as a special cause and the proportional liability regime does not apply to the concurrent causes including the special cause. If this judicial practice is accepted, it seems that all other statutory exclusions in marine insurance should be considered as special causes in concurrent causation so as to exclude the application of the proportional liability regime. In other words, insurers can exclude their liability if the statutory exclusions are one of the proximate causes regardless of whether other excluded or uninsured risks are also proximate causes. It may be inferred that there is no concurrent causation if one of the proximate causes is a statutory excluded risk in the Chinese Maritime Code. However, the Chinese Maritime Code itself does not expressly regulate the insurer's liability in this circumstance and the Chinese courts have not explained why the proportional liability regime does not apply here.

English law has a similar provision in statute law. The Marine Insurance Act 1906 (UK) provides that unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured, or for any loss proximately caused by rats or vermin or for any injury to machinery not proximately caused by maritime perils.[53] Similarly, English courts, like Chinese courts, do not consider the circumstance in which the statutory exclusion is one of the concurrent causes as concurrent causation. However, at English law, unlike in Chinese judicial practice, insurers cannot rely on the statutory exclusions to exclude their liability at common law, but are held liable for loss or damage to the subject matter insured.

In *Global Process Systems Inc and another v Syarikat Takaful Malaysia Berhad* (*The 'Cendor MOPU'*),[54] the oil rig *Cendor MOPU* was lost during carriage. The loss resulted from metal fatigue in the three legs and a leg-breaking wave during the voyage. The insurer refused to pay, contending that the loss was the result of inherent vice in the legs themselves. The

[53] Marine Insurance Act 1906 (UK), s 55(2)(c). This is a particular rule of the proximate cause provision in the Marine Insurance Act 1906.

[54] [2011] UKSC 5, [2011] 1 Lloyd's Rep 560.

circumstances appear to be similar to those in *The Miss Jay Jay*, where two separate causes could be identified, namely, initial unfitness and a peril of the seas, and it was unclear how in practice these causes would be weighed and balanced. However, the Supreme Court did not consider that *The 'Cendor MOPU'* involved concurrent causation. Lord Diplock, by (in effect) invoking the statutory definition of perils of the seas, defined 'inherent vice' in opposition to perils of the seas, thereby avoiding any overlap between the insured risk and the excluded risk.[55] Thus, in the view of Lord Clarke, where a proximate cause of the loss was perils of the seas, there was no room for the conclusion that the loss was caused by inherent vice.[56] Because the loss of the rig was caused by a peril of sea, there was no inherent vice, thereby avoiding the causation issues that arise where there are multiple causes of loss, one of which is an insured risk and one of which is an uninsured or excluded risk.[57]

It is believed that the provisions relating to marine insurance in the Chinese Maritime Code were modelled on the relevant provisions in the Marine Insurance Act 1906 (UK). Although the Chinese courts avoided the overlap between the insured risk and the excluded risk in *Zheng Songhai v Yong An*, they did not choose to apply the perils of sea as the insured risk to hold the insurer liable for loss or damage to the subject matter insured. Chinese courts need a clear legal reasoning for holding that the insurer will not be liable once a statutory excluded risk is one of the concurrent causes of the loss or damage to the subject-matter insured. Otherwise, Chinese courts should consider all the proximate causes because statutory excluded risks have no priority over insured or uninsured risks in contract as concurrent causes. If this logic is correct, then the proportional liability regime should apply to the *Zheng Songhai v Yong An* case. However, the Chinese courts did not apply it to the case. Even if the circumstance in the *Zheng Songhai v Yong An* case is not concurrent causation, Chinese courts may wish to consider the approach of English courts in *The 'Cendor MOPU'* to decide the insurer's liability rather than categorising the statutory exclusions as special risks to exclude the insurer's liability.

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55 *Soya v White* [1983] 1 Lloyd's Rep 122.
56 [2011] 1 Lloyd's Rep 560, 583.
57 Ibid 587.

9 Conclusion

Chinese insurance law and maritime law provide a concept of proximate causation but do not provide answers to the question of the insurer's liability in the circumstance of concurrent causation. Chinese courts adopt the proportional liability regime to hold insurers liable if one of the proximate causes is an insured risk. This regime ignores the other proximate causes as uninsured risks or excluded risks and therefore violates the real intention of parties to insurance contracts. The proportional liability regime, regardless of whether it is based on the principle of proportionality, is not an appropriate approach for determining the insurer's liability in the circumstance of concurrent causation. The traditional approach, ie, the construction of contract approach, should be appropriate and sufficient to identify the insurer's liability in this circumstance. If this is accepted by Chinese judicial practice, then whether a statutory exclusion can prevail over the contractual risks and uninsured risks should depend upon the construction of the insurance contract, rather than upon the priority of statutorily excluded perils.