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Right of subrogation in marine insurance:

A comparative study of English and Chinese Law

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Summary

Marine insurance is one of the oldest forms of protection methods against the loss. It has a very long history and is associated with the development of the maritime business. When the assured is facing a loss caused by the third party, he has the free choice of suing the insurer or the third party. The problem raised under this circumstance. The assured has the possibility of double recovery that cannot be recognized by the principle of insurance law. The definition of subrogation provides the solution for this situation.

The thesis will examine the law of subrogation under English law and compare it with Chinese Law through analysing the cases law and English legislation.

The last part of the thesis is the comparison study between Chinese law and English law. In the Chinese law respect, there are some confused issues about the right of subrogation such as the scope and definition. The author will figure out the differences between Chinese law and English law and provide the possible suggestions on these issues.

Preface

The purpose of this thesis is to examine the law of subrogation under English law and compare it with Chinese law. I will analyse the related provisions and cases law jurisdiction.

To prepare this thesis I have read several books in marine insurance that contain the chapters of subrogation rights. The books are *Marine Cargo Insurance*, *The Law of the Marine Insurance*, *The Modern Law of Marine Insurance* and *The Law of Marine Insurance* and some other books. Furthermore, I have quoted some speeches of Lord on different cases in order to make the statement clear and accurate. Finally, I analyse the relevant provisions in MIA and Maritime Code in China in order to compare the differences between them.

After finishing the thesis, I will graduate from Lund University as a master student of Maritime Law programme. I am grateful to a number of people for supporting me to finish the thesis. I must thank firstly Abhinayan Basu who is my supervisor and has provided quite a lot of suggestions and help me on this work. I must also thank my parents. I could not finish the master programme without their encouragement and support. Then I must thank Professor Proshanto K. Mukherjee from World Maritime University and Professor Lars-Göran Malberg from University of Goteborg for guiding the study during these two years. In addition, I need thank my dear friends Chun Deng and Lijia Yi from the maritime law programme in Lund University. They provided the suggestions on the structure and the Chinese law respect on the right of subrogation. Finally, I would like to thank Peidi Liu from University of Goteborg for the extra support.

Abbreviations

CIF	Cost, Insurance and Freight
FOB	Free on Board
MIA	Marine Insurance Act, 1906
P&I Club	Protection and Indemnity Club
PPI	Policy Proof Insurance
SUPPLYTIME 2005	Time Charter Party for Offshore Service Vessels Code
TOWCON	International Ocean Towing Agreement
USD	United State Dollar

1 Introduction

1.1 Background

Maritime business is always facing quite a lot of risks in practice from very early time. Marine insurance as one of the oldest forms of protection against the loss has a very long history and is associated with the development of the maritime business. As the ship owner or cargo owner may encounter the risks from sea or from third parties, it is better for the owners to buy the marine insurance, which can cover the loss once they meet the risks. When the owner buys the marine insurance, he is called the assured and the person or company who provides the various kinds of insurance is called an insurer or an underwriter (the insurance company who handles with negotiations).

Further, assuming that the assured faces a loss of the insured cargo and it is caused by the third party during the transportation over the ocean, the assured has choice of claiming from the insurer under the contract of indemnity or from the third party who has caused the loss under the tort. Now the problem is raised under this circumstance. Generally speaking, the assured has the free rights to choose either claim he wants to pursue at first. If the assured decides to pursue claiming the recovery from the insurer under the insurance policy, the insurer must pay the assured indemnity for the loss. The existence of the right to sue the third party is no defence.¹ It means that the insurer cannot reject this claim or payment. The reason is that the “insurer should first have exhausted his rights against the third party.”² Apart from claiming the insurer under the policy, the assured also has the choice of claiming from the third party. This brings a difficulty. “A right to compensation or indemnity from the third

¹ Rhidian Thomas, *The Modern Law of Marine Insurance, volume 2*, London: Informa House, 2002 at p. 123.

² Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at p. 308.

party is no barrier to an assured recovering against the insurer under the policy. Similarly an assured's right to recover as against a third party is in no way prejudiced by either a right of indemnity under an insurance policy or actual payment by the insurer."³ The problem of double recovery may happen under this circumstance. However, the nature of insurance as an indemnity contract does not allow the assured recovered doubly by the insurer and third party. The doctrine of subrogation provides the solution of this issue. If the insurer pays the assured, the insurer is entitled to exercise all the remedies and rights of assured against the third party. As Lord held in the case *Castenllain v. Preston* reads as follows:

As between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, a legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been diminished.⁴

1.2 The purpose of the thesis

The purpose of this thesis is to examine the law of subrogation under English law and compare it with Chinese Law. To achieve this purpose, the author will closely examine the relevant provisions on Marine Insurance Act, 1906 of United Kingdom and relevant case law jurisdictions. This thesis will examine the provisions related to subrogation and Chinese law as containing to Chinese Maritime Code.

The thesis will identify the differences in the law on the subject matter in these two jurisdictions and discuss if there is any need to make improvements in Chinese Law.

³ Howard Bennett, *The Law of Marine Insurance*, 2nd. Edition, Oxford: Oxford University Press, 2006 at p.776.

⁴ The case of *Castenllain v. Preston* (1883) LR 11 QBD 380.

The thesis will be an attempt to explain the position of Chinese Law of subrogation to foreign lawyers and highlight the possible differences in outcome on the same case if brought before an English court and a Chinese court.

1.3 Structure of the thesis

Chapter 2 is the brief overview of the subrogation in marine insurance. It is including the general introduction of subrogation and the proper fields of subrogation. In addition, it provides a deeper introduction about the subrogation especially in marine insurance. In the following part of this chapter, there is an argument about the nature of the subrogation whether it is an equitable right or an implied contractual term in common law? At the end of the chapter is the purpose of the right of subrogation.

Chapter 3 is combined with two parts that are the various situations under the subrogation and rights of the insurer before and after the full indemnification of the assured. In the first part of this chapter, the author provides the situations of recoupment and distinguishes the definitions of abandonment and the salvage. The second part of this chapter talks about the rights and obligations of the insurer and assured respectively. The author focuses on the disadvantages of the issue and the insurer should act in the name of the assured when he claims the third party based upon the subrogation. The problem in this chapter is when the insurer could have the right of subrogation. The author answers this question in the 3.2.1 of this chapter.

Chapter 4 is about the relative issues under the right of subrogation. The first part of this chapter is the comparison between the subrogation and the assignment. In this part, the author wants to tell the real differences between these two confused definitions, namely subrogation and assignment. At the end of the first part, the author uses a case that highlights the differences between the subrogation and assignment. There

is saying that the subrogation will replace the assignment someday. However, it is an arguable issue and the author uses some cases to prove that this is an incorrect view and provides the reasons as well. In the second part of the chapter, the author provides the situations on co-assured and the waiver clause of the subrogation. There is a question whether or not the insurer could use the right of subrogation against the co-assured. The author uses the cases and provisions to answer this question. In addition, the author provides the waiver clause of the exclusion on co-assured that is a situation when the co-assured cannot be protected.

Chapter 5 provides some litigation issues concerning to the third party. At the beginning of this chapter, the author asks a question: who is controlling the rights to claim the recovery from the third party? The reason for this question is that the insurer should act in the name of assured under the right of subrogation in English law. In the last part of this chapter, the author explains the four periods of the assured's forfeiture of the claiming rights from the third party. It leads to different results depending on the different periods.

Chapter 6 is about the right of subrogation under the Chinese law. As China belongs to the continental legal system, there are quite a lot of differences in the right of subrogation between the Chinese law and English law. The author divides this issue into four parts: the definition, the insurers' claiming right, the scope of subrogation and the obligations of the assured on protecting the right of subrogation. These four parts could be compared with the English law that are analysed in the previous chapters. Moreover, the author points out the disadvantages in Chinese law through comparing it with English law. Finally, the author provides possible suggestions on how to improve the situation.

1.4 Research methodology

In this master thesis, the descriptive method of research is used for introducing the history and development parts of the subrogation in marine

insurance law and showing the situations, sections, rights and obligations under different chapters. Since the marine legislation under Chinese law is stated in the existing legal framework of Maritime Code and Insurance Law, the author uses the descriptive methods in order to clarify the exact statement of the legislation.

In addition, the method of cases analysis is also used into this thesis. It is easy to understand the abstractive definitions or situations of bringing the case and lord's speech. It is to say in this essay, the author uses quite a lot of cases analysis to support the discussion. The scope of the cases is from nineteenth century to present. The cases are relevant to main subject that is the right of subrogation in marine insurance are introduced in details among this master thesis. However, several cases which relating to the waiver clause, co-assured, etc. are not stated in details.

Finally, the comparative method is also used in this thesis. The author uses this method when analyses the differences between the subrogation and assignment. This study method is also used in the chapter that is about the comparison study between the Chinese law and English law in respect of right of subrogation. Four respects, definition of subrogation under Chinese law, insurer's claiming rights, scope of subrogation in Chinese law perspective and the obligations of assured to protect the subrogation rights are compared with English law which is stated in early chapter separately and accordingly.

2 History and development of subrogation in marine insurance

2.1 History of subrogation

Subrogation is a crucial principle in the field of insurance, which appears at early time of Imperium Rome. The word “subrogation” comes from an English word “substitution” and “surrogate” of Latin. In English law perspective, the word of “subrogation” refers to a process. The process is that one party of the contract is considered to substitute for another party. Therefore, the “one party” based on his own benefits could acquire the other’s rights against the third party. “It is often said that a subrogated claimant ‘stands in the shoes’ of the party whose rights he is deemed to have required.”⁵ The subrogation rights appear in different situations, which can be “acquired by contract” and “can be awarded as a remedy for unjust enrichment.”⁶ Such as Lord Hoffmann said in case of *Banque Financiere de la Cite v. Parc (Battersea) Ltd* (1991) 1 AC 221 “Subrogation may arise either from the express or implied agreement of the parties or by operation of law in a number of different situations.”⁷ In marine insurance field, after paying the underwriter thereupon can get the implied subrogation according to the Section 79 in Marine Insurance Act, 1906 (MIA).⁸ However, the underwriter usually asks for subrogation from

⁵ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 1.01, p. 3.

⁶ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: University Press, Oxford, 2007 at, para. 1.02, p. 3.

⁷ The case of *Banque Financiere de la Cite v. Parc (Battersea) Ltd* (1991) 1 AC 221, House of Lords.

⁸ Marine Insurance Act 1906, Art. 79 Right of subrogation.

- (1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

assured after paying in reality. It means the right of subrogation is on both of implied (MIA) and express (contract) sides. There are some differences between the implied and express subrogation in the respect of the letter of subrogation. Such as the underwriter could claim the indemnity from the third party using the name of assured no matter if the payment has been received or not.⁹ Alternatively, underwriter claims the indemnity based on its own benefit that means the sum money of returning under subrogation is more than the indemnity under the insurance contract. The underwriter does not need to return extra money back to the assured.¹⁰

The theories of unjust enrichment and subrogation are confused sometimes. Subrogation could be a contractual term about transferring the rights of claiming the recovery from third party and the basis of the subrogation right is the common intention among the parties. However, under some circumstances, the right of subrogation could be also considered based on the prevention of unjust enrichment under equitable doctrine.¹¹ Actually, “there is no general doctrine of unjust enrichment in English law”,¹² said Lord Diplock in the case *Orakpo v. Manson Investments Ltd* (1978) AC 95. However, this point of view has been changed in the following case of *Banque Financiere de la Cite v. Parc (Battersea) Ltd* (1991) 1 AC 221. As Lord Steyn declared “unjust enrichment ranks next to contract and tort as part of the law of obligations. It is an independent source of rights and obligations.”¹³ Thus, the words of Lord Hoffmann in this case can be the definitive statement of English law.¹⁴ “Indeed, it might be more accurate to

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogation to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.

⁹ The case of *Arthur Barnett Ltd v. National Insurance Co. of New Zealand Ltd* (1967) NZLR 874 (NZCA).

¹⁰ J. Birds, *Contractual Subrogation in Insurance*, JBL, 1979 at p. 124, 131.

¹¹ *supra*. note 7.

¹² The case of *Orakpo v. Manson Investments Ltd* (1978) AC 95.

¹³ *supra*. note 7.

¹⁴ His statement that non-contractual subrogation is a remedy for unjust enrichment has been followed in: *Birmingham Midshires Mortgage Services Ltd v. Sabherwal* (1999) 80

describe his Lordship's speech as a definitive restatement of the law... it does not establish any new principles and contain nothing which conflicts with any of the established principles relating to subrogation."¹⁵

2.2 The proper fields of subrogation

The principle of subrogation can be applied into three main situations. Firstly, the most significant one is insurance subrogation. It will be introduced in details in the following. Secondly, the author takes an example to explain this situation. A as a debtor owes B as a creditor amount of money for the reasons like contractual, unjust enrichment, tort or others. Then B receives the payment from C in respect of A's obligations. However, there is no contractual distribution clause between A and C. It is possible that C could claim to B based upon the right of subrogation by legal fiction. Hence, B's rights are not extinguished by the payment but are transferred to C so that he could claim for his own benefits. It means that C is given the new rights that are copied from B's extinguished rights. There is another example of subrogation in the guarantee law as following:

There are many situations where two parties are liable to a creditor, where one satisfied his own liability to the creditor, and where his payment or other performance also has the effect of discharging the other's liability. In such cases, and whether or not the parties have previously agreed that the performing party should have a contractual indemnity, the law commonly giving him a restitutionary remedy against the other. Depending on the proper distribution of the burden of liability between claimant and defendant, the claimant's primary remedy is a contribution or reimbursement award. In addition, and as supplementary measure which is capable of supporting either entitlement, the claimant has also commonly been afforded the remedy of subrogation to the paid-off creditor's extinguished rights against the defendant. Such remedies have been made available between various parties, including sureties and principal debtors, co-

P & CR 256 (CA) 264; *Cheltenham & Gloucester plc v. Appleyard* (2004) EWCA Civ 291 [32].

¹⁵ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 1.03, p. 4.

sureties; sureties and sub-sureties; joint contractors; partners; joint wrongdoers; and several wrongdoers liable for the same damage.¹⁶

In order to make this situation clear, there is a case named *Niru Battery Manufacturing Co. v. Milstone Trading Ltd* (2004) EWCA Civ 487. The *Niru* had the sale of goods contract with *Milestone* on the subject matter of lead ingots. The payment was letter of credit against presentation on various documents including bills of lading and an inspection certification issued by SGS. The seller *Milestone* financed this deal through loan from CAI, using the deposit of the warehouse warrants relating to the lead as the security method. This arrangement put *Milestone* in a dilemma position. Because *Milestone's* only source of fund was the letter of credit. Nevertheless, the payment under letter of credit required the bill of lading from the *Milestone*, which in reality that the goods needed to be released from the warehouse. However, the *Milestone* could not release the goods without the warehouse warranties kept by the CAI until the payment done. Finally, the *Milestone* presented a falsely bill of lading. Then the CAI presented the falsely bill of lading and other necessary documents together to the bank for claiming the payment. CAI paid the money away for the benefit of another company in *Milestone's* group, even though it had previously sold the subject matter that was the goods of the sale to *Niru*. The payment was paid under the letter of credit. The outcome was that *Niru*, which has been indemnified the bank for its payment under the letter of credit, had been induced to the part of USD 5.8m, without any return.¹⁷

SGS claimed to be returned all of the payment under three legal reasons, which are subrogation, recoupment and contribution under the Civil Liability (Contribution) Act 1978. Clarke LJ from the Court of Appeal stated the leading judgement, held that “SGS was entitled to be subrogated to *Niru's* rights against CAI; SGS was entitled to reimbursement; and (if

¹⁶ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 6.03, p.88.

¹⁷ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 6.18, p. 96.

the 1978 Act applied) SGS would be entitled to 100 percent contribution under its terms.”¹⁸

Finally, the third situation of how subrogation works in reality is explained in another example. A as a debtor owes B as a creditor amount of money. A could claim the indemnity from C based upon in tort or contract between them after paying B. In the normal run of things, A pays B and then recovers the expenditure from C. However, this process can be disrupted if A becomes bankrupt or insolvent and B needs to improve that A is becoming bankruptcy or insolvency as an unsecured debtor. Under this circumstance, B could recover a little money or just nothing, even though A’s estate is swollen by the amount of the indemnity. To prevent this situation, there is principle that A could transfer his indemnity rights to B and allows him to enforce this right against C for his own exclusive benefit. For this kind of subrogation, there is one example, which is stated in the Third Parties (Rights against Insurer) Act, 1930. It is about the third party who has a claim against the bankrupt or insolvent assured to enforce his rights under the liability policy.¹⁹ There is a new vision of the Act in 2010, Third Parties (Rights against Insurer) saying that B who is the aggrieved party can claim the indemnity from C according to the insurance contract directly. It seems like the instead of A’s contractual rights. It is to say that this provision is much more similar with the right of subrogation in insurance law.

2.3 Development of subrogation in marine insurance

In modern society, the doctrine of subrogation and abandonment are to be distinct quite well under the English insurance law system. However, the situation that the indemnity insurer is entitled to acquire the assured to subsist the rights based on the subrogation now is derived from the

¹⁸ The case of *Niru Battery Manufacturing Co. v. Milstone Trading Ltd* (2004) EWCA Civ 487.

¹⁹ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 1.10, p. 7.

principle of abandonment from the eighteenth century (1750 - 1850).²⁰ The abandonment doctrine during that time allowed a marine insurer who had paid the total loss for the subject matter to be entitled to acquire whatever remained of the insured subject matter (terms the “salvage”). As Judge Tindal stated in the case *Roux v. Salvador* (1835) 1 Bing (NC), “out of the very nature of the contract of insurance, which is a contract of indemnity only: for the assured would obviously be more than indemnified, unless the underwriter is put into his place as to all the benefit that may be derive from what has been actually saved or recovered from the loss.”²¹

As time passed and law evolved, the doctrine of subrogation and abandonment were separated for the first time in the case *Simpson v. Thomson* (1877) LR 3 App Cas 279, Lord Blackburn that stated that:

Where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remains of the ship, and all rights incident to the property, are transferred to the underwriters as from the time of the disaster in respect of which the total loss is claimed for and paid...But the right of the assured to recover damages from a third person is not one of those rights which are incident to the property in the ship; it does pass to the underwriters in case of payment for a total loss, but on a different principle. And on this same principle it does pass to the underwriters who have satisfied a claim for a partial loss, though no property in the ship passes.²²

Lord Chancellor made a statement in this case about the right of subrogation as well. There is a principle that if the underwriter who has an

²⁰ *ibid*

²¹ The case of *Roux v. Salvador* (1835) 1 Bing (NC) 526, 539.

²² The case of *Simpson v. Thomson* (1877) LR 3 App Cas 279.

In this case, there were two ships with the accident of collision that belonged to the same owner; as a result, one of the ships was total loss. Therefore the insurer paid the indemnity of total loss to the shipowner. After paying the indemnity, the insurer thought could subrogate the rights which included with the owners of the cargo which had been destroyed, in the distribution of the fund lodged in the court by the owner of the other colliding vessel who was, of course, the very same person whom the insurer had previously indemnified. The House of Lord ruled that the insurer had no right to be a claimant to any part of the fund in this circumstance. Because he was acting in the name of assured, he was in fact taking action against himself.

insurance contract with the assured, the underwriter pays the good indemnity for the loss and he is entitled to succeed all the ways and means by the assured in order to protect himself against or reimbursed himself for the loss. Based on this principle, the underwriter of a vessel that has been lost in the sea is entitled to succeed the ship if he can find it and recover it. Moreover, the underwriter could claim any rights that the owner of the vessel might have maintained on the insured vessel against the third party or the wrongdoer who is causing the loss. In addition, the underwriter must act in the name of assured.²³ Lord Cairns also had some words to confirm Lord Chancellor. Assuming that an accident of collision happened at the sea, Lord Cairns held if an underwriter paid the partial loss of a vessel to the assured, the underwriter could sue the assured if his vessel was in fault of the collision. There is no fundamental principle for the underwriter's rights "except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity...loss."²⁴

Five years later, Judge Brett stated the classic definition about the subrogation in case *Castenllain v. Preston* (1883) LR 11 QBD 380:

Now it seems to me that in order to carry out the fundamental rule the insurance law, this doctrine of subrogation must be carried to the extent, which I am now about to endeavour to express, namely that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been diminished.²⁵

²³ Susan Hodges and Roy Carlile, *Cases and Materials on Marine Insurance Law*, London, Sydney: Cavendish Publishing Limited, 1999 at p. 18.

²⁴ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 10.14, p. 313.

²⁵ The case of *Castenllain v. Preston* (1883) LR 11 QBD 380.

The real meaning of doctrine of subrogation is much further than the meaning of transferring those rights, which may give a cause of action at any time in either the contract or tort. Because if there is a contract between the assured and third party about the loss or damage on subject matter, the third party satisfies the assured about the loss with good action or good compensation. Then there is no subrogation right for the underwriter under this circumstance. It is true that there is an existence of the right of action for a moment that is good for the assured, which the underwriter could have been subrogated. However, he cannot have the right of subrogation until he has paid the sum insured and made good loss.

All the cases and statements above are the fundamental factors of Section 79 “Rights of subrogation” in MIA Section 79 states as following:

- (1) Where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.
- (2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of its as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.²⁶

The Section 79 states two separate issues that are salvage and subrogation (the first part of Section 79 deals with subrogation and salvage and the second part deals with the subrogation on payment of partial loss). “Salvage is the right of an underwriter who has paid for a total loss (actual or constructive) to assert proprietary rights over whatever remains of the

Also Howard Bennett, *The Law of Marine Insurance*, 2nd. Edition, Oxford: Oxford University Press, 2006 at para. 25.05, p. 777.

²⁶ Marine Insurance Act 1906, Art. 79 “Right of subrogation”.

insured subject-matter.”²⁷ The main principle in Section 79 is that the underwriter is entitled to subrogate the rights of the assured against the third party or person who has caused the loss of insured subject matter and the payments from the third party which satisfies the loss of the assured’s loss on the subject matter. If the underwriter has fully indemnified to the assured, the underwriter should act in the name of assured order to begin the litigation proceedings against the third party or wrongdoer.²⁸

In the twentieth century, there are quite a lot of developments in this field. The insurer’s rights on the insured subject matter that could be against the defendant under the subrogation were reaffirmed by different occasions.²⁹ During the same time, the courts made the great process in the development of the subrogation right based on many cases, revisiting the rationales and prerequisites for the award. Meanwhile, the courts limited the scope of the subject and brought the developments into practice.³⁰

2.4 Nature of subrogation in marine insurance

It has been explored for a long time in English court about the nature of subrogation in marine insurance. There are two main theories: one is under the principle of unjust enrichment of equity and the other is a matter of implied term of contract in common law.

²⁷ Robert Merkin, *Marine Insurance Legislation*, 3rd. Edition, London, Singapore: LLP, 2005 at p.97.

It is much clearer to explain like this: in the case of total loss, the insurers are also to be entitled to take over the property in the goods, which mean “salvage”. Therefore Section 79 (1) is about the salvage and subrogation. The meaning of the word “salvage” here is different from salvage that means a kind of service, that saves or helps to save the subject of the service, including marine property, from danger for the reward.

²⁸ *supra*. note 26.

²⁹ The cases of *James Nelson & Sons Ltd v. Nelson Line (Liverpool) Ltd* [1906] 2 KB 217; *H Cousins & Co Ltd v. D & C Carriers Ltd* (1971) 2 QB 230 (CA); *Caledonia North Sea Ltd v. British Telecommunications plc* [2002] UKHL 4, [2002] 1 Lloyd’s Rep. 553 [11] (Lord Bingham) and [89] (Lord Hoffmann).

³⁰ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 10.29, p. 320.

The nature under the equitable doctrine is stated in the case *Banque Financiere de la Cite v. Parc (Battersea) Ltd* (1991) 1 AC 221 Lord Hutton expressed as following:

The doctrine of subrogation applies in a variety of circumstances where the defendant has been unjustly enriched at the expense of the plaintiff, and where equity considers that it would be unconscionable for the defendant to retain that enrichment. In such a case, as Goff and Jones say, the remedy is fashioned to the facts of the particular case. In the *Orakpo v. Manse Investments* [1978] AC 95, 104E Lord Diplock stated that some rights by subrogation “appears to defeat classification except as an empirical remedy to prevent a particular kind of unjust enrichment.”³¹

Besides, Lord Hoffmann also kept the point that remedy of subrogation was not the common intention among the parties. The speech is follow:

...it is a mistake to regard availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral. Such an analysis has inevitably to be propped up by presumption which can verge upon outright fictions, more appropriate to a less developed legal system than we now have...I think it should be recognised that one is here concerned with a restitutionary remedy and that the appropriate questions are therefore, first, whether the defendant would be enriched at the plaintiff's expense; Secondly, whether such enrichment would be unjust; and thirdly, whether there are nevertheless reasons of policy for denying the remedy.³²

There is another case *Napier and Ettrick v. Kershaw* [1993] 1 Lloyd's Rep 197, the Court appealed that the subrogation was a kind of remedy under the equitable doctrine but not the implied terms under the contractual law.³³ However, the right of subrogation might be negotiated by an underwriter on the express terms in the insurance contract that is the scope of unjust enrichment under the equitable doctrine.³⁴

³¹ *supra*. note 7.

³² Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 455.

³³ The case of *Napier and Ettrick v. Kershaw* [1993] 1 Lloyd's Rep 197.

³⁴ The case of *Bee v. Jenson* [2008] 2 Lloyd's Rep IR 221.

According to the equitable doctrine, could the underwriter have the right of subrogation after the payment, which is defaulted or refused by assured at the beginning? The general principle of equitable doctrine is that the person who claims the remedies cannot be the wrongdoer. This argument appears in the case *England v. Guardian Insurance Ltd* [2002] Lloyd's Rep IR 404. In the judgment from court said that the subrogation could not be extinguished even though there is non-appropriate of underwriter.³⁵ Because the subrogation is the right *in rem* not in *personam*, it means that the underwriter could have lien or property on the payment from third party. There is another instance under the circumstance when the assured becomes bankruptcy or insolvent. It is to say that the money from the third party should be returned to the underwriter based upon the subrogation. However, the underwriter may be one of the creditors even without guarantees according to the implied terms under the insurance contract. It is possible for the underwriter not to get the payment back. The right of claiming could be invalid after the assured becomes bankruptcy or insolvent even it has been transferred from the assured to the underwriter.³⁶ It is to say that under the equitable doctrine, the payment for loss from the third party to the assured is considered as an equitable lien or good for the insurer. The purpose of this consideration is to protect the insurer's rights under the subrogation.³⁷

To conclude the subrogation's nature, in the author's view, subrogation is under the equitable doctrine originally; however, it could be modified by the implied terms in the insurance contract. "The nature of the rights is such that where the insurance claim has been paid; the insurers are subrogated to the assured's rights, whether or not the claim is actually payable under the policy."³⁸

³⁵ The case of *England v. Guardian Insurance Ltd* [2002] Lloyd's Rep IR 404.

³⁶ The case of *White v. Dobbinson* (1844) 14 Sim 273.

³⁷ Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 456.

³⁸ Jonh Dunt, Ander W. Baker, QC and Hatty Sumption (ed.), *Marine Cargo Insurance*, London: Informa Law Mortimer House, 2009 at para. 16.4, p. 342.

Also can be found in the case *King v. Victoria Assurance Company Limited* (1896) AC 250 (PC), assuming a bona fide payment under the policy, not merely a voluntary gift.

2.5 Purpose of subrogation

Generally speaking, there are two purposes of subrogation in marine insurance law. On one hand, the assured cannot receive the indemnity from different persons twice. It means that the assured should not be doubly recovered. Because the assured can claim indemnity from the insurer according to the insurance contract and at the same time, the assured can claim the loss from the third party based upon the tort or contract. It is possible that the assured will get the indemnity twice or even more, which means earning money from the accident if there is no right of subrogation. This situation is unfair, inappropriate and immorality by law and real life.

On the other hand, the wrongdoer but not the insurer should take responsibility for his fault at the end of indemnity proceedings legally. The injured party has the rights to choose whether claiming the indemnity from any of the insurer or the third party. However the assured usually sues the insurer from whom he could get the indemnity easier and faster comparing with suing the third party (for the reason of tort, contract or unjust enrichment) in reality. Under this circumstance, it is possible to ignore the liability of third party who really has caused the loss after the insurer paying the indemnity. There should be the right of subrogation in order to avoid this situation.

There is a case in Canada named *Somersall v. Friedman* (2002) 3 SCR 109 and the Judge Iacobucci stated that:

It is possible to keep in mind the underlying objectives of the doctrine of subrogation which are to ensure (i) that the insured received no more and no less than a full indemnity, and (ii) that the loss falls on the person who is legally responsible for causing it... Consequently, if there is no danger of the insured's being overcompensated and the tortfeasor has exhausted his or her capacity to compensate the insured there is no reason to invoke subrogation. Similarly, if the insured enters into a limits agreement or otherwise abandons his or her claim against

an impecunious tortfeasor the insurer has lost nothing by his inability to be subrogated.³⁹

Based upon the analysis above, there is no right of subrogation in the sum insurance but only in the indemnity insurance. The ship insurance or cargo insurance in maritime law belongs to the indemnity insurance. Nevertheless, an important exception is PPI (Policy Proof Insurance) in this circumstance. Case *John Edwards Co. Ltd. v. Motor Union Insurance Co Ltd.* [1922] 2 K.B. 249 is about PPI. The plaintiff owned a vessel. The vessel had a collision accident with another vessel and sunk. The plaintiff had insured the chartered freight with the defendants under the PPI policy. After the collision, the insurers had the honoured policy and indemnified the assured, acting in the name of the assured. Then they found themselves excluded from a fund with the court by the owners of the other colliding vessel. The issue was raised that if the insurance policy is an honour policy, what does the underwriter do based upon the subrogation right on the payment under the insurance contract. In the view of Lord McCardie, this kind of policy is a contraction of the indemnity contract and it is not the indemnity contract at all. The insurer pays the indemnity without consideration for the total loss or the partial loss when the event happened. The event should be written in the insurance contract. The Section 4 of the MIA⁴⁰ cannot be destroyed. There is no legal scope of operating the main principle of subrogation. The significant principle of the subrogation is not there. There is also another point stated by Lord:

It is destitute of all legal effect between the parties. If so, it cannot operate as if it were a valid bargain carrying

³⁹ The case of *Somersall v. Friedman* (2002) 3 SCR 109.

⁴⁰ Marine Insurance Act, 1906. Art. 4 “Avoidance of wagering or gaming contracts.”

- (1) Every contract of marine insurance by way of gaming or wagering is void.
- (2) A contract of marine insurance is deemed to be a gaming or wagering contract-
 - (a) where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no exception of acquiring such an interest; or
 - (b) where the policy is made “interest or no interest” or “without further proof of interest than the policy itself,” or “without benefit of salvage to the insurer,” or subject to any other like term:

Provided that, where there is no possibility of salvage, a policy may be affected without benefit of salvage to the insurer.

with it the legal and equitable results and the body of jural remedies which ordinarily flow from an insurance indemnity contract. Legal proceeding to enforce subrogative rights cannot be based on a document which is stricken with sterility by Act of Parliament.⁴¹

The right of subrogation could be used in explaining some confused situations in reality. If the assured claims indemnity from the insurer, it is unacceptable that the insurer refuses the request and asks the assured to claim from the third party for loss. The accurate method is that the insurer should pay at first and claim the expenditure from the third party under the right of subrogation.⁴² For the same reason, if the assured chooses to claim indemnity from the third party, the third party cannot refuse to pay the recovery under the excuse that the insurer could pay for the total loss or the partial loss in the first position of recovery.⁴³

⁴¹ Susan Hodges and Roy Carlile, *Cases and Materials on Marine Insurance Law*, London, Sydney: Cavendish Publishing Limited, 1999 at p. 19.

Also can be found in the case *John Edwards Co. Ltd. v. Motor Union Insurance Co Ltd.* (1922) 2 K.B. 249.

⁴² The case of *Collingridge v. Royal Exchange Assurance* (1877) QBD 173.

⁴³ The case of *Mason v. Sainsbury* (1782) 3 Doug 61, *Clark v. Tull t / a Ardington Electrical Service* [2002] Lloyd's Rep IR 524.

3 Overview of right of subrogation & rights and obligations of the parties

This chapter is the extension part of chapter 2. There are several kinds of situations of the right of subrogation under marine insurance that will be discussed in 3.1. These situations can be classified as recoupment in 3.1.1 and abandonment in 3.1.2. For the right of abandonment, the author introduced it in 2.3, the development of the subrogation. These two definitions are confused and hardly to distinguish in some special circumstance. The Lord Blackburn separated them for the first time.

There is a precondition for the insurer of enjoying the right of subrogation that when the insurer pays the full indemnity. It will be discussed in 3.2.1. The main parties of subrogation are the insurer and the assured. They enjoy rights while burdening the obligations separately at the same time. These will be discussed in the rest part of this chapter.

3.1 Various situations under the right of subrogation

In the insurance field, there are three different situations under the right of subrogation. Firstly, the assured receives the compensation on the insured subject matter from the third party who causes the loss before the insurer pays; the insurer may have the right to reduce or to recoup the indemnity. Secondly, the assured receives amount of money for compensation on the insured subject matter from the third party who causes the loss after the insurer's payment. The insurer could ask for returning. Finally, the rights of the assured against the third party should be transferred to the insurer. According to the analysis above, the most complicated and common situation is the first one. For the second one where the money received after indemnification by the insurer is a kind of mistake of fact. The

insurer is entitled to get the money back from the assured based upon the fundamental principle of equitable of restitution. For the final situation, the insurer, as a secured creditor, substitutes the rights from the assured's right against the third party based upon the equitable lien. Combination of the first and second situation is called "recoupment" which is discussed in the following.⁴⁴

3.1.1 Recoupment

The situation of recoupment arises when the indemnity is overpaid or the assured is doubly recovered by the insurer and third party. It means that the assured is earning benefit from the insured risks. No matter the benefit happens before or after the indemnification from the insurer, the insurer is entitled to substitute the position of the assured and get the benefit as well. When the benefit from the third party happens before the indemnification paid by the insurer, "the net effect is *pro tanto*"⁴⁵ of reducing the liability of the assured. Moreover, when the benefit is paid by the third party after the indemnification from the insurer, the insurer has the right to accept the benefit. As known, the basic and significant principle in insurance law is that the assured who faces the loss under the marine policy shall be fully indemnified in the marine insurance contract, which is a kind of contract of indemnity. However, the assured should not be more than full indemnification.⁴⁶ It could be wrong of the proposition that is preventing the assured of getting the full indemnity or giving the assured more than the full indemnity.⁴⁷

This theory is widely used in reality. However, it also brings some confused problems such as the voluntary payment or gifts. For instance, the assured's house is destroyed in an accident of fire. The insurer pays the indemnity. Meanwhile, the assured's friends or families also give some

⁴⁴ Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 450.

⁴⁵ Howard Bennett, *The Law of Marine Insurance*, 2nd. Edition, Oxford: Oxford University Press, 2006 at para. 25.05, p. 777.

⁴⁶ *supra*. note 25.

⁴⁷ There are some words from the Lord in footnote 25.

money as compensation to him. Under this circumstance, could the insurer ask for returning the indemnity back using the reason of recoupment principle? The right of recoupment of the insurer is used in claiming the assured if the assured has benefits from the compensation which is received from the third party for the loss. “The right is usually exercised by an insurer claiming from the assured a sum equivalent to any sum of damages paid to the assured by a third party legally liable for the loss.”⁴⁸ Actually, the insurer is entitled sometimes to pay the assured as *ex gratia* to decrease the loss unless the donor wants to give the benefit to the assured to exclude the insurer.

The intention of benefitting the assured, who does not exclude the insurer or not diminish the loss, should be expressed as evidence in the agreement between the donor and the assured. This kind of voluntary payments or gifts should be excluded from the recoupment. Because the recoupment is used by the insurer to reduce the indemnification from the assured who has been paid. The reason is that purpose of the voluntary payment or gift is not to diminish the loss.⁴⁹ In the case *Burnand v. Rodocanachi* (1881-82) 7 App. Cas.777, the insured cargo was destroyed by Confederate cruiser Alabama during the American Civil War. The underwriters paid the indemnity for the actual total loss of insured cargo to the owners. In addition, the American Government paid the compensation to the cargo owners for the loss as well.⁵⁰ The problem is that could underwriters be entitled to get the compensation back based on the reason of subrogation?

The judgement suggested that the underwriters could not get the compensation, because the compensation from the American Government was a kind of voluntary payments or gifts but not the payment for reducing

⁴⁸ Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 451.

⁴⁹ Susan Hodges and Roy Carlile, *Cases and Materials on Marine Insurance Law*, London, Sydney: Cavendish Publishing Limited, 1999 at p. 34.

⁵⁰ The case of *Burnand v. Rodocanachi* (1881-82) 7 App. Cas.777.

the loss. The government would not pay the money because of reducing the indemnified loss against the insurer.⁵¹

Nevertheless, in the case *Colonia Versicherung AG & Ors v. Amoco Oil Co.* [1997] C.L.C 454, the insurer was entitled to recoup. In this case, the seller (defendant) *Amoco* sold the oil on the FOB terms to the buyer (plaintiff) *Astra* and *Astra* resold the cargo on the CIF terms to ICI. The cargo became contaminated after the ship arrival by ICI. However, there was no dispute about the cargo's contamination in the *Amoco's* shorelines. *Astra* bought all risks for the cargo and transferred the policy to ICI on the terms of CIF. After finding out that the cargo was unqualified, the ICI claimed the compensation to *Amoco*. *Amoco* finally paid because of the business and legal reasons. ICI transferred the rights against the underwriter to *Amoco* in their agreements. Therefore, *Amoco* then claimed the indemnity from underwriter as the assignee. However, the underwriter refused the request based on the reason that the compensation ICI received was a kind of voluntary payments or gifts. In the court, Lord Hirst did not agree this point and he stated that:

It follows that the crucial question is whether, on the construction of the Deeds, and in particular of course the second Deed, it was the intention of Amoco to benefit ICI to the exclusion of the Colonia...the first Deed, with its provisions for release of ICI's claims against Amoco, and its express reservation of the underwriters' subrogation rights, is fully in line with the second Deed. Thus, as a matter of pure construction, I am satisfied that the

⁵¹ *supra*. note 49.

Lord Blackburn held: ...In the present case, the Government of the United States did not pay it (the compensation) with the intention of reducing the loss. Lord Coleridge says in his judgment, and says very truly, that the Government of the United States cannot by any action of theirs deprive a man, suing this country, of any right which he has. I quite agree in that; but I think that Lord Coleridge, if he had taken the same view as I do for the matter, would have seen that an Act of Congress of the United States might effectively prevent any such right arising. If, once the right has vested to recover any such sum, of course an Act of Congress could not take it away... 'We do not pay the money for the purpose of repaying or reducing the loss against which the insurance company have indemnified, but for another and different purpose', it effectively prevents the rights rising...I should, myself, prefer to use my own phrase expressing the same idea, and to say that it was not paid in such a manner as to reduce the loss against which the plaintiff's has to indemnify the defendants; it is the same thing, but rather differently expressed.

intention demonstrated is not to benefit ICI to the exclusion of Colonia.⁵²

Based on the analysis above, in the author's view, if the assured and the third party who pays the compensation are in the good commercial relationship, whether before or after the underwriter paying, this "money" could not be accepted as "voluntary payments or gifts" by the court. However, the agreement or the evidence between them is also significant.

3.1.2 The abandonment and salvage

The insurer can substitute the right of subrogation from the assured whether in the situation of total loss (constructive or actual total loss) or in partial loss. The insurer can subrogate the property and salvage.⁵³ There is another saying that under this circumstance, the assured abandons the insured subject matter to the insurer.

Under the circumstance of total loss, the principles of subrogation and abandonment are different but confused sometimes. Lord Atkin had the similar statement in the case *Glen Line v. Attorney – General* [1930] 37

⁵² The case of *Colonia Versicherung AG & Ors v. Amoco Oil Co.* (1997) C.L.C 454.

The author put the words of Lord Hirst for the factors of his speech here. The factors can be found in the case as well.

- (1) The recital quote above expressly recors the desire of both parties to "resolve any disputes that exits or may arise between them as a result of the transactions", and this desire is fulfilled by clause 1.2 under which ICI release and discharge Amoco from "all claims liabilities obligations and causes of action whatsoever contingent or not contingent, known or unknown, which it now has, had or may have arsing out of the transaction"...this to my mind fully vindicates Mr. Thomas' submission that, irrespective of the question whether there was any direct liability owed by Amoco to ICI, this was a true commercial settlement of any possible claims by the former against the latter.
- (2) The assignment is expressly qualified by the words "except to the extent of the insurance underwriter's subrogation rights." These words must, for the reasons given above, be construed in their wide sense, so as to include Colonia's rights as against ICI to treat Amoco's payment as diminishing ICI's loss.
- (3) This construction is underlined by the last sentences of clause 1.2 which expressly stipulates that the release shall not effect the subrogation rights of the underwriters which they "have or by virtue of any payment to any person firm or corporation shall acquire" which words are clearly apt to cover Amoco's payment to ICI.
- (4) The final words of clause 4.1 stipulating that "no warranty is given express or implied that Amoco will be able to pursue all or any claims" seems to me to show that the parties recognised that Amoco might well not be entitled to pursue their claim against Colonia.

⁵³ *supra*. note 26.

Lloyd's Rep 55, "confusion is often caused by not distinguished the legal rights given by abandonment... from the rights of subrogation."⁵⁴ Nevertheless, right of subrogation and abandonment have essential differences indeed. In MIA Section 63 is about effect of abandonment that is stated as follows:

- (1) Where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject – matter insured, and all property rights incident thereto.
- (2) Upon the abandonment of a ship, the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and, where the ship is carrying the owner's goods, the insurers entitled a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.⁵⁵

According to this section, the underwriter can take over the property abandoned in the case of total loss. Moreover, the underwriter may take over the remains of a ship or cargo. The underwriters can choose if they want to accept the property or not. It depends on their wishes.⁵⁶ The insurer can earn benefit under the abandonment because the value of salvage of abandoned subject matter maybe higher than the indemnity. At the same time, the insurer takes over the property as well. On the contrary, the insurer should not earn benefit from the compensation paid by the third party according to the right of subrogation. The underwriter must return the money back if it is overpaid. Accordingly, here is an example in car insurance. If the insured's car has an accident or was stolen, this is governed by the policy. Then the underwriter pays a total loss. Under this circumstance, the underwriter is entitled to take over whatever remains on the car. In addition, the underwriter could take the action of disposition on it and follow the proceedings or accept the recovery on that property. It

⁵⁴ The case of *Glen Line v. Attorney – General* [1930] 37 Lloyd's Rep 55.

⁵⁵ Marine Insurance Act 1906, Art. 63 "Effect of abandonment".

⁵⁶ The case of *Blane Steamships Ltd v. Minister of Transport* (1951) 2 KB 965.

Also can be found in book: Robert Merkin, *Marine Insurance Legislation*, 3rd. Edition, London, Singapore: LLP, 2005 at p.81.

should be like that even the value of the property is increased or even more than the indemnification for the total loss from the underwriter itself.⁵⁷

In addition, the concept of notice of abandonment and abandonment are different. The notice of abandonment is when the assured decides to abandon the insured subject matter to the insurer and he must give a notice of abandonment.⁵⁸ In the case *Kaltenbach v. Mackenzie* (1878) 3 CPD 467, Lord Brett has the statement about abandonment. The abandonment is not particular to policy under the marine insurance. It is the part of every contract of indemnity. It is to say that if there is a claim about an absolute indemnity under the contract of indemnity, there should be a part of abandonment among all the claiming of indemnity that is in what he may receive.⁵⁹

3.2 Rights of the insurer before and after full indemnification of the assured

3.2.1 The right of subrogation raised after the full indemnification

It is very clear in Section 79 (1) of MIA saying that “where the insurer pays the total loss, either of the whole...and he is thereby subrogated to all the rights and remedies...”.⁶⁰ It means that after paying the full indemnity, the insurer can get the right of subrogation. Moreover, it is easy to find out this view in the construction of Marine Insurance Act 1906 as well.⁶¹ In addition, there is the reason of Clause 16.2 in Institute Cargo Clause saying as follow:

It is the duty that of the Assured and their employees and agents in respect of loss recoverable hereunder

⁵⁷ Mance, Iain Goldrein and Robert Merkin, *Insurance Disputes*, 2nd. Edition, London: Informa Law, 2004 at para.8.70.

⁵⁸ Marine Insurance Act 1906, Art. 62 (1) “Notice of abandonment”.

⁵⁹ The case of *Kaltenbach v. Mackenzie* (1878) 3 CPD 467.

⁶⁰ *supra*. note 26.

⁶¹ In the Marine Insurance Act 1906, Section 79 (Right of Subrogation), Section 80 (Right of Contribution) and Section 81 (Effect of under insurance) are in the same chapter named “Right of Insurer on Payment”.

16.2 to ensure that all rights against carriers, bailees or other third parties are properly preserved and exercised and the insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties.⁶²

Maybe the insurer still needs to research or investigate the situation. There is no subrogation without the full payment. It is possible to breach the contract without acting in the name of assured against the third party. Therefore, it is better to have an express clause about enforcement for the assured even though there are some cases about protecting the right of subrogation after paying the indemnity. There is no subrogation unless the insurer pays the 100 percent indemnity.⁶³ In the case *Scottish Union and National Insurance Company v. Davis* [1970] 1 Lloyd's Rep 1, it says that there is no subrogation if the insurer denies or recoups the payment which he should pay under the insurance contract.⁶⁴ In English law, the most important point, which the insurer's liability of paying the full indemnity, is totally discharged no matter which methods the insurer pays the full indemnity to the assured. In the case *Brown v. Albany Construction Co Ltd*, Lord Stuart-Smith had the words as "a perfectly straightforward case where the liability under the policy was discharge in the way that was agreeable to both parties."⁶⁵

If the indemnity paid by the insurer is just an *ex gratia* payment but not the liability in law, could the insurer subrogate? The reasons of an *ex gratia* payment are like breaching the warranties clause in contract by the assured, or lacking of sufficient evidences of causing the loss. Under this circumstance, it is safe to have an express clause in the insurance contract between the assured and the insurer for the possibility that the insurer wants to claim the subrogation. In the previous cases, the insurer's *ex*

⁶² Institute Cargo Clause, Clause 16 "Duty of Assured."

It is the duty that of the Assured and their employees and agents in respect of loss recoverable hereunder, 16.1 to take such measure as may be reasonable for the purpose of averting or minimising such loss.

⁶³ *supra*. note 40.

⁶⁴ The case of *Scottish Union and National Insurance Company v. Davis* [1970] 1 Lloyd's Rep 1.

⁶⁵ The case of *Brown v. Albany Construction Co Ltd* (CA 16 June 1995).

gratia payment is under condition that the assured must sue the third party and get the full compensation back. If it was successful, some of the compensation that belongs to insurer in original must be returned back as the name of recoupment by trustor.⁶⁶ However, if the insurer acting in the name of assured against the third party before the indemnification, the assured could apply to repeal the insurer's name and cancel the litigation to the court. Nevertheless, the insurer may get the ratification from the assured after the payment even though it expires.⁶⁷

However, some different situations in the world are not the same as in English law. For example, in the United States of America, the insurer and the assured can claim the rights against the third party in the common name if the insurer pays some of the indemnity. Moreover, it is legal that insurer can claim the rights of subrogation only with a settlement even the payment has not been received. On contrary, in China, the insurer can get the subrogation unless he pays the full indemnity and presents the evidence of payment.⁶⁸

3.2.2 The insurers' rights before the full indemnification

3.2.2.1 The implied obligations of the assured

It is difficult for the insurer to claim the right of subrogation before paying the whole indemnification unless there is an implied obligation under the insurance contract. As known, in the insurance contract there is an obligation between the insurer and the assured. It means the assured should not do anything, which could diminish the subrogation right of insurer.

⁶⁶ The cases of *Naumann v. Ford* (1985) 2 EGLR 70 and *Lonrho Export Ltd. v. ECGD* (1999) Ch 158, 181.

⁶⁷ The cases of *Presentationes Musicales SA v. Secunda* (1994) Ch 271 and *Victoria Teachers' Credit Union v. KPMG* (2000) VSCA 23.

⁶⁸ Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 458.

This obligation may be implied by law unless there is nothing expressed in the insurance contract.⁶⁹

It is to say that if there is a settlement between the assured and the third party who causes the loss and the settlement is harmful in the respect of the insurer, the insurer has the rights to sue the assured.⁷⁰ However, the insurer cannot sue the assured if the settlement between the assured and third party is a *bona fide* settlement.

3.2.2.2 Express obligations of the assured before full indemnification from the insurer

In reality, there is an express term in the insurance contract about the assured's obligations before full indemnification. The Clause 9 in the International Hull Clauses named "Duty of the assured"⁷¹ is an example of this express obligation. For marine cargo insurance, there is a Clause 16 in

⁶⁹ The case of *Sola Basic Australia Ltd v. Morganite Ceramic Pty Ltd* (1989), refer to Liangyi Yang, "*Marine Cargo Insurance*," (2010), p. 458, CA NSW 1989.

"That is to say, the insurer may enjoin any apprehended breach of the stipulation, may subsequently sue for any actual breach in damages, may plead the breach as an defence if the insured claims under the relevant policy of insurance, and may sue for an injunction or damages any third person who induces a breach of that stipulation."

⁷⁰ The cases of *Commercial Union Assurance Co. v. Lister* (1874) LR App 483, *West of England Fire Insurance Co. v. Isaacs* (1896) 2 QB 377 and *Horse, Carriage and General Insurance Co. v. Petch* (1916) 33 TLR 131.

⁷¹ International Hull Clauses (01/11/03), Clause 9 "Duty of the Assured (Sue and Labour)":

9.1 In the case of any loss or misfortune it is the duty of the Assured and their agents and agents to take such measures as may be reasonable for the purpose of averting or minimising a loss which would be recoverable under this insurance.

9.2 Subject to the provisions below and to Clause 15, the Underwriters shall contribute to charge properly and reasonable incurred by the Assured their servants or agents for such measures general average, salvage charges (except as provided for in Clause 9.4), special compensation and expenses as referred to in Clause 8.5 and collision defence or attack costs are not recoverable under this Clause9.

9.3 Measures taken by the Assured or the Underwriters with the object of saving, protecting or recovering the subject – matter insured shall not be considered as a waiver or acceptance of abandonment or otherwise prejudice the rights of either party.

9.4 when the Underwriters have admitted a claim for a total loss and the vessel under this insurance and expense have been reasonably incurred in saving or attempting to save the vessel and other property and there are no proceeds, or the expense exceed the proceeds, then this insurance shall bear tis pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonable by regarded as having been incurred in respect of the vessel. Excluding all special compensation and expenses as referred to in Clause 8.5.

Institute Cargo Clause named “Duty of Assured”⁷² that is also an express obligation for the assured in insurance contract. The insurer can claim the assured if he does not take proper action before expire time according to this clause. Moreover, the insurer could apply the injunction from the court to force the assured to take some action against the third party. There is another method that the insurer pays the full indemnity as soon as possible and then subrogates the rights on the subject matter against the third party.

3.2.2.3 Limited explanation from courts on the express obligations

This express term is arguable in reality. The case *Noble Resources and Unirise Development v. George Albert Greenwood (The Vasso)* (1993) 2 Lloyd’s Rep 309 is an example of the argument. The plaintiff’s cargo was insured with the defendant under an open cover subject to the Institute Cargo Clause (A). The cargo was on the vessel named “*Vasso*” shipped to Qingdao. The cargo was lost when the vessel sank. The insurer declined that the payment was on the basis that the assured (plaintiff) breached the Clause 16, the duty of assured clause. In addition, the assured should have applied for the Mareva injunction to prevent the ship owner from removing the proceeds from the jurisdiction. However, the court held that “it was necessary for the insurer to show that a step was a proper one which a reasonable assured, having regard to the interests of itself and the insurers and to the provisions of the policy, should have taken.”⁷³ It is to say that if the application of Mareva injunction fails, it does not establish the fail performance that is affected by Clause 16. The assured’s acting was reasonable and proper.⁷⁴

⁷² *supra.* note 62.

⁷³ The case of *Noble Resources and Unirise Development v. George Albert Greenwood (The Vasso)* [1993] 2 Lloyd’s Rep 309.

⁷⁴ *ibid.*

In conclusion, the courts would like to take the limited or strict explanation on express terms like “Duty of Assured” to the insurer. Lord Dillon said in the case *Svensk Exportredit v. New Hampshire Insurance Co*:

it cannot be right, where there are difficult tactical decision to be made, for the insurers to be able to stand on the sidelines and dare (assured) to take the step that they think reasonable, against the chance that the insurers will be able say ‘oh well, they should have done something else, so we’re let off the hook’: I do not regard that as a commercially viable way of construing this contract.⁷⁵

3.2.3 The insurer’s rights after the full indemnification

3.2.3.1 Sections 80 and 81 of the MIA

According to the MIA, there are three rights of the insurer after paying the full indemnity in general. First one is the right of contribution in the Section 80 of the MIA:

80 (1) Where the assured is over-insured by double insurance, such insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.⁷⁶

This section is about the right of contribution under double insurance where there are concurrent policies from the same assured and the same interest. The underwriter and the contractual indemnifier are to be considered as at the same position. Therefore, if the underwriter paid the assured, underwriter could be entitled to contribute from the contractual

⁷⁵ The case of *Svensk Exportredit v. New Hampshire Insurance Co*, refers to Liangyi Yang, “*Marine Cargo Insurance*,” (2010), p. 460, CA 30 March 1988.

⁷⁶ Marine Insurance Act 1906, Art. 80 “Right of contribution”.

indemnifier, but no subrogation. The right of contribution is the right under the equity. However, it is governed by the insurance contract that is about the underwriter that cannot be liable to the contribution against the assured.⁷⁷ However, if a policy contains that the underwriter is liable only for its rateable proportion of the loss but he does not pay the full amount of the loss in the event, there is no right of contribution.

Second situation is dealing with the under insurance in the Section 81 of the MIA and reads as follows:

Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation he is deemed to be his own insurer in respect of the uninsured balance.⁷⁸

This section is about the effect of under insurance. This average principle of under insurance described in this section is exercised automatically in the total loss. The assured, who recovers to the financial limits under the policy, at the same time, shall bear the uninsured part of loss on his own. This principle is significant in the partial loss. Under this circumstance, the assured is considered as a part of the insurer and the assured is required to share the loss with the insurer. The basis of the share part is the proportion of the value on the subject matter.⁷⁹

3.2.3.2 Section 79 of the MIA

The final situation is in Section 79 of the MIA that has been stated earlier.⁸⁰ Apparently, the insurer receives the right of subrogation against the third party who causes the loss after paying the full indemnity. However, the plaintiff is still the assured according to English law, which may cause some problems.

⁷⁷ Robert Merkin, *Marine Insurance Legislation*, 3rd. Edition, London, Singapore: LLP, 2005 at p.101.

⁷⁸ Marine Insurance Act 1906, Art. 81 “Effect of under insurance”.

⁷⁹ Robert Merkin, *Marine Insurance Legislation*, 3rd. Edition, London, Singapore: LLP, 2005 at p.102.

⁸⁰ *supra*. note 26.

The first problem is that the right of insurer against the third parties is based upon the assured's rights. Because of the insurer should act in the name of assured under subrogation after paying the full indemnity. It is to say that the insurer's subrogation right might be affected if there is a limitation of liability or limitation of compensation in the contract between the assured and the third party. There is a clause named "knock- for - knock" in the TOWCON and SUPPLYTIME 2005.⁸¹ This principle is from the car insurance industry. If there is an accident like collision between the two cars on land, the two assureds, as well as the owners of cars claim the indemnity from their own insurers separately without suing each other. Obviously, the purpose of this action is to diminish the cost of litigation proceeding and administrative cost. This principle is widely used on the charter party or the industry of oil exploration in the ocean. Therefore, it deprives the right of subrogation of the insurer after paying the full indemnity. It is possible that the assured should disclose the situation into the underwriter. However, there is no obligation of disclosure if this principle should be well known by the insurer.⁸²

The second problem is that the settlement between the assured and the third party might affect the subrogation of insurer. The settlement whether it is a *bona fide* settlement or not, is agreed after the loss but before paying the full indemnity between assured and the third party.⁸³ The insurer can

⁸¹ TOWCON standard form, Clause 25 "Liability and indemnity" and SUPPLYTIME 2005, Clause 14 (b) "knock- for- knock".

The full vision of these two clauses are in the supplement.

⁸² Marine Insurance Act 1906, Art. 18 (3) (b).

Section 18 Disclosure by assured

(3) In the absence of inquiry the following circumstances need not to be disclosed namely-

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer.

The insurer is presumed to know the matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

⁸³ The case of *West of England Fire Insurance Co. v. Isaacs* (1896) 2 QB 377.

The landlord covenanted to insure the dismissed premises against fire and expend any money received under the insurance on reinstatement of fire damage. A fire occurred as a

claim the compensation from the assured if he could improve that it is not a *bona fide* settlement or harmful to his subrogation.⁸⁴

The third problem is about the arbitration clause in the contract between the assured and the third party. The right of subrogation might be affected by the arbitration clause in the contract.⁸⁵ This arbitration clause is very common and significant in marine cargo insurance. The insurer should pay attention to it. It is the first time to have it in the Clause 19 named “Law and Arbitration” in the Congebill 94.⁸⁶ Moreover, most arbitration clauses are governed and construed in accordance with English Law. If there are some disputes arising in this clause, it should be referred to arbitration in London. It is to say that if the insurer wants to sue the ship owner, the insurer should go to London for arbitration process, not China or somewhere else. It is possible for the insurer to face the Mareva injunction from the English courts if he ignores this arbitration clause.⁸⁷

The fourth problem is that there is an impossibility that the third party lets the insurer involve into the litigation, because the assured is the plaintiff

result of which the tenant had the choice of calling upon either the landlord under the covenant or upon his own insurer. Having chosen the latter course of action and the insurer having paid, the tenant then renounced his rights as against the landlord, thus destroying the insurer’s subrogation rights. As a result, the insurer was held entitled to restitution from the assured of the indemnity paid.

⁸⁴ Howard Bennett, *The Law of Marine Insurance*, 2nd. Edition, Oxford: Oxford University Press, 2006 at para. 25.18, p. 782.

⁸⁵ In the cases of *Schiffartsgesellschaft Detlef von Appen GmbH v. Wiener Allianz Versicherungs AG* [1997] 2 Lloyd’s Rep 279; *The Front Comor* [2005] 2 Lloyd’s Rep. 257;

Starlight Shipping Co. v. Taiping Insurance Co. [2008] 1 Lloyd’s Rep. 230.

⁸⁶ Congebill 94, Clause 19 (a).

(a) This Charter Party shall be governed by and construed in accordance with English law and any dispute arising out of this Charter Party shall be referred to arbitration in London in accordance with the Arbitration Acts 1950 and 1979 or any statutory modification or re-enactment thereof for the time being in force. Unless the parties agree upon a sole arbitrator, one arbitrator shall be appointed by each party and the arbitrators so appointed shall appoint a third arbitrator, the decision of the three-man tribunal thus constituted or any two of them, shall be final. On the receipt by one party of the nomination in writing of the other party’s arbitrator, that party shall appoint their arbitrator within fourteen days, failing which the decision of the single arbitrator appointed shall be final.

For disputes where the total amount claimed by either party does not exceed the amount stated in Box 25 the arbitration shall be conducted in accordance with the Small Claims Procedure of the London Maritime Arbitrators Association.

⁸⁷ Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 462.

although in name. The insurer is the real plaintiff who is behind the assured. The third party cannot doubt whether the payment from the insurer is adequate for claiming.⁸⁸

The final problem is that the insurer may lose the right of subrogation if the assured becomes bankrupt before or during the litigation unless the insurer wants to restore the assured. It could be explained in the circumstance of assignment. The person who has the assignment can bring the action against the debtor or the wrongdoer through being a part of assignor. If the assured becomes bankrupt during the proceeding, the insurer cannot do anything because he has no reason on himself against the wrongdoer. The only thing that the insurer can do is to apply to restore the assured in register.⁸⁹

It is to say that the insurer is worried about the economic situation of the assured. Under this circumstance, the insurer could claim to assign the rights against the third party to the assured. The insurer can act in his own name as the assignee to sue the third party. Therefore, the effect, which has been discussed above, will not affect the insurer anymore.

⁸⁸ *supra*. note 34.

⁸⁹ In the case of *M H Smith Ltd (Plant Hire) v. Mainwaring* [1986] 2 Lloyd's Rep 244.

4 Associated conceptions and definitions relating to subrogation

4.1 Comparison between subrogation and assignment

At the end of last chapter the author mentions that if the insurer is unsatisfied with the economic situation of the assured, it is better that the insurer could claim the assignment rights against the third party. In the case *M H Smith (Plant Hire) Ltd v. D L Mainwaring*, the insurer has no right of subrogation in the name of the assured against the third party because the assured became bankrupt. If the insurer wants to get the right of success, it is better to restore the assured to register. In reality, it is possible to avoid the assured's terrible economic situation by taking the action of assignment instead of subrogation.⁹⁰

4.1.1 A brief view on the law of assignment

There are two kinds of assignments: one is the equitable assignment and the other is legal assignment.

The definition of equitable assignment is "If the rights were equitable, the assignee could sue in his own name, but it is necessary to make the assignor a party to the suit if he retained any interest in the subject matter, for instance if the assignment was not absolute but conditional or by way of charge..."⁹¹

⁹⁰ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 10.63, p. 333.

⁹¹ Hugh Beale, *Chitty on Contracts*, 30th. Edition, London: Sweet & Maxwell, 2010 at para. 19-002.

Moreover the definition of legal assignment must fulfil three legal factors⁹² and the insurer could sue the third party in his own name without making the assignor be a party of the suit proceeding. It is to say that there are three conditions to be satisfied. The first one is the assignment that must be absolute and clear. The second one is that the notice of assignment must be in writing. The last condition is that the notice in writing must be delivered to the debtor. If these three conditions are satisfied, the assignee can sue the debtor in his own name instead of being a joiner of the action. It is possible that the assignee could sue in his own name in case where he must sue in the assignor's name.⁹³

The equitable assignment requires making the assignor be a party in the litigation as the common defendant or the common plaintiff. It depends on the attitude of assignor. The reason is clarifying the payment from the debtor and it should be given to the assignor or assignee if the assignment is not absolute. Therefore, the obligations on the debtor are discharged after paying. Additionally, the three conditions under the legal assignment are confirming that the assignment is absolute and the notice must be in writing from the assignor. It is to say that the status of creditor transfers from the assignor to the assignee and the assignee could sue the debtor in his own name.

⁹² Law of Property Act, 1925. Section 136:

- (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the rights of the assignee) to pass and transfer from the date of such notice-
 - (a) the legal rights to such debt or thing in action;
 - (b) all legal and other remedies for the same;
 - (c) the power to give a good discharge for the same without the concurrence of the assignor;
- (2) This section does not affected the provisions of the Policies of Assured Act, 1867.
- (3) The country court has jurisdiction (including power to receive payment of money or securities into court) under the provision to subsection 1 of this section where the amount or value of the debt or thing in action does not exceed.

⁹³ Hugh Beale, *Chitty on Contracts*, 30th. Edition, London: Sweet & Maxwell, 2010 at paras. 19-006 and 19-007.

Under the circumstance of insurance contract, if the third party such as the carrier or the ship owner who causes the loss and needs to pay the compensation to the cargo owner or the assured, the ship owner is called debtor and the cargo owner is called the assignor under assignment. The cargo owner assigns the rights of claiming the compensation to the insurer. Therefore, the insurer becomes the assignee. The right of claiming compensation is a kind of contract benefits and can be transferred without the permit of the debtor. There is another similar example. The liquidator who is responsible for collecting all sum of belonging to the company under the circumstance of liquidation that is based on the benefit of the creditors of the company. "He will therefore wish to ensure that the assignment is not merely a device to prevent the recovery falling into the general assets of the company for distribution among the creditors." Therefore, in order to avoid this situation, it should have the action of assignment, which the insurer could be entitled to recover based on the principle of subrogation under English law.⁹⁴

The words following are about the advantages of the assignment. Firstly, as mentioned before, the insurer could lose the subrogation rights if the assured becomes bankruptcy before or in the duration of litigation. Because of the insurer is acting in the name of the assured to claim the rights against the third party.⁹⁵ However, the insurer could sue the third party in his own name under the circumstance of legal assignment without considering about the limited economic situation of the assured.

Secondly, the compensation received from the third party should be paid to the insurer directly without asking the assured under assignment. Moreover, if the compensation from the third party is more than the indemnification from the insurer, the insurer does not need to return the

⁹⁴ Mance, Iain Goldrein and Robert Merkin, *Insurance Disputes*, 2nd. Edition, London: Informa Law, 2004 at para.8.73 in the 1st footnote.

⁹⁵ *supra*. note 89.

part of overpaid back to the assured like the rate benefit.⁹⁶ It is different from the subrogation.

Thirdly, the assignee could get the rights without the full payment. However, the insurer could get the subrogation rights unless he pays the full indemnity. The action of assignment could be taken in advance if the insurer and the assured agree it.

Finally, another advantage is that the object of assignment is the benefits such as the contract benefit but not the liabilities. However, under the subrogation, the insurer might face the counter claim from the third party. The reason is that the insurer sues the third party acting in the name of assured.

4.1.2 Subrogation compared with assignment

Based on the analysis above, it is obvious that the assignment is better than subrogation. There is a saying in the case *Compania Colombiana de Seguros v. Pacific Steam Navigation Co. (The Colombiana)* (1963) 2 Lloyd's Rep 479, Lord Roskill: "...Whereas by subrogation they could only recover up to 100 per cent of their loss..."⁹⁷ However in the following, the insurer would like to subrogate but not assign.

Firstly, there is a main disadvantage in legal assignment that requires the express notice in writing under the hand of the assignor and the notice needs to be given to the debtor. However, the insurer could have the subrogation rights automatically from the assured after paying the 100 percent indemnity. In addition, the notice in writing is not easy as well since the insurer and the assured must recognise who is the debtor. In marine cargo insurance field, the debtor is usually the carrier under the policy. Whereas it is difficult to identify who is the carrier, the ship owner

⁹⁶ The case of *Lucas Ltd v. Export Credit Guarantee Department* (1974) 2 ALL ER 889.

⁹⁷ The case of *Compania Colombiana de Seguros v. Pacific Steam Navigation Co. (The Colombiana)* [1963] 2 Lloyd's Rep 479.

is the carrier sometimes. The bareboat charter is the carrier and the voyage charter or the time charter is the carrier.⁹⁸

Secondly, the insurer does not want to sue the third party in his own name since he is considering about the trade reputation. In the author's view, the insurer is usually a renowned company and dealing with a lot of commercial business. The other business might be affected badly by the litigation that is under the insurer's own name. In fact, the insurer must sue the assured or the third party in his own name that might have a welcome dissemination. This might be the top consideration of influence against the wide usage of assignment, which is the alternative of subrogation.⁹⁹

Thirdly, there is an arbitration clause in the policy especially on the London arbitration clause. It brings an ambiguous issue that the assured has begun the action of ship arrest or even the arbitration process to the ship owner or carrier before the insurer pays the 100 percent indemnity. The start of the action of ship arrest or the arbitration proceeding is allowed by law. This action is accordance with the Institute Cargo Clause, Clause 16 named "Duty of Assured".¹⁰⁰ It is obvious that the assured who acts as the plaintiff and the ship owner (or the carrier) who acts as the defendant are the two parties of arbitration process. Under the circumstance of subrogation, the real plaintiff is the insurer but he should act in the name of the assured. The lawyer will report to the insurer instead of the assured. However, under the circumstance of assignment, the assured cannot be the plaintiff anymore. The plaintiff is the insurer at that moment of assignment. Lord Phillips held that it was a problem in law since the nature of arbitration agreement was personal.¹⁰¹ In the following

⁹⁸ The case of *Homburg Houtimport BV v. Agrosin Private Ltd (The Starsin)*, also known as: *Owners of Cargo Lately Laden on Board the Starsin v. Owners of the Starsin* [2000] 1 Lloyd's Rep. 85.

⁹⁹ Merkin Robert, *Colinvaux's Law of Insurance in Hong Kong*, Hong Kong (China): Sweet & Maxwell, 2009 at para. 11- 004.

¹⁰⁰ *supra*. note 62.

¹⁰¹ The case of *London Steamship Owners Mutual Insurance Association Ltd v. Bombay Trading Co Ltd. (The Felicie)* [1990] 2 Lloyd's Rep. 21.

case *Montedipe SpA v. JTP- RO Jugotanker (The Jordan Nicolov)*, Lord Hobhouse had a lord speech about the effect of arbitration clause in right of subrogation and assignment.¹⁰²

The final complicate point is that the applicable law of assignment. Does it apply the law of the insurance contract based upon the subrogation, or does it apply the law of debtor as in the carriage contract or the storage contract? In the case, *Compania Colombiana de Seguros v. Pacific Steam Navigation Co. (The Colombiana)* held that claiming the bill of lading contract should be in accordance with the English law. However, to choose the claiming assignment under the insurance contract should be in accordance with the Colombia law. In addition, the regulations about the absence of evidence are different under these two legal systems. Therefore, there should be a notice of application of law before the action is brought. The action might fail and the claim is time barred if there is no notice to be given.¹⁰³

4.1.3 Distinction of subrogation and assignment discussed in case law

There is a typical case about the differences between subrogation and assignment. The case of *Central Insurance Co Ltd v. Seacalf Shipping Corporation (The Aiolos)* [1983] 2 Lloyd's Rep. 25 highlights the main disadvantage in assignment, which is needed of notice, or in the absence of notice, the presence of the assignor before the court. In this case, there was a deal of cargo (soya bean meal), which is insured for carriage aboard. The cargo was found of shortage at the destination. The insurer paid the

¹⁰² The case of *Montedipe SpA v. JTP- RO Jugotanker (The Jordan Nicolov)* [1990] 2 Lloyd's Rep. 11.

The fact of that arbitration...had tripartite charter, involving claimant, respondent and arbitrators, did not invalidate Ps' argument that if P2 were the legal assignees they could enforce the arbitration agreement in the same manner as P1 so long as notice of the assignment was given both to the other party to the dispute and to the arbitrators (as in the present case).

¹⁰³ *supra*. note 97.

Also in the book: Jonh Dunt, Ander W. Baker, QC and Hatty Sumption (ed.), *Marine Cargo Insurance*, London: Informa Law Mortimer House, 2009 at para. 16.7, p. 343.

shortage fee and got the subrogation receipt that is titled by the Taiwanese law. The insurer could claim from the ship owner based on the right of subrogation according to the insurance contract. At the beginning, the insurer claimed that the proper claimant should be the assured. Nevertheless, on the court, the insurers were allowed to amend the pleading. The insurers appealed that the action has been assigned to them and the insurers themselves who were the proper claimants. However, this appeal was doubted. Finally, the court held that the amendment was allowed on the condition that the insurer should join the cargo owners as the joint defendants. The reason is that they were considered as the assignors before the court.¹⁰⁴

In conclusion, the right of subrogation and assignment are almost the same in some respects. Nevertheless, subrogation and assignment have their own advantages and disadvantages separately from the analysis above. Subrogation is better for the parties in sometime. On the contrary, assignment is better than the subrogation in some cases because it depends on different reality and cases.

4.2 Co-assured and waiver clause of subrogation

4.2.1 The insurer cannot exercise subrogation right against the co-assured

The case *Simpson v. Thompson* (1877) LR 3 App Cas 279 was about two sister ships had an accident of collision. The insurer cannot claim the ship (wrongdoer) which belongs to the same ship owner (the assured as well) after paying the indemnity. This problem was solved in the Clause 7 of International Hull Clauses (01/11/03) reading as follows:

Clause 7 Sistership

¹⁰⁴ Jonh Dunt, Ander W. Baker, QC and Hatty Sumption (ed.), *Marine Cargo Insurance*, London: Informa Law Mortimer House, 2009 at para. 16.5, p. 343.

Should the insured vessel come into collision with or receive salvage from another vessel belonging wholly or in part to the same Owners or under the same management, the Assured shall have the same rights under this insurance as they would have were the other vessel entirely the property of owners not interested in the insured vessel; but in such cases the liability for the collision or the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.¹⁰⁵

For the co-assured, the insurer cannot have the right of subrogation to claim one assured who causes the loss after the insurer paying another assured. This is based upon the theory of the co-assured considered as one assured. It is like the circuitry of action.¹⁰⁶ In the case *National Oilwell (UK) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, the company named *National Oilwell* (NOW) had a contract with another company named *Davy Offshore* (DOL) on supplying the engineering equipment in order to build an oil production platform in the North Sea. However, there was a dispute between the two companies about over quality of the workmanship. In addition, it had resulted in a totalling in excess of 13 million pounds of work by NOW being unpaid in invoices. The DOL had paid the builders all risks policy for the whole project and the DOL had been indemnified the policy for the losses caused by the defective equipment from NOW. "When NOW sued the DOL over the unpaid invoices, the insurers, by way of subrogation, in the name of DOL, counter claimed for their loss."¹⁰⁷ There was a problem of the co-assured that the NOW was a party of the insurance that was brought by the DOL. The court had no doubt that the insurer could not exercise the right of subrogation in the name of one co-assured against another co-assured. There is an exception when the other co-assured is guilty of wilful misconduct or not covered by the policy against the risk under the indemnity that has been paid. It is possible to breach the implied terms in the contract if the insurer sues the other co-assured based on the right of

¹⁰⁵ International Hull Clauses (01/11/03), Clause 7 "Sistership".

¹⁰⁶ The case of *Petrofina (UK) Ltd v. Magnaload Ltd* [1983] 2 Lloyd's Rep 91.

¹⁰⁷ Susan Hodges and Roy Carlile, *Cases and Materials on Marine Insurance Law*, London, Sydney: Cavendish Publishing Limited, 1999 at p. 32.

subrogation. In addition, this kind of right is excluded by the principle of circuitry of action. The insurer cannot exercise the right of subrogation against one of the co-assured according to the insurance contract, which the co-assured has the benefits under the policy on it. At the same time, the insurance contract must cover the loss and protect the co-assured against the loss on the insured subject matter that the insurer seeks by the way of subrogation.¹⁰⁸ The reason is that the insurer would breach the implied term in the policy and might widen the circuitry action that can exclude the claim.

Beside the theory of circuitry action, there is another saying of implied terms that the insurer cannot sue one co-assured by the way of subrogation in the case *National Oilwell (UK) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582. Lord Colman explained that:

The explanation for the insurers' inability to cause one co-assured to sue another co-assured is that in as much as the policy on goods covers all the assureds on an all risks basis for loss and damage, even if caused by their own negligence, any attempt by an insurer after paying the claim of one assured to exercise rights of subrogation against another would in effect involve the insurer seeking to reimburse a loss caused by a peril (loss or damage even if caused by the assured's negligence) against which he has insured for the benefit of the very party against whom he now sought to exercise rights of subrogation. That party could stand in the same position as the principal assured as regards a loss caused by his own breach of contract or negligence. For the insurers who had paid the principal assured to assert that they were now free to exercise rights of subrogation and thereby sue the party at fault would be to subject the co-assured to a liability for loss and damage caused by a peril insured for his benefit...it is necessary to imply a term into the policy of insurance to avoid this unsatisfactory possibility...the purported exercised by insurers of rights of subrogation against the co-assured would be in breach of such a term and would accordingly provided the co-assured with a defence to the subrogation claim.¹⁰⁹

¹⁰⁸ Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 470.

¹⁰⁹ The case of *National Oilwell (UK) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582. Also in the book: Jonh Dunt, Ander W. Baker, QC and Hatty Sumption (ed.), *Marine Cargo Insurance*, London: Informa Law Mortimer House, 2009 at para. 16.5, p. 344.

Moreover, there is another evidence of implied theory in the case of *Stone Vickers Ltd v. Appledore Ferguson Shipbuilder Ltd.*¹¹⁰ In these two cases above, it is clear to say that the implied term should be covered by an insurance policy. “If the insurer were permitted to bring subrogated proceedings in respect of a loss against which it had previously agreed to insure him, which would be inconsistent with the terms of the policy.”¹¹¹ This implied term depends on each different individual contract. However, in the cargo insurance contract, generally, the fundamental rule is that there is no subrogation against the co-assured.

4.2.2 The reason for the existence of co-assured

The phenomenon of co-assured is very common in the insurance field. The purpose is that the principal assured wants to bring the relative companies and people into the same insurance contract in order to get more protections. In addition, the principal assured could avoid to be sued by the insurer after paying the indemnity if there are relative companies or people

¹¹⁰ The case of *Stone Vickers Ltd v. Appledore Ferguson Shipbuilder Ltd.*[1991] 2 Lloyd’s Rep 288, reversed on a different point [1992] 2 Lloyd’s Rep 578.

Lord Colman held that: “ where a policy is effected on a vessel to be constructed and it is expressed to be for the benefit of sub-contractors as co-assured, if a particular sub-contractor negligence causes loss of or damage to the whole or part of the vessel which has been insured under the policy and the sub-contractor has an insurable interest in the vessel, it is not open to underwriters who have settled the insured shipbuilder’ claim to exercise rights of subrogation in respect of the same loss and damage against the co-assured subcontractor. To do so would be completely inconsistent with the insurer’s obligation to the co-assured under the policy. The insurer would in effect be causing the assured with whom he had settled to pursue proceedings which if successful would at once cause the co-assured to sustain a loss arising from loss or damage to the very subject-matter of the insurance in which that co-assured has an insurable interest and a right of indemnity under the policy. In my judgement so inconsistent with the insurer’s obligation to the co-assured would be the exercise of rights of subrogation in such a case that there must be implied in to the contract of insurance a term to give it business efficacy that an insurer will not in such circumstances use rights of subrogation in order to recoup from a co-assured the indemnity which he has paid to the assured. To exercise such rights would be in breach of such a term. In such a case the law recognizes the rights of the co-assured by enabling him to rely on his rights under the policy by way of defence in the proceedings which the insurers have caused to be commenced in breach of their implied obligation under the policy. This is an effective means of enforcing the co-assured’s rights and makes it unnecessary for him to join the insurers as third parties in the action.”

¹¹¹ Charles Mitchell and Stephen Watterson, *Subrogation: law and practice*, Oxford: Oxford University Press, 2007 at para. 10.70, p. 337.

under the same insurance contract. This action was admitted in the Section 23 (1) in MIA stating like: “a marine policy must specify the name of the assured, or of some person who affects the insurance on his behalf.”¹¹² There is also some words from Lord Lloyd in the case *Petrofina (UK) Ltd v. Magnaload Ltd* [1983] 2 Lloyd’s Rep 91. He held that the principle contractor should be able to insure the whole contract works in his own name. The names of all the sub-contractors are just like the baliee or the mortgagee. One of the sub-contractors could be able to recover the full loss of the insured subject matter and he should hold the over benefit beyond his own interest in the trust of the other sub-contractors.¹¹³

For the marine cargo insurance, the London market open covers give a wide definition about the assured: “ABC Limited, and / or as agents and / or subsidiaries and / or associated companies and / or for whom they may have instructions to insurer.” It protects the assureds who may have their own carriers (particular the carrier by road and the also the carrier by sea), or the warehouse keepers who are involved in the carriage and storage of the cargo. If there is no wider definition about the assured, the express clause waiver of subrogation could be the alternative method. The waiver clause: “Insurers waiver all rights of subrogation and / or recourse against the Assured and / or subsidiary companies of the Assured engaged in the carriage of and / or storage of the subject – matter insured.” The wider definition about the assured includes the CIF buyer sometimes. It means that all the companies in a group are considered as the assured. However, there is an extension in the definition that includes the CIF buyers of cargo. Therefore, “the original insured, in the case ABC Limited, acts as ‘agent’ on behalf of a buyer of the cargo ‘for whom they may have instructions to insure.’”¹¹⁴ In addition, these words are revised in the Institute Cargo Insurance named “Benefit of insurance” as following:

¹¹² Marine Insurance Act 1906, Art. 23 “What policy must specify”.

¹¹³ *supra*. note 109.

¹¹⁴ Jonh Dunt, Ander W. Baker, QC and Hatty Sumption (ed.), *Marine Cargo Insurance*, London: Informa Law Mortimer House, 2009 at para. 3.28, p. 39.

15.1 covers the Assured which includes the person claiming indemnity either as the person by or on whose behalf the contract of insurance was effected or as an assignee,
15.2 shall not extend to or otherwise benefit the carrier or other bailee.¹¹⁵

It is clear that the CIF buyer could be the assignee based on the insurance contract or the certificate of insurance; otherwise, the buyer could be the co-assured to claim the indemnity to the insurer. The co-assured's rights should be limited based on the insurance contract since the policy is a joint policy but not the composite policy.

4.2.3 Exclusions on co-assured

In the case of *National Oilwell (UK) Ltd (NOW) v. Davy Offshore Ltd (DOL)* [1993] 2 Lloyd's Rep 582, the principal assured was the DOL who was the main contractor in a North Sea oil project. The DOL had an insurance contract with the insurer and brought the NOW as a co-assured into the insurance contract. There was a section in the contract saying that "Other Assureds: Any other company, firm, person or party (including but not limited to contractors and / or sub-contractors and / or supplies) which whom the Assured have entered into agreement and / or contracts in connection with the subject matters of this Insurance, and / or any work activities, preparation etc., connected herewith." The benefits of the other assured shall be covered for the whole project period under the policy and should be full coverage, unless there is an opposite position section in the contract. It should be limited under this circumstance.¹¹⁶ Moreover, in the sale of goods contract between NOW and DOL, there is a term saying that: "The Purchaser shall on behalf of and in the joint names of the Purchaser and...the Supplier and all sub-contractors insure on 'All Risks' basis the Work and materials in the course of manufacture until the time of delivery in the amount of the Contract Price..."¹¹⁷

¹¹⁵ Institute Cargo Clause, Clause 15 "Benefit of insurance".

¹¹⁶ *supra*. note 109.

¹¹⁷ *ibid*.

From the terms in the insurance contract and sale of goods contract, it is obvious that the policy period under the insurance contract may cover the whole project. The policy period should be the same on the principal assured and the other co-assured. Nevertheless, the insurer does not want the same policy period of all the co-assured. Because of some sub-contractors such as NOW, join the project only for short period but not the whole project period. Therefore, there are words like “until the time of delivery” in the sale of goods contract between NOW and DOL. It means that NOW is not the co-assured after delivering the goods to DOL anymore. The engineering equipment was destroyed in the sea because of the defective of quality when it was installed. The DOL raised counter claim when NOW claimed the payment of goods. Actually, the right of counter claiming is the subrogation right of the insurer against the NOW after the insurer paying DOL. The court agreed that the insurer was entitled to subrogate since NOW was no longer the co-assured when the accident happened and even there was an express waiver clause in the policy.

In conclusion, one co-assured should pay attention to the policy period whether or not it is the same period with the other co-assured even there is an express waiver clause of subrogation in the policy. If the period is different, the co-assured cannot apply the right of subrogation against the insurer when he is not covered by the policy.

There is another example in the case *Stone Vickers Ltd v. Appledore Ferguson Shipbuilder Ltd* [1991] 2 Lloyd’s Rep 578.¹¹⁸ The supplier *Stone Vickers* had a sale of goods contract on the subject matter of propeller to the *AS (Appledore Ferguson Shipbuilder Ltd)*. The *AS* bought the insurance of Institute Clause of Builder’s Risks for one and half years and the *Stone Vickers* was a party of the co-assured. As the statement in the contract: “Agreed included...sub-contractors as additional co-assured for their respective rights and interests, without recourse against any co-

¹¹⁸ *supra.* note 107.

assured.”¹¹⁹ The *AS* claimed the indemnity from the insurer because of the defective of the propeller. The insurer paid the indemnity and then subrogated against the supplier. However, the *Stone Vickers*, as well as the supplier raised the counter claim based upon the reason of co-assured. The problem was brought whether they were the co-assureds or not. It is similar with the “Himalaya clause”¹²⁰. In this case, the Lord Parker said: “all sub-contractors unidentified and incapable of identification at the time were automatically covered. It can only mean that declarations naming or properly describing sub-contractors would be accepted”¹²¹

Lord Parker declared that there were four requirements that need to be satisfied if the *AS* wanted to be the co-assured.

(a)The policy must make it clear that the sub-contractor is intended to benefit from the provisions in the policy; (b) The policy must make it clear that the main assured, in addition to contracting for the insurance provisions on his own behalf, is also contracting as agent for the sub-contract that these provisions should apply to the sub-contractor; (c) The main assured must have authority from the sub-contractor to contract on his behalf, although perhaps later ratification by the sub-contractor would suffice; and (d) and difficulty about consideration moving from the sub-contractor would have to be overcome.¹²²

Lord Parker held that the first and second requirements were not fulfilled and the last two requirements did not need to be talked about. The insurance documents do not make it clear whether or not the supplier intended to be protected by its provision. Moreover, it is obvious that the *AS* was not acting as agent of the supplier.

¹¹⁹ Liangyi Yang, *Marine Cargo Insurance*, China: Law Press, 2010 at p. 475.

¹²⁰ The case of *Midland Silicones v. Scruttons* [1961] 2 Lloyd’s Rep 365, Lord Reid stated about the “Himalaya clause”: I can see a possibility of success of the agency argument if (firstly) the bill of lading makes it clear that the stevedores is intended to be protected by the provisions in it which limit liability, (secondly) the bill of lading makes it clear that the carrier, in addition to contracting for these provisions on his own behalf, is also contracting as agent for the stevedore that these provisions should apply to the stevedore, (thirdly) the carrier has authority from the stevedore to do that, or perhaps later ratification by the stevedore would suffice, and (fourthly) that any difficulties about consideration moving from the stevedore were overcome.

¹²¹ *ibid.*

¹²² *ibid.*

4.2.4 The waiver clause of subrogation

It is common in the oil industry. The oil companies or the subsidiaries are the owners of the tankers used to transport the oil. Under this circumstance, if there is an accident on the tanker at sea and the cargo owner claims the loss from the insurer. The cargo owner's insurer who pays the indemnity of the loss would have the rights of subrogation against the carrier. In a roundabout way, the same company would have stood the loss. Moreover, if the carrier and a seller of cargo are fundamentally the same, the similar issue is in where the cargo is sold under the CIF term. The CIF buyer could refuse the documents if it is not in order and the buyer could avoid paying price in the contract. Under this circumstance, if the buyer rejects to accept the document and the cargo loss at this time, the seller should bear the loss under the CIF term. If the seller claims the loss from his insurer and then the insurer pays the indemnity of the loss, the insurer could have the right of subrogation against the wrongdoer. Therefore, if the company has both interests in the cargo and the carriage of the cargo, "it makes good commercial sense, when insuring the shipment, to employ, in policy of insurance, a 'subrogation waiver clause.'"¹²³ This kind of waiver clause could prevent the insurer from pursuing (using the right of subrogation) after the insurer paying the indemnity to the assured. In the case *Enimont Supply SA v. Chesapeake Shipping Inc, (Surf City)* [1995] 2 Lloyd's Rep 242 the clause was employed. In February 1990, the tanker *Surf City*, which was carrying a cargo of naphtha and gas oil, exploded and caught fire. The fire was brought under the control by the salvors operating under Lloyd's form. *Gulf Insurance* indemnified *Enimont*, the CIF buyers of part of the cargo of naphtha, for their loss and then sought, by way of subrogation, to recover their loss from *Chesapeake Shipping*, the owners of *Surf City*. *Chesapeake Shipping* contended that *Gulf Insurance* had no rights of subrogation because of a term in policy of insurance and cl 16 of the Bulk

¹²³ Susan Hodges and Roy Carlile, *Cases and Materials on Marine Insurance Law*, London, Sydney: Cavendish Publishing Limited, 1999 at p. 35.

Oil Clause (1962). In addition, it was stated: “it is agreed that no right of subrogation expect through general average, shall lie against any vessel...belonging in part or in whole to a subsidiary and / or affiliated”¹²⁴ *Gulf Insurance* accepted that cl 16 precluded them from claiming against the original assured, the CIF sellers. However, contended that, as *Enimont* were CIF buyers, they were not a party to the original insurance, and as they were assignees to the policy of insurance, ci 16 did not apply.¹²⁵

The court declared that the *Chesapeake Shipping* was entitled to apply the waiver clause of subrogation. Since the clause 16 applied not only on the original assured (CIF seller) but also to the CIF buyer whom the policy had been assigned. Lord Clarke held that:

...It does not seem to me to follow from those considerations that because the assured’s subsidiary will be protected where assured is paid under the policy, the clause means that it is not to be protected where the insurer pays the CIF buyer and not the original insured... The same is, I think, true if the matter is viewed from the point of view of the insurer. The clause shows that the insurer is willing to waive his rights against the carrying ship where a CIF buyer procures the carriage in a vessel owned by a company in his group. I see no good commercial reason why he should not be willing to do so throughout the carriage. It makes no commercial sense to say that the waiver applies only so long as the loss is sustained by the assured and not when it is sustained by the buyer.¹²⁶

¹²⁴ There would be no subrogation waiver clause in the current version of the Institute Bulk Oil Clauses (1/2/83).

¹²⁵ The case of *Enimont Supply SA v. Chesapeake Shipping Inc, (Surf City)* [1995] 2 Lloyd’s Rep 242.

¹²⁶ *ibid.*

5 Litigation issues concerning to the third party under subrogation

The third party plays a significant role in right of subrogation. Since the third party is the person, who causes the loss and the insurer could claim the compensation from them under the subrogation. However, the insurer could sue the third party and the assured could join the litigation as joined defendant if he refuses to give the authority of certification. The assured could forfeit the rights against the third party in different periods during the proceeding. It could lead different results according to the different time.

5.1 Who is controlling the rights to claim recovery from the third party under subrogation

It is common that the assured stops controlling the right against the third party if he is indemnified well. The right transfers to the insurer based upon the subrogation. The assured must allow the insurer to act in the name of assured for suing the third party according to the right of subrogation even though the litigation has not begun. However, the assured might reject to use his name or to give the authority certification because the assured and third party have the common commercial benefit or other reasons. Under this circumstance, the insurer could bring the assured and the third party together as the joined defendant.¹²⁷ If the assured refuses the permit of using his name in the proceeding, the best method should be the joined co-defendant with the insurer. The purpose of this action is to make sure the assured being in the part of the action so that the judgement could be given. The “subject of course to the imposition of

¹²⁷ The case of *Esso Petroleum Co. Ltd v. Hall Russell & Co. Ltd (The Esso Bernicia)* (1989) AC 643.

a charge on the proceeds of the action for the benefit of the insurer” is the good explanation of this issue.¹²⁸

On the contrary, the insurer and the assured usually take a period to get the agreement on the indemnity amount. The common method is that the assured begins to claim the loss from the third party during negotiation time with the insurer on the amount. The assured might encounter a difficult situation if the claiming under insurance contract fails and the time limit is about to expire. In marine cargo insurance, this subject is taken one-step further in Clause 16 of the Institute Cargo Insurance. It is to say that if the insurer rejects to pay the indemnity under the insurance contract, the assured should have a positive duty to take recovery proceeding to the third party.¹²⁹ In the case, *Netherland Insurance Co. Est 1845 Ltd v. Karl Ljungberg & Co AB (The Mammoth Pine)*, there was a cargo of plywood voyaged from Singapore to Esbjerg in Denmark. The cargo was insured in the Institute Cargo Insurance (All Risks) for the carriage. Some of the goods were short loaded or delivered damaged. The insurer refused to pay the indemnity and without prejudice to denial of insurance liability, the assured was under the Bailee Clause’s¹³⁰ obligations that should take action to protect the time limit and preserve the rights against the carrier. The court held that the insurer was entitled to do that. The assured could ask the cost of the proceeding to be returned from the insurer based on the implied terms in the insurance contract. It is clear that the assured could claim to recover the costs of proceeding even though it is unsuccessful for him.¹³¹ “Such costs have, under general principle of subrogation. Been held to include costs of pre-trail investigations and other related costs reasonably directed at attempting to reduce the loss.”¹³²

¹²⁸ Merkin Robert, *Colinvaux’s Law of Insurance in Hong Kong*, Hong Kong (China): Sweet & Maxwell, 2009 at para. 11- 013.

¹²⁹ The case of *Netherland Insurance Co. Est 1845 Ltd v. Karl Ljungberg & Co AB (The Mammoth Pine)* [1986] 2 Lloyd’s Rep. 19.

¹³⁰ The predecessor of Duty of Assured Clause of the Institute Cargo Insurance.

¹³¹ *supra*. note 129.

¹³² Jonh Dunt, Ander W. Baker, QC and Hatty Sumption (ed.), *Marine Cargo Insurance*, London: Informa Law Mortimer House, 2009 at para. 16.17, p. 349.

However, could the assured have the rights to control the claiming recovery from the third party ultimately? As the author said earlier, the assured would like to transfer the right of claiming the third party after paying full indemnification by the insurer. Nevertheless, the assured would like to have the right of claiming the recovery from the third party if he is paid only on a part of the loss or the uninsured loss in the circumstance of under insurance. Under this circumstance, the assured always wants to take the rights against the third party and needs to return the money back to the insurer while insurer has paid to the insurer. In the case *Commercial Union v. Lister* (1874) LR 9 Ch App 483, there was a mill destroyed by the gas explosion which was caused by the mistake of the gas supplier. The insured value of the mill was 33,000 pounds. The assured appealed that his uninsured loss was 56,000 pounds. On this basis, the assured claimed that it was a under insurance. Moreover, he also claimed 6,000 pounds for the loss of benefit, which was obvious, the uninsured part. The insurer would like to pay the 33,000 pounds but he was worried about if he did so the assured might accept the balance from the gas supplier to end this litigation. Therefore, the insurer applied the injunction and declaration to the court which are “(1) they were entitled to the benefit of the assured’s right of action; (2) that the assured be restrained from processing the action for anything less than the whole amount of the claim; and (3) that the assured be retrained from refusing to allow the insurers to use his name.”¹³³ The court held that the assured was entitled to control the proceeding. It is to say that the assured is the real *dominus litis* of the proceeding of claiming the recovery from the third party. There is only one condition, which is the assured should not reduce the amount of money and the assured should act as the trustaor and return the money back to the insurer. The assured is entitled to have the rights of controlling the litigation against the third party after the payment from the insurer even when the assured is insured partly. This clause is considered as the

¹³³ The case of *Commercial Union v. Lister* (1874) LR 9 Ch App 483. Also can be found in book: Jonh Dunt, Ander W. Baker, QC and Hatty Sumption (ed.), *Marine Cargo Insurance*, London: Informa Law Mortimer House, 2009 at para. 16.18, p. 349.

contraction of contractually subrogating the interests from the assured to the insurer although the shortage results from the deductible.¹³⁴

In conclusion, the right of claiming the recovery against the third party belongs to the assured because of the insurer claiming is also in the name of the assured as well even if the assured fails in the proceeding. In principle, the assured is the owner (*dominus litis*) of the rights claiming against the third party because it is the claiming recovery proceeding of the assured in original.

5.2 Assured forfeits the right of subrogation to the third party

This situation is that the assured voluntarily forfeits his rights of claiming the recovery from the third party when the assured receives the indemnification from the insurer. It is obviously destroying the insurer's right of subrogation. Under the principle of freedom of contract, the words about this issue can be written as the third party could have the benefit of the insurance from the assured.¹³⁵ The case *Canadian transport co Ltd v. Court Line Ltd* (1940) AC 934 was about a charter party. The "ship owner to give time charters the benefit of the Protection and Indemnity Club Insurances as far as club rules allow."¹³⁶ However, the court held that this provision did not apply because the most common situation was that the third party could not share the benefit from the P&I Club. Nevertheless, Lord Atkin said that a person who might have the contract with the insurer on the terms is injured by other. If the insured risk happens, the assured, he will look to the insurer at first instead of the wrongdoers.¹³⁷

¹³⁴ Howard Bennett, *The Law of Marine Insurance*, 2nd. Edition, Oxford: Oxford University Press, 2006 at para. 25.16, p. 781.

¹³⁵ Here the assured does not bring the third party as co-assured of the insurance contract.

¹³⁶ The case of *Canadian transport co Ltd v. Court Line Ltd* (1940) AC 934.

¹³⁷ *ibid.*

In the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, the article 3 (8) that means that is invalid when in the policy, it reads as follows:

Any clause, covenant, or agreement in contract of carriage relieving the carrier or the ship or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.¹³⁸

In order to avoid the carrier and ship owner exploiting an advantage, there is a clause 15.2 in the Institute Cargo Clause stated: “This insurance...shall not extend to or otherwise benefit the carrier or other bailee.”¹³⁹ If there is a clause about the ship owner who could have the benefit from the cargo insurance as long as the policy allows in the charter party contract, it will have no influence under the circumstance of the Clause 15.2. However, if the provision in the contract is like the ship owner to have the benefit of the cargo insurance, it means that the assured of the cargo deprives the right of subrogation from insurer.

The result of forfeiting the right of claiming recovery to the third party is different depending on the different moment of forfeiture. The time of forfeiture of the right of subrogation can be divided into four parts that will be introduced in the following.

5.2.1 Assured forfeits the subrogation rights before insurance contract

This situation is that the assured and the third party have the contract about giving up the subrogation before the insurance contract is made which means there is no opportunity of exercising the right of subrogation. Under this circumstance, the only remedy of the insurer is claiming the assured

¹³⁸ International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, there is an Article 3 (8).

¹³⁹ *supra.* note 115.

breach the duty of disclosure. In the case *Marc Rich & Co AG v. Portman* [1996] 1 Lloyd's Rep 430¹⁴⁰, it was about the *Marc Rich* (MR) bought the demurrage liability insurance for his oil trade. This kind of insurance covers the demurrage of the vessel which is charter party from the MR. "This insurance extend in respect of above vessels/trading area only to include all which the assured shall be liable to pays as charters including costs and expenses due to loading/unloading beyond the agreed period..."¹⁴¹. The insurer rejected to pay the indemnification and asserted that the assured did not disclose that the payment under insurance contract could not be subrogated to the third party. In the contract between the MR and the third party, MR took the responsibility of the delay that caused the demurrage. However, Lord Longmore did not agree on this point and declared that the insurer who could prove this insurance did not need to be disclosed in fact. "The underwriters have not discharged onus of showing that in the comparatively new and rarely used market in which demurrage was insured it was material for a prudent underwriter to be informed about either actual or assumed recoverability from the third party."¹⁴² This disclosure was not adequate and the third party was not disclosed at all.

It is difficult for the insurer if he wants to use the excuse of disclosure to deraignment. Because of the court would like to refuse this kind of technology excuse. It is not essentially significant to decline the right of subrogation and salvage of insurer unless the insurer can prove it has bad influence to the indemnification such as reducing the amount of money. The fact, which reduces the right of subrogation and salvage of the insurer, is *prima facie*. Moreover, it requires to be disclosed only when the assured should know the premium rating under this circumstance.¹⁴³ In addition, Section 18 (3) (b) of the MIA is about that there is no duty of disclosure if

¹⁴⁰ The case of *Marc Rich & Co AG v. Portman* [1996] 1 Lloyd's Rep 430, also known as *Glencore International AG v. Portman*.

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ Merkin Robert, *Colinvaux's Law of Insurance in Hong Kong*, Hong Kong (China): Sweet & Maxwell, 2009 at para. 11- 036.

the knowledge is in ordinary course of the insurer,¹⁴⁴ such as the “knock-for-knock” clauses in the TOWCON and SUPPLYTIME 2005 separately.¹⁴⁵ Therefore, the insurer presumes to know the matters and he could not refuse to pay the indemnification using the excuse of disclosure.

5.2.2 Assured forfeits the subrogation right before the loss after the insurance contract

In this period, there are no remedies for the insurer if the assured has contract with the third party about forfeiture of subrogation rights, unless there is a clause about forbidding this action in the insurance contract. The reason is that the assured could increase the insured risk if it is not forbidden in the policy under the English insurance law that allows the assured to take some action except changing the essence of insured risk. The assured has an agreement with the third party which discharges the obligations of the third party in the duration time before the loss occurred but after the insurance contract. It is to say that the insurer cannot reject the policy. “It is clear that the insurer’s contingent subrogation rights come into existence as soon as the policy is entered into.”¹⁴⁶ It means that there is no implied obligation on the assured about refusing to have an agreement with the third party that restricts the third party’s liability.¹⁴⁷

5.2.3 Assured forfeits the subrogation rights before the indemnification from insurer after the loss

It could say that there is no right of subrogation in this period because the insurer has not paid the full indemnification. It is not easy for the insurer to control the action between the assured and the third party such as the assured claiming the recovery or making the settlement. The assured does not allow depriving the subrogation right of insurer that is implied by

¹⁴⁴ *supra*. note 82.

¹⁴⁵ *supra*. note 81.

¹⁴⁶ *supra*. note 143.

¹⁴⁷ The case of *State Government Insurance v. Brisbane Stevedoring Pty Ltd* (1969) 123 CLR 228.

law.¹⁴⁸ The assured could be sued if he does so.¹⁴⁹ Moreover, there is another case refers to the under insurance.¹⁵⁰ The assured has the settlement with the third party paying the balance of the under insurance as recovery. It is obviously destroying the subrogation right of insurer since the insurer is also bounded on the settlement. It is very common in reality that the assured claims half of the loss from the insurer and at the same time, claims another half of the loss from the third party who causes the loss. However, this kind of action breaches the implied obligations in law.¹⁵¹

5.2.4 Assured forfeits the subrogation rights after the indemnification

In this period, there is a existence of subrogation right. However, the assured is the *donimus litis* of the rights claiming the recovery from the third party.¹⁵² It is because the assured still has some parts of loss that have not been indemnified by the assured. Under this circumstance, the best and most safe method is to get the permission from the insurer about the settlement between the assured and the third party. Nevertheless, it maybe not enough for the parties even though the settlement between the assured and the third party contains the well-meant.¹⁵³ It is possible for the insurer to apply the Mareva injunction to stop the settlement between the assured and the third party.

In conclusion, the assured can take action of forfeiting the right of subrogation during the proceeding at any time. It results in different outcomes. The insurer should pay attention to the moment that the assured gives up the subrogation rights because it can destroy the whole proceeding of indemnification that is extremely significant to the insurer.

¹⁴⁸ *supra*. note 33.

¹⁴⁹ *supra*. note 70.

¹⁵⁰ The case of *Law Fire Assurance Co. V. Oakley* (1888) 4 TLR 309.

¹⁵¹ This has been talked in the 3.2.2.1, "The implied obligations of the assured."

¹⁵² This has been talked in the 5.1, "Who is controlling the rights to claim recovery to third party under subrogation."

¹⁵³ *supra*. note 33.

6 Right of subrogation under Chinese law

The subrogation doctrine is one of the most complicated and significant theories in insurance law. There are some arguments about subrogation under Chinese law. Such as the legal foundation, limitation and bereavement of subrogation and the defence rights of the third party. There are some cases in the English law that bring issues about subrogation, such as the unexpected benefits from the currency rate,¹⁵⁴ the insurer's rights against the sistership.¹⁵⁵ Comparing with English law, there are not so adequate and proper provisions about the right of subrogation before the Insurance Law of People's Republic of China and the Maritime Code of the People's Republic of China.¹⁵⁶ There are not so many claims about subrogation right in the maritime court in China. In this chapter, the author wants to have a comparison study between the Chinese law and English law in the right of subrogation in order to figure out some problems and give the possible suggestions.

6.1 The definition of subrogation under Chinese law

In English law, there are two main theories about the nature of subrogation. They are the principle of unjust enrichment and implied term of contract. Actually, there are some arguments on this issue. The nature of the right of subrogation is that the insurer is entitled to subrogate the assured's rights when the insurance claim has been paid, no matter the claim is actually payable under the policy.¹⁵⁷ As the author talked about earlier, the nature of subrogation is under the equitable doctrine originally but can be modified by the implied terms in the insurance contract. However, the

¹⁵⁴ The case of *Yorkshire Insurance Co. Ltd v. Nisbet Shipping Co. Ltd* [1961] 1 Lloyd's Rep. 479.

¹⁵⁵ *supra.* note 22.

¹⁵⁶ It enters into force as of July 1, 1993.

¹⁵⁷ *supra.* note 38.

right of subrogation in China was written in Law (In the Insurance Law and Maritime Code as mention before). The subrogation right was considered as the express terms in the insurance contract or the agreed subrogation in the certification in the international practice. The Article 252 of the Maritime Code is the first time to have the legal definition of subrogation in China, which reads as follows:

Where the loss of or damage to the subject matter insured within the insurance coverage is caused by a third person, the right of the insured to demand compensation from the third person shall be subrogated to the insurer from the time the indemnity is paid. The insured shall furnish the insurer with necessary documents and information that should come to his knowledge and shall endeavour to assist the insurer in pursuing recovery from the third person.¹⁵⁸

Although in English vision of Maritime Code, it uses word of “subrogate”. In the Chinese vision, the real meaning of the word is “transfer”. There is confusion about the subrogation and legal assignment. However, in the Insurance Law the real meaning of the word is similar with the meaning of subrogation in English Law, it reads as follows:

If an insured risk occurs due to the damage of the objects insured by a third party, the insurer shall, starting from the date of paying the indemnities, subrogate the insured to exercise the right to indemnities from the liable third party.¹⁵⁹

In the view of author, the right of subrogation under Chinese law is neither the implied subrogation nor the legal assignment. The right of subrogation and the assignment are very different conceptions. Under the circumstance of legal assignment, the insurer could act in his own name in the claiming recovery from the third party by fulfilling the three legal requirements even though the payment is more than the indemnity that he pays to the assured. On the contrary, under the circumstance of subrogation, the insurer should recoup the part of overpaid. Under English law, the assured

¹⁵⁸ Maritime Code of the People’s Republic of China, Art. 252.

¹⁵⁹ Insurance Law of People’s Republic of China, Art. 45 (1).

always has the right of controlling the claims recovery from the third party even though he is not full indemnified. The insurer must act in the name of the assured to exercise the right of subrogation. Nevertheless, under Chinese Law, the insurer could sue the third party about the recovery where he has paid the assured without acting in the name of assured. The insurer exercising the right of subrogation “shall not affect the right of the insured to the claim for indemnity from the third party on the part not compensated for.”¹⁶⁰ It deprives the assured’s rights of claiming the recovery of the part that cannot be indemnified if the definition of legal assignment and subrogation is confused. Furthermore, under the Maritime Code and Insurance Law, the insurer could subrogate the right that is claiming the recovery of the loss from the wrongdoer. The insurer could not subrogate the right, which is the remedy to diminish the loss of assured. In addition, the insurer could not get the money as gifts or voluntary payment of the assured whether or not it reduces the loss. The case of *Castenllain v. Preston*¹⁶¹, under Chinese law, the insurer could not have the right of subrogation if the assured received the payment from the third party voluntary.

In addition, it is clear in Chinese law, the pre-condition of subrogation is paying the full indemnification. The insurer could not take any action to protect the rights before the full indemnification. In English law, there are some arguments about the right of subrogation whether or not, should begin with the contract. There is another saying that the subrogation should begin at that moment of signing the policy.¹⁶²

6.2 The insurer’s claiming rights

It has been argued for a long time about whether or not the insurer could claim the recovery from the third party of using his own name or acting in

¹⁶⁰ Insurance Law of People’s Republic of China, Art. 45 (3).

“The subrogation of the insurer to exercise the right to claim for indemnities according to the provisions of the first paragraph of this article shall not affect the right of the insured to claim for indemnity from the third party on the part not compensated for.”

¹⁶¹ *supra*. note 25.

¹⁶² The case of *Boag v. Standard Marine Insurance Company, Ltd* (1937) 2 K.B. 113.

the name of the assured. As the author mentioned earlier, the right of subrogation is considered as the international practice before it comes into law. In the litigation of subrogation, the subrogation certification is required under Chinese law. There is a trend that the claiming right of the assured is “transferred” to the insurer after the full indemnification paid by the insurer. It is obvious that the insurer is entitled to sue the third party directly without acting in the name of assured. In addition, the claiming right of insurer is in accordance with Civil Procedure Law of the People’s Republic of China, Article 108 (1)¹⁶³. At the same time, the purpose of legislation prefers to accept the insurer who could sue the third party in his own name directly.

It is different under English law. The English law does not recognize the rights of the insurer suing the third party in his own name unless the three requirements of legal assignment are satisfied. The insurer should “stand in the shoes” of the assured and the insurer does not have the time against the wrongdoer directly. To exercise the rights of suing the wrongdoer, the insurer must act in the name of the assured not in his own name.¹⁶⁴ Under the principle of privity of contract, the insurer is not being a part in the relationship between the assured and the third party. Therefore, the insurer cannot claim the third party about the recovery in his own name. It is different under Chinese law that the insurer is entitled to sue the third party directly. The insurer exercise the right of subrogation “shall not affect the right of the insured to the claim for indemnity from the third party on the part not compensated for.”¹⁶⁵

Nevertheless, the insurer’s right of suing the third party without acting in the name of the assured has brought some problems in practice especially under the situation of ship arrest. If the party who takes an action of ship

¹⁶³ Civil Procedure Law of the People’s Republic of China, Article 108 (1).

The following conditions must be met before a lawsuit is filed:

(1) The plaintiff must be a citizen, legal person, or an organization having a direct interest with the case.

¹⁶⁴ *supra.* note 25.

¹⁶⁵ *supra.* note 160.

arrest is the assured, it is not clear whether the insurer could sue the third party in his own name instead of the assured. If the answer is the insurer could not do so and he needs to take an action to begin another independent lawsuit proceeding in order to be compensated. In addition, the assured will not be the person who has the “direct interest” after he is paid full indemnification by the insurer. As a result, the ship will be released without any conditions. On the view of author, the insurer could subrogate the rights from the assured suing the recovery from the third party. Therefore, he could be a party of the joined plaintiff with the assured to exercise the rights.

6.3 The scope of subrogation under Chinese law

In English law, the insurer could subrogate the rights and remedies that could diminish the loss. However, under the Maritime Code and Insurance Law¹⁶⁶ in China, the object of subrogation is the right of claiming the compensation from the third party or the wrongdoer. Therefore, the right of subrogation is only related to the liability in tort or in breaching the contract of the third party. Firstly, the scope of subrogation is concerning to the assured’s rights which have been discharged or deprived. It means that the insurer has no right to claim the gifts or voluntary payment from the third party whether or not it diminishes the loss of the assured. Secondly, the lost is caused by the third party or wrongdoer. The right of subrogation excludes the assured’s right, which might be implied by law or under the insurance contract. In the case of *Castenllain v. Preston*,¹⁶⁷ the assured received indemnification from the insurer and received the payment of selling the house after the house was destroyed in a fire. The insurer had no right to claim the payment of selling the house. It means that the insurer could not recoup the payment that is gift or a voluntary payment from the third party. Furthermore, the definition of the third party is not clear under Chinese law. Under the situation of marine cargo

¹⁶⁶ *supra*. note 158,159.

¹⁶⁷ *supra*. note 25.

insurance, the scope of third party does not include the sistership or co-assured. If a vessel has collision with her sistership, the insurer could not have the right of subrogation after paying the full indemnification.

In addition, the Chinese law limits the insurer's right of subrogation to the assured's families or members.¹⁶⁸ There are no clear explanations about whether or not there is the limitation of rights to claim the co-assured. In practice, the court would like to limit the insurer's right of subrogation to the co-assured and sistership that is accordance with the English law as mention in the part 4.2 of this thesis. Moreover, the insurer could not exercise the right of subrogation if the policy is invalid.

According to Chinese law, the right of subrogation raised "from the time of indemnity is paid."¹⁶⁹ However, there is one point not clearly that is after the full indemnification or the actual loss is paid to the assured, could the insurer have the right of subrogation? In the situation of under insurance, the insurer is entitled to subrogate the rights where he has paid according to the policy. "In the case of under insurance, the insurer shall acquire the right to the subject matter insured in the proportion that the insured amount bears to the insured value."¹⁷⁰ Under this circumstance, the insurer has the subrogation right which is covered by the indemnification that pays to the assured against the third party; meanwhile, the assured has the right of claiming the recovery of uncompensated part to the third party. However, the insurer is entitled to sue the third party in his own name directly and the assured has the rights to claim recovery of un-indemnified part of the loss. It might bring the situation that there are two different judgements under the same claims. To solve this problem, in the view of author, it is better to define the joint lawsuit proceeding. Once the assured

¹⁶⁸ Insurance Law of People's Republic of China, Art. 47.

Except the family members or other members of the insured deliberately cause the insured risk to occur as provided for in the first paragraph of Atr. 44 of this law, the insurer shall not subrogate the family members or other members of the insured to exercise the right to indemnity claims.

¹⁶⁹ *supra*. note 158.

¹⁷⁰ Maritime Code of the People's Republic of China, Art. 256.

or the insurer claims the loss from the third party, the other one could automatically join the proceeding as the joint plaintiff for their own loss separately. This method could protect the assured and the insurer at the same time and they could contribute the recovery based on the proportion.

If the insurer pays the indemnification based on *ex gratia*, it is not clear if he could have the right of subrogation under Chinese law. However, the insurer could have the right of subrogation once he pays the good indemnification.¹⁷¹ Under the same principle, the insurer is entitled to have the right of subrogation unless the loss is caused by the exception liabilities.

6.4 The obligations of assured to protect the right of subrogation

It will infract the right of subrogation of the insurer if the assured has the right of claiming the recovery from the third party no matter before or after he is paid by the insurer. The result of infracting the subrogation is different and depends on the purpose of the action. “Where the insured waives his rights of the claim against the third person without the consent of the insurer is unable to exercise the right of recourse due to the fault of the insured, the insurer may take a corresponding reduction from amount of indemnity.”¹⁷² There are no words about the assured abandons the claiming rights to the third party after he is paid by the insurer in this code. Meanwhile, there are no words about whether the insurer is bound to the settlement, which contains the clause on forfeiture the claiming rights before the indemnification is paid, but after the casualty of the loss. The Insurance Law makes reparation of this defective in the Article 46 read as follows:

If, after an insured risk occurs, the insured has forfeited the right to claim for indemnities from the third party before

¹⁷¹ *supra*. note 38.

In the case of *King v. Victoria Assurance Company Limited* (1896) AC 250.

¹⁷² Maritime Code of the People’s Republic of China, Art. 253.

the insurer pays insurance money, the insurer shall not undertake to indemnities.

If, after the insurer has paid indemnities to the insured, the insured forfeits the right to indemnities from the third party, without the insurer's consent, the act is invalid.

If, due to that fault of the insured, the insurer cannot subrogate the insured to exercise the right to claim for indemnities, the insurer shall reduce the payment of insurance money correspondingly.¹⁷³

The legal effect of the assured who forfeits the rights of claiming the indemnity from the third party has a conflict in the Maritime Code and Insurance Law. In the Maritime Code, it is said that the insurer could reduce the amount of money if the assured forfeits the right of claiming the recovery from the third party before the indemnification is paid. However, in the Insurance Law, it is said that the insurer cannot take over the liability of paying the indemnification if the assured forfeits the rights before paying the indemnification but after the loss happened. It is not clear in Chinese law whether the insurer's subrogation is deprived or not when the assured and the third party have the settlement. Meanwhile it is forbidden that the assured claims the recovery from the third party after he is paid indemnification fully. The action of forfeiture from the assured is invalid after he is paid the full indemnification by insurer. The insurer pays a part of the loss if it is under insurance and it does not deprive the rights of the assured to claim the un-indemnified part from the third party. It cannot be judged whether the settlement is valid or not, which contains the clause about the total loss including the indemnified part and the un-indemnified part. Under English law, the insurer is bound to the settlement about discharging the liabilities of the third party between the assured and the third party. However, under Chinese law, it does not recognize this point. In the view of author, if the insurer pays the partial loss of the damage, the insurer should bound to the settlement no matter it is about recovering the total loss or the partial loss. Nevertheless, the third party is given another hard job that is to check whether the insurer has paid the full indemnification to the assured. If the assured is not paid the full

¹⁷³ Insurance Law of People's Republic of China, Art. 46.

indemnification, the third party might be sued by the insurer based on the right of subrogation, even the third party has paid the full recovery. It is unfair to the third party obviously.

If the assured forfeits the right of claiming the recovery from the third party before paying the full indemnification by the insurer, the insurer is entitled to reduce the amount of money both in the Maritime Code and in Insurance Law. However, it is not clear whether the obligations of protecting the right of subrogation including the protection of limit time or the ship arrest. In practice, there is a clause about the assured should ensure “all the rights against carriers, bailees, or other third parties are properly preserved and exercised.”¹⁷⁴ It is easily to say that the assured breach the contract if he does not protect the limit time well. There is no entitlement of ship arrest under the assured’s obligations.

The time of forfeiting the claiming right is after the insured risks occurring under the Art. 46 in Insurance Law. However, there is no article about whether the insurer is bound to the forfeiture action by the assured before the insured risks occurs. In the author’s view, the insurer is entitled to reduce the amount of payment but the forfeiture action is still valid. If the assured breaches the duty of disclosure to the insurer, the insurer could refuse to pay the indemnity or reduce the payment.

Furthermore, if the assured gets the recovery from the third party and get the indemnification from the insurer, could the insurer ask for returning? There are no words about this issue under Chinese law. However, under English law, the insurer is entitled to ask for returning money back. The purpose of subrogation is avoiding the double recovery. If the indemnity that the assured received is more than the loss, the overpaid part should be returned to the insurer. However, if it is the under insurance, “the insurer shall acquire the right to the subject matter insured in the proportion that

¹⁷⁴ *supra*. note 62.

the insured amount bears to the insured value.”¹⁷⁵ It is to say that if the assured has the settlement with the third party about the total loss, the insurer could ask for returning based on the proportion of the indemnification.

In conclusion, it is clear that there are many problems of subrogation rights under Chinese law in respect of the definition, the claiming rights, the scope of the subrogation right and the obligations. Based on the analysis above, the definition of subrogation is not clear under Chinese law, in the Maritime Code, it is more similar with assignment. However, in the Insurance Law it is similar with the meaning of subrogation under English law. Moreover, the Chinese law allows the insurer to sue the wrongdoer directly in his own name that is totally forbidden in English law. The scope of subrogation under Chinese law is included by the scope of subrogation under English law. The obligations of assured to protect the subrogation right are separately stated in the Maritime Code and Insurance Law. They are consistence on some parts while some points are inconsistent.

¹⁷⁵ *supra.* note 172.

7 Conclusion

Through the analysis in previous chapters, it is clear to see that this thesis contains right of subrogation and the relative situations under subrogation including the rights of the insurer before and after paying the full indemnification, the assignment, the co-assured, the waiver clause and the third party. At the last part of this thesis there is the extend part based upon all the previous chapters. Comparison between the Chinese law and English law is straightforward to figure out the disadvantages to the business of Chinese law. However, it is not to say that English law is a kind of perfect and there are still some critics arguments in English legislation as well.

As known it has been argued for a long time in English court about the nature of right of subrogation, whether the subrogation is a “child” of equity or the implied terms in the contract? As Lord Huttin said that “the doctrine of subrogation applies in a variety of circumstance where the defendant has been unjustly enriched ...defendant to retain that enrichment.”¹⁷⁶ However, the principle of equity is that the one who claims the remedies cannot be the wrongdoer. In the following cases, this issue was discussed quite a lot. In the author’s view, the nature of subrogation is under the equity from the original but can be modified by the implied terms in the contract between the parties. It is saying that the insurer could have the right of subrogation when the indemnification is paid no matter the claim is payable under the policy. The purpose of subrogation is avoiding the double recovery from the insurer and the third party, because the assured is entitled to choose whom he will sue freely. The situation of double recovery or earing profile from the risk is inconsistent with the principle with law. Therefore, the right of subrogation rose.

¹⁷⁶ *supra*. note 7.

The right of recoupment is under the situation of overpaid. Recoupment is restitution under equity. The insurer is entitled to ask the overpaid part of money back from the assured. However, it brings another issue. If there is the gift or voluntary payment, could the insurer exercise this recoupment right? In the author view, it is impossible for the insurer. In the chapter 6, this issue is compared between English law and Chinese law. The regulations about this issue have the same legislation purpose.

The following question is about when the insurer could have the right of subrogation. According to English law, it is very clear that “where the insurer pays the total loss, either of the whole...he is thereby subrogated to all the rights and remedies...”¹⁷⁷ It is to say that the insurer could have the right of subrogation after paying the full indemnity. However, in Chinese law, it is clear that when should the insurer have the right of subrogation. The confused point is the pre requirements of the subrogation. Does the assured need to be paid full indemnification under the policy or the assured need to be indemnified the actual loss? In the author’s view, it is better to have clear explanation about it. Moreover, the author prefers after paying the full indemnification the insurer could have the right of subrogation.

Concerning to the difference between the subrogation and the assignment, it is main point is that under the legal assignment, the insurer could claim the recovery to the third party in his own name and do not need to return the overpaid. However, as known, the insurer must act in the name of the assured and need to return the overpaid part back. This point is mixed in Chinese law. In the Insurance Law, it is more like the real definition of subrogation as in English law. However, in Maritime Code, it is more similar with the definition of assignment. Actually, these two definitions are totally different. In the author view, it is better to change the definition about subrogation in Maritime Code in order to make it clearly and legally. There is saying that subrogation will replace the assignment one day. In the author view, it is not correct. They have their own advantages and

¹⁷⁷ *supra.* note 26.

disadvantages. The assignment is better than the subrogation, but it is converse sometimes. Therefore, the application of subrogation or assignment depends on the different reality. The insurer could not exercise the subrogation rights against the co-assured in general. The reason is that it is a circuitry of action under this circumstance. It wastes the money and energy to pursue this kind of claim. However, some exclusion for the co-assured means the insurer could exercise the right of subrogation to the co-assured, such as the co-assured has different policy period with each other.

The rights of controlling the proceedings to claim from the third party, in the author view, should belong to the assured. Because the third party whom is causing the loss should bear the compensation for the loss. Therefore, the right of claiming the recovery belongs to the assured in original that is based on the contract (in tort). Under the circumstance of subrogation in English law, the insurer must act in the name of assured to claim the rights. Therefore, the real owner of the right is still the assured.

There is a significant difference between Chinese law and English law. The insurer is entitled to claim the recovery directly in his own name under Chinese law that is not recognized under English law. The insurer's right about suing the third party without acting in the name of the assured has brought some problems in the practice especially under the situation of ship arrest. If the party who takes an action of arrest the ship is the assured, it is not clear whether the insurer could sue the third party in his own name instead of the assured. The answer is the insurer could not do so and he needs to take an action to begin another independent lawsuit proceeding. In addition, the assured will not be the person who has the "direct interest" after he is paid full indemnification from the insurer. As a result, the ship will be released without any conditions. On the view of author the insurer could subrogate the rights from assured suing the recovery to the third party. Therefore, he could be a party of the joined plaintiff with the assured to exercise the rights.

Supplement

1: TOWCON, Clause 25:

(a)

(i) The Tugowner will indemnify the Hirer in respect of any liability adjudged due or claim reasonably compromised arising out of injury or death of any of the following persons, occurring during the towage or other service hereunder, from arrival of the Tug at the pilot station or customary waiting place or anchorage at the Place of Departure (whichever is sooner), until disconnection at the Place of Destination, however such geography and/or time limits shall not apply to sub-clause 25 (a)(i)2. Below:

(1) The Master and members of the crew of the Tug and any other servant or agent of the Tugowner; (2) The members of the riding crew provided by the Tugowner or any other person whom the Tugowner provides on board the Tow; (3) Any other person on board the Tug who is not a servant or agent of the Hirer or otherwise on board on behalf of or at the request of the Hirer.

(ii) The Hirer will indemnify the Tugowner in respect of any liability adjudged due or claim reasonably compromised arising from out of injury or death occurring during the towage or other service hereunder to of any of the following persons: (1) The Master and members of the crew of the Tow and any other servant or agents of the Hirer; (2) Any other person on board the Tow for whatever purpose except the members of the riding crew or any other persons whom the Tugowner provides on board the Tow pursuant to their obligations under this Agreement.

(b)

(i) The following shall be for the sole account of the Tugowner without any recourse to the Hirer, his servants, or agents, whether or not the same is due to any breach of contract, negligence or any other fault on the part of the Hirer, his servants or agents:

(1) Loss Save for the provisions of Clause 16 (c), loss or damage of whatsoever nature, howsoever caused to or sustained by the Tug or any property on board the Tug. (2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tug or obstruction created by the presence of the Tug. (3) Loss or damage of whatsoever nature suffered by the Tugowner or by third parties in consequence of the loss or damage referred to in (i) and (ii) above. (4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tug or in respect of preventing or abating pollution originating from the Tug.

The Tugowner will indemnify the Hirer in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage. The Tugowner shall not in any circumstances be liable for any loss or damage suffered by the Hirer or caused to or sustained by the Tow in consequence of loss or damage howsoever caused to or sustained by the Tug or any property on board the Tug.

(ii) The following shall be for the sole account of the Hirer without any recourse to the Tugowner, his servants or agents, whether or not the same is due to any breach of contract (including as to the seaworthiness of the Tug), negligence or any other fault on the part of the Tugowner, his servants or agents:

(1) Loss or damage of whatsoever nature, howsoever caused to or sustained by the Tow. (2) Loss or damage of whatsoever nature caused to or suffered by third parties or their property by reason of contact with the Tow or obstruction created by the presence of the Tow. (3) Loss or damage of whatsoever nature suffered by the Hirer or by third parties in consequence of the loss or damage referred to in 1. and 2. above. (4) Any liability in respect of wreck removal or in respect of the expense of moving or lighting or buoying the Tow or in respect of preventing or abating pollution originating from the Tow.

The Hirer will indemnify the Tugowner in respect of any liability adjudged due to a third party or any claim by a third party reasonably compromised arising out of any such loss or damage but the Hirer shall not in any circumstances be liable for any loss or damage suffered by the Tugowner or caused to or sustained by the Tug in consequence of loss or damage, howsoever caused to or sustained by the Tow.

(c)

Save for the provisions of Clauses 17, (Permits & Certification); 18, (Tow-worthiness of the Tow); 19, (Seaworthiness of the Tug); 22 (Termination by the Hirer) and 23 (Termination by the Tugowner), neither the Tugowner nor the Hirer shall be liable to the other party for:

(i) any loss of profit, loss of use or loss of production whatsoever and whether arising directly or indirectly from the performance or non performance of this Agreement, and whether or not the same is due to negligence or any other fault on the part of either party, their servants or agents, or

(ii) any consequential loss or damage for any reason whatsoever, whether or not the same is due to any breach of contract, negligence or any other fault on the part of either party, their servants or agents.

(d)

Notwithstanding any provisions of this Agreement to the contrary, the Tugowner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owners or Chartered Owners of Vessels by any applicable statute or rule of law for the time being in force and the same benefits are to apply regardless of the form of signatures given to this Agreement.

2: SUPPLYTIME 14 (b), Knock-for-knock:

(i) Owners-Notwithstanding anything else contained in this Charter Party excepting Clauses 6(c)(iii), 9(b), 9(e), 9(f), 10(d), 11, 12(f)(iv), 14 (d), 15 (b), 18(c), 26 and 27, the Charterers shall not be responsible for loss of or damage to the property of any member of the Owners' Group, including the Vessel, or for personal injury or death of any member of the Owners' Group arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, injury or death is caused wholly or partially by the act, neglect, or default of the Charterers' Group, and even if such loss, damage, injury or death is caused wholly or partially by unseaworthiness of any vessel; and the Owners shall indemnify, protect, defend and hold harmless the Charterers from any and against all claims, costs, expenses, actions, proceedings, suits, demands and liabilities whatsoever arising out of or in connection with such loss, damage, personal injury or death.

(ii) Charterers-Notwithstanding anything else contained in this Charter Party excepting Clause 11, 15(a), 16 and 26, the Owners shall not be responsible for loss of, damage to, or any liability arising out of anything towed by the Vessel, any cargo laden upon or carried by the Vessel or her tow, the property of any member of the Charterers' Group, whether owned or chartered, including their Offshore Units, or for personal injury or death of any member of the Charterers' Group or of anyone on board anything towed by the Vessel, arising out of or in any way connected with the performance of this Charter Party, even if such loss, damage, liability, injury or death is caused wholly or partially by the act, neglect or default of the Owners' Group, and even if such loss, damage, liability, injury or death is caused wholly or partially by the unseaworthiness of any vessel; and the Charterers shall indemnify, protect, defend and hold harmless the Owners from any and against all claims, costs, expenses, actions, proceedings, suits, demands, and liabilities whatsoever arising out of or in connection with such loss, damage, liability, personal injury or death.

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