THE INDEMNITY PRINCIPLE IN CARGO INSURANCE IN MULTIMODAL TRANSPORT: A COMPARATIVE STUDY OF ENGLISH AND CHINESE LAW

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CERTIFICATE OF ORIGINALITY

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_____ (Signed)

Zhang Mingzhao (Name of student)

To My Parents and Husband

ABSTRACT

China has become one of the major exporting and importing countries in the world. With the growth of multimodal transport, there is a pressing need for insurance to fully cover the risks of loss of and damage to goods in transit against perils from the sea, air, rail and road, as well as during cargo operation and temporary storage whilst switching transport modes. At present, stakeholders utilise various ways of insuring their goods in both domestic and foreign insurance markets. However, in China the laws applicable to marine and non-marine insurance are different, which thus poses a real dilemma in the application of law, since the insurance of goods in multimodal transport may or may not fall within the bounds of marine insurance.

Under both Chinese and English insurance law, the fundamental principle is that of indemnity, which provides that the assured who suffers a loss caused by the insured contingencies shall be indemnified by the insurer for his loss, such indemnity being limited to his loss. This principle is closely allied with those of insurable interest, measure of indemnity, and subrogation regarding its three propositions – the object, content and aftermath of indemnity, respectively.

Given the above, this thesis investigates the application of the above three propositions of the indemnity principle in the insurance of goods in multimodal transport in China, mainly by conducting a comparative analysis alongside English insurance law. Its key findings are as follows:

(i) The classification of the insurance of goods in multimodal transport and its applicable law depend on the employment of a sea leg in China, whilst the English

Marine Insurance Act (MIA) 1906 would arguably apply to the insurance of goods in multimodal transport.

(ii) The seller, buyer, carrier and freight forwarder all have insurable interests in the goods in multimodal transport, subject to satisfying the proposed pecuniary interest approach in Chinese law or the wide definition of insurable interest in English law.

(iii) There are inconsistencies between the general insurance law and marine insurance law in China relating to total loss and its valuation, since the two regimes are influenced by different sources of law, one being based on previous domestic ordinances, and the other also taking into consideration the English MIA 1906. Ambiguities also exist regarding the extent of loss and deductibles.

(iv) Whether the carrier or actual carrier are regarded as the "third party" under subrogation depends on individual insurance and carriage arrangements. Where recovery from the third party is insufficient to compensate the paid indemnity, the *pro rata* approach best reflects the legal basis for subrogation under Chinese law, whereas English law adopts a mixture of approaches.

The contributions of this thesis are twofold. Firstly, it provides a complete picture of how goods are insured under multimodal transport in both the English and Chinese insurance markets and analyses the classification and applicable laws governing contemporary insurance contracts for goods in multimodal transport. Secondly, through a comparative analysis with English law, it comprehensively examines the principle of indemnity under Chinese law with regard to the insurance of goods in multimodal transport, and identifies the ambiguities and inconsistencies in current Chinese laws and regulations. This thesis is the first piece of dedicated scholarly work on the insurance of

goods in multimodal transport from the perspective of the most fundamental principle of insurance law – the principle of indemnity. It pinpoints specific suggestions for drafting insurance contracts for goods in multimodal transport, as well as for better coordinating the laws relating to marine and non-marine insurance contracts in China.

PUBLICATIONS ARISING FROM THE THESIS

A. Journal publications

1. Mingzhao Zhang and Ling Zhu, "Understanding Who Has an Insurable Interest in Goods Under Multimodal Transport in Chinese Law" (2018) 48 2 *Hong Kong Law Journal* 739-762

2. Mingzhao Zhang and Ling Zhu, "Are Goods Fully Insured Throughout Multimodal Transport? Problems with Current Practice" (Under final preparation for planned journal submission to *Journal of Maritime Law and Commerce*)

3. Mingzhao Zhang and Ling Zhu, "Mapping the Measure of Indemnity under Cargo Insurance in Multimodal Transport under Chinese Insurance Law" (Submitted to *Asia Pacific Law Review*)

B. Presented conference paper

4. Mingzhao Zhang and Ling Zhu, "Defining GIT Insurance as Cargo Insurance in the Context of Multimodal Transport" in *Conference on Logistics and Maritime Studies on One Belt One Road 2016*, Hong Kong, China

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CHAPTER 1

INTRODUCTION

Background of the Research

From the mid-20th century onwards, containers have been used to consolidate cargoes,[1] and the continuous growth of containerization has, since the Second World War, nurtured the rise of multimodal transport.[2] Nowadays, multimodal transport is becoming a more and more commonly used means of transporting goods in international trade.[3]

A multimodal transport of goods is a combination of two or more modes of carriage.[4] Currently, various international and regional conventions are in force to deal with the carriage of goods by different modes in a multimodal transport.[5] There apparently lacks a set of unified international rules that can be applied to the carriage of goods by

[1] M G Graham and D O Hughes, *Containerisation in the Eighties* (Essex: LLP, 1985). The container revolution was first introduced in 1956 by Sea-Land, an American haulier company, for transport between New York and Puerto Rico. However, the practice of transporting goods in unit load devices was known as far back as 1801. *See* Richard Palmer and Frank DeGiulio, "Terminal operations and multimodal carriage: history and prognosis" (1989) 64 *Tulane Law Review* 281.

[2] David A Glass, *Freight Forwarding and Multimodal Transport Contracts* (London: Informa, 2nd edn, 2012), p 1-2; Baris Soyer and Andrew Tettenborn (ed), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multi-modal Transport in the 21st Century*, Chapter 16 (New York: Taylor and Francis, 2013), p 286; Indira Carr, *International Trade Law* (London and New York: Routledge, 4th edn, 2009), p 401.

[3] UNCTAD, Expert Meeting on the *Development of Multimodal Transport and Logistics Services* (Geneva: Sep 2003), TD/B/COM.3/EM.20/2.

[4] The most commonly agreed definition of multimodal transport is provided in the United Nations Convention on International Multimodal Transport, under which "…international multimodal transport means the carriage of goods by at least two different modes of transport on the basis of a single multimodal transport contract…" Article 1 of the United Nations Convention on International Multimodal Transport (not in force).

[5] These conventions are the Convention for the Unification of Certain Rules Relating to International Carriage of Air (the Warsaw Convention) and the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) for the carriage of goods by air, the Brussels Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules), the Hague Visby Rules and the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) for the carriage of goods by sea, and the Convention on the Contract for the International Carriage of Goods by Road (CMR) for the carriage of goods by road.

multimodal transport. Given such a fragmented liability regime and the difficulty in locating the place of loss under containerised transport, claiming against a multimodal transport carrier becomes complex and time-consuming.

The mechanism of insurance transfers the assured's risk of loss of or damage to goods in multimodal transport to the insurance market for the price of the premium. Under an insurance contract, the assured is entitled to be indemnified up to the full value of the insured goods. The existing literature on multimodal transport is extensive; its focus is, however, mainly on the law of carriage,[6] whereas few studies specifically relate to the insurance perspective. Certain piecemeal discussions in the literature may be found, such as on insurance for goods in transit,[7] logistics insurance,[8] bailment and insurance,[9]

[6] Multimodal transport becomes a necessary component of many research studies on shipping law or the law of carriage of goods by sea, international carriage of goods by air, and international carriage of goods by road. *See e.g.* Simon Baughen, *Shipping Law* (London and New York: Routledge Cavendish, 4th edn, 2009), and John Wilson, *Carriage of Goods by Sea* (Harlow: Longman. 7th edn, 2010); Malcolm Clarke, *International Carriage of Goods by Road: CMR* (London: Informa, 5th edn, 2009); John Ridley, *Ridley's law of the carriage of goods by land, sea and air* (Kent: Shaw & Son, 7th edn, 1992); Soyer and Tettenborn (n 2 above). A number of studies have begun to examine the carrier's liability in multimodal transport, such as Ralph D Wit, *Multimodal transport: carrier liability and documentation* (London: LLP, 1995); Malcolm Clarke, "Multimodal Transport in the New Millennium" (2002) 1 *World Maritime University Journal of Maritime Affairs* 71; Michael F Sturley, "Phantom carriers and UNICITRAL's proposed transport law Convention" (2006) Lloyd's Maritime and Commercial Law Quarterly 426. Since the modern freight forwarder may serve as a carrier and issue its own bills in any modes of transport, there have also been numerous discussions on freight forwarders and multimodal transport. See e.g. Paul Bugden, *Goods in transit and freight forwarding* (London: Sweet & Maxwell, 2013); Glass (n 2 above).

[7] Saul Sorkin, *Goods in transit* (New York: Lexis Nexis, 2006). Sorkin's monograph, firstly published in 1976, with the most current edition in 2006, covers rights, obligations and remedies for losses, damages and delays of goods shipped by air, sea or truck. In Volume 5, he investigated extensive agendas of insurance from marine insurance, inland marine insurance, liability insurance, motor carrier liability insurance, aviation insurance and many other issues in insurance law and contracts. Discussions are largely based upon American law.

[8] Studies of cargo insurance in the context of multimodal transport are sometimes included in the discussions on insurance for logistics operations, the broad scope of which covers both cargo insurance and insurance for carrier's liability. There have been many Chinese scholarly works in this regard. For instance, Zhang Xianglan and Zhang Lina briefly examined the Chinese legal framework of insurance for logistics operations and insurance policies available in the Chinese market in "Perfection of China's logistics insurance Law," *Journal of Wuhan University of Technology (Social Sciences Edition)* 20 (2007) 5 641; Zhuang pointed out a relatively comprehensive insurance arrangement for logistics operations in China, including insurance for the equipment, cargo, employer's liability insurance, motor vehicle insurance, and logistics liability insurance in Zhuang Y, "The promoting effects of the logistics insurance to modern logistics industry" (2008) 30 4 *Storage Transport & Preservation of Commodities* 8-9; and

and marine cargo insurance.[10] However, there lacks any coherent research into cargo insurance in multimodal transport.

As a matter of fact, there are different ways of insuring goods in multimodal transport. Traditional cargo policies insure risks in association with one transport mode. As a result, a cautious party in the multimodal transport of goods may choose to purchase insurance separately for each transport leg, so that he is clearly protected for the entire transit.[11] In addition, the insurance market has developed insurance products for goods in transit. The insurance of goods in transit covers the loss of or damage to cargo sustained during transit, irrespective of the employed modes of transit.[12] Therefore, the goods in multimodal transport may be insured by: (1) a single cargo police for unimodal transport, often with a 'warehouse-to-warehouse' cover; (2) a combination of policies

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Wang's thesis on logistics insurance covers cargo insurance, insurance for equipment and liability insurance, with the focus on the last. *See* Wang Yingmin, *A study on some legal problems of logistics insurance* (Master's Thesis, Dalian Maritime University 2004). But the narrow scope of such insurance means liability insurance for logistics operators, rather than cargo insurance in logistics operations. *See e.g.* Caroline Colebunders, *Multimodal cargo carrier liability and insurance: in search of suitable regime* (Master thesis, Gent University, 2013); Liu Yi, *Research on legal problems in logistics liability insurance* (Master's Thesis, Shanxi Unviersity 2011); Liu Guogang, *Research on legal issues of logistics liability insurance* (Master's Thesis, Dalian Maritime University 2010); Xu Zhan, *The research on law issues related to the third party marine logistics insurance in China* (Master's Thesis, Dalian Maritime University 2010).

[9] Norman Palmer, *Palmer on Bailment* (London: Sweet & Maxwell, 3rd edn, 2009), Yin R G S, "Insurance in a bailment" (1995) *Singapore Academy of Law Journal* 7 367.

[10] Cargo insurance, which was originally for unimodal transportation, can, with the extended warehouse to warehouse cover, provide cover for goods carried in multimodal transport. Cargo insurance in the multimodal context was investigated by Soyer in Chapter 16 in an edited book. But this work focuses on the transit clause of ICC and its consistency with MIA 1906 so as to provide a complete cover for cargo insurance in multimodal transport. *See* Soyer and Tettenborn (n 2 above), and Charles Debattista, *Bills of lading in export trade: formerly the Sale of Goods Carried by Sea* (Haywards Heath: Tottel, 3rd edn, 2009).

[11] For example, under the SG policy, cover is confined to the sea leg when the goods were loaded on board the vessel to when they were discharged and safely landed, without additional clauses. The SG policy is virtually no longer used since the introduction of the Lloyd's Form of Marine Policy (MAR) and the standard Institute Clauses. *See* Jonathan Gilman, Robert Merkin, Clair Blanchard and Mark Templeman, *Arnould's law of marine insurance and average* (London: Sweet & Maxwell, 16th edn, 1997), p 521.

[12] Lord Justice Mance, Iain Goldrein QC and Robert Merkin (eds), *Insurance Disputes*, Chapter 20 (London and Hong Kong: LLP, 2nd edn, 2003), p 587.

that are purchased for each unimodal transport (e.g. goods in 'sea-rail' transport are insured through two polices for the sea and rail carriage respectively); or (3) a collective policy that applies irrespective of the employed modes of transport.

However, it is still debatable as to whether any of these can in all cases provide a satisfactory coverage for goods in multimodal transport. The level of satisfaction is a subjective standard that can be measured by both the assured and the insurer's reasonable expectations.[13] The assured's reasonable expectation of coverage is a principle to guide the construction of insurance policies; the insurer's expectation, on the other hand, is receipt of the insurance premium and his non-liability under an insurance contract. Although it has been argued that the assured's reasonable expectation of coverage prevails over the insurer's reasonable expectation of non-liability because it is the assured's reasonable expectation of coverage that matches the function of insurance,[14] any frustration of the insurer's reasonable expectation will also in return impact the price paid by the assured to acquire the expected coverage. Hence, both the insurer and the assured's reasonable expectations are employed in this thesis to evaluate whether contemporary insurance policies can provide satisfactory coverage for goods in multimodal transport.

(i) English and Chinese insurance markets in general

Both English and Chinese markets play an important role in insuring goods in multimodal transport. Due to the historical economic predominance of the British market in insurance placement, cargo policy forms from the British insurance market are

[13] Yong Qiang Han, *Policyholder's Reasonable Expectations* (Oxford and Portland, Oregon: Hart Publishing, 2016). "Policyholder" in this book is interchangeable with the meaning of "the assured".
[14] See *ibid*, p 181-95.

in widespread use throughout the international insurance market.[15] In China, insurance used to be an alien concept. However, the Chinese insurance market has gradually established its own insurance law and practice under the strict governance of the China Insurance Regulatory Commission (CIRC).[16] With the furtherance of the "One Belt One Road" initiative,[17] the Chinese insurance market may play an increasingly important role in insuring goods in multimodal transport.

In both markets, English or Chinese law may apply based upon the express applicable law clause in the insurance contract.[18] It is within the freedom of the contract for the assured and the insurer to choose the applicable law. There is nothing preventing parties in China from insuring its goods via the British insurance market using British standard cargo policies, and *vice versa*.

(ii) Demarcation of marine and non-marine insurance and resultant dilemmas

Theoretically, an insurance contract is classified by the nature of the event on which the sum insured becomes payable. Accordingly, the insurance may be classified as marine

[15] According to a report from the United Nations Conference on Trade and Development (UNCTAD), approximately two-thirds of the countries in the world use the British standard policy forms to insure cargo, either solely or in conjunction with local policies. *See* UNCTAD, *Legal and documentary aspects of the marine insurance contract*, TD/B/C.4/ISL/27/Rev.1, p 11-12. The report was lastly updated in 1992. Even nowadays, the British market is still one of the leading insurance markets, in terms of the cargo premium collected. *See* https://iumi.com/images/Berlin2015/Presentations/14_09_seltmann_2.pdf (visited 23 Jan 2019).

[16] CIRC is the regulatory agency affiliated under the Chinese State Council to supervise the national insurance market. It was merged with the China Banking Regulatory Commission in 2018.

[17] "One Belt One Road" refers to the New Silk Road Economic Belt and the 21st-century Maritime Silk Road. It is a concept first mentioned by President Xi Jinping in late 2013. This ambitious initiative covers 65 countries on 3 continents and is expected to benefit 63% of the world's total population.

[18] For instance, Clause 19 of ICC 1982 and ICC 2009. It should be noted that many Chinese standard cargo policies do not contain a choice of law clause; the applicable law is to be ascertained in each individual case according to the conflict of laws principle. Nevertheless, parties using Chinese standard cargo policies usually add an *ad hoc* choice of law clause that refers to Chinese law.

insurance or non-marine insurance.[19] Under both English and Chinese law, there is also a demarcation of marine and non-marine insurance law.[20]

Differences exist in the rules of law applicable to marine and non-marine contracts. In English law, two commonly agreed differences are pertinent to the measure of indemnity.[21] First, the valuation of the insured subject-matter under a marine policy is the value at the commencement of the risk,[22] whereas it is the value at the time of loss in non-marine insurance.[23] Second, the doctrine of constructive total loss only exists in marine insurance contracts,[24] and does not apply to non-marine insurance contracts.[25] In Chinese law, researchers have also drawn attention to the demarcation between marine and non-marine insurance law.[26] They particularly highlight the differences, which also include constructive total loss and valuation of the insured subject-matter.[27]

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[19] Details of the classification vary between the English and Chinese law. *See* section 2.3 of this thesis.

[20] There are academic discussions on whether it is sensible to separate marine insurance from non-marine insurance. John Birds and Norma J Hird, "Misrepresentation and non-disclosure in insurance law, identical twins or separate issues?" (1996) 59 *The Modern Law Review* 285, 293 states that it cannot be sensible – "if insurance contracts are to be regarded as being in some way different from general contracts (and we accept that they should be so regarded), then all insurance contracts should be so regarded. It is the concept of risk that renders them different, not anything that could be regarded as being peculiar to marine insurance"; Gerald Swaby, "Insurance law: fit for purpose in the twenty-first century?" (2010) 52 *International Journal of Law and Management* 21, 22 also agrees that MIA should be applied equally to both marine and non-marine consumers. On the other hand, Malcolm Clarke, "Marine Insurance system in common law countries, status and problems", available at http://www.bmla.org.uk/ (visited 12 Jul 2018), argues that "the general trend within insurance law, however, is one of polarization so that, if reasons can be given, differences between marine insurance law and non-marine insurance law will not be unacceptable". The largely accepted rules that are different between marine insurance law and non-marine insurance law are also listed in this symposium paper.

[21] Other differences concern the formality of the policy, assignment, broker's obligation for the payment of premium, the assured's obligation to prevent or mitigate the loss etc. The different treatment of warranties under marine and non-marine insurance has been unified under the Insurance Act 2015. For a comprehensive list of differences, see e.g. Robert Merkin and Judith P Summer, *Colinvaux's Law of Insurance* (London: Sweet & Maxwell, 10th edn, 2014), p 23-24; Robert Merkin, *Marine Insurance Legislation* (Abingdon and New York: Informa, 5th edn, 2014) p 1; Clarke, *ibid.*

[22] Section 16, MIA 1906.

[23] *Wilson and Scottish Insurance Corp Re* [1920] 2 Ch. 28.

[24] Section 60, MIA 1906.

[25] *Moore v Evans* [1918] AC 185.

[26] See *e.g.* Fu Tingzhong, *Baoxianfa lun (Research on Insurance Law)* (Beijing: Tsing Hua University Press, 2011), p. 177; Wang Pengnan, *Haishang Boxian Hetongfa Xianglun (Research on the contract of*

Depending on the employed modes of transport, multimodal transport could entail a combination of perils arising from the sea, air, road and rail legs. It is difficult to categorise the insurance of goods in multimodal transport into either marine or non-marine insurance in both countries without examining the insured voyage in question. This difficulty in classifying the insurance of goods in multimodal transport can lead to a dilemma in the applicable law, especially in the above-mentioned areas of difference.[28]

Without the necessary predictability and uniformity of the applicable rules of law, the assureds are less confident about what they will recover in the event of a loss. [29] There is a likelihood that the costs for resolving disputes may increase and that these would eventually be borne by the consumers. In light of the continuing development of multimodal transport, the possible dilemmas as to the application of marine or non-marine insurance law may require careful consideration.

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marine insurance) (Dalian: Dalian haishi daxue chubanshe, 4th edn, 2017), p.4. But there have been only a few dedicated studies for this issue. One representative study of this topic is Wang Haibo, *Study on the Coordination of Marine Insurance Law and General Insurance Law* (Doctoral thesis, Fudan University, 2012), pp.44-9, 79-102.

[27] Other differences include the contractual parties, duty of disclosure and warranty. It has also been argued that insurable interest is also one of the differences between marine and non-marine insurance law in China, since marine insurance law in China has no explicit provisions about the insurable interest, whereas there is a doctrine of insurable interest in general insurance law in China. See e.g. Wang Haibo, *ibid*, p.223; Fu, *ibid*, p. 177. However, in the absence of any explicit requirement in Chinese marine insurance law, the general insurance law should be applicable. In other words, insurable interest in marine insurance law should be subject to the general insurance law. Hence, this thesis does not deem the insurable interest doctrine as one of the differences between marine and non-marine insurance law.

[28] *Tannenbaum & Co and Others v Heath and Another* [1908] 1 KB 1032; *Henderson v The Underwriting and Agency Association, Limited* [1981] 1 QB 557; L.J. Scrutton in the case *Leon v Casey* [1932] 2 KB 576 stated that "in my view, in order to decide whether the case is one in which the order (for ship's paper) should be made, regard must be had to the policy of insurance and to the adventure giving rise to the action…If the adventure has nothing to do with the sea at all, if for example, the policy is an in and out policy…, and the policy is not in the form of a policy of marine insurance at all, then no order should be made for ship's papers; but if the policy is in the form of a marine policy involving risk at sea, the order must be made; and the rule equally applies…where the transit, though partly by land, is covered by a policy…which is substantially a policy of marine insurance".

[29] Michael F Sturley, "Restating the law of marine insurance: a workable solution to the Wilburn Boat problem" (1998) 29 *The Journal of Maritime Law and Commerce* 41, 51 arguing the position in the law of marine insurance in the United States. This argument can also be applied in the wider context.

(iii) The indemnity principle and its propositions

An insurance policy is a contract of indemnity.[30] In both English and Chinese insurance law, the principle of indemnity is a fundamental principle which applies to both marine and non-marine insurance contracts.[31]

Under English law, the fundamental status of the indemnity principle is that any rules deviating from it are not allowed, unless otherwise provided. Its position is well illustrated by Brett L.J. in *Castellain v Preston*, as follows:

> 'The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give

[30] But not all insurance contracts are indemnity insurance. For example, life insurance and accident insurance are contingency insurance where the insurer will pay a pre-agreed sum irrespective of the amount of loss suffered on occurrence of a specific event.

[31] *Castellain v Preston* (1883) 11 QB 380; Charles Lewis, "A fundamental principle of insurance law" (1979) *Lloyd's Maritime and Commercial Law Quarterly* 252, 275; Malcolm Clarke, *Policies and perceptions of insurance law in the twenty-first century* (Oxford: Oxford University Press, 2005), p 27; John Birds, Ben Lynch and Simon Miles, *MacGillivray on Insurance Law* (London: Sweet & Maxwell, 13th edn, 2015), p 9; Si Yuzhuo, *Haishangfa zhuanlun (Maritime Law Monograph)* (Beijing: Zhongguo renmin daxue chubanshe, 2nd edn, 2010), pp. 383; Wang Pengnan, *Haishang Baoxian Fetongfa Xianglun (Research on the contract of marine insurance)* (Dalian: Dalian haishi daxue chubanshe, 3rd edn, 2010), pp. 23-25; Zhu Zuoxian, *Study on Principle of Indemnity under Marine Insurance Law* (Doctoral thesis, Dalian Maritime University, 2008) p. 12.

to the assured more than a full indemnity, that proposition must certainly be wrong.'[32]

In Chinese insurance law, the indemnity principle has not been explicitly written into legislations.[33] Instead, there have been a lot of academic debates in the area. There is a consensus that the indemnity principle in Chinese law should also aim at indemnifying the assured so that he would be in the same position as before the occurrence of the insured accident, subject to the detailed provisions in the contractual agreement.[34]

As a general principle, indemnity applies in connection with other doctrines[35] and has more than one proposition as regards its application. Due to its importance, much has been analysed and debated about the propositions of the principle of indemnity; the relevant literature can be found in many different insurance studies, including those on general insurance law and marine insurance law. In English law, to name a few: Lowry and Rawlings have studied the measure of indemnity in insurance law[36] and Bennett has analysed it in marine insurance law.[37] Arnould's Law of Marine Insurance and Average has adopted indemnity as the guiding principle when discussing subrogation.[38] The

[32] (1883) 11 QBD 380, p 386.
[33] Two principles provided in the Chinese Insurance Law are "the voluntary principle" and "the principle of good faith".
[34] Zhu (n 31 above).
[35] Principles should be distinguished from doctrines. As Robert Keeton summarised in "Reasonable expectations in the second decade" (1976) 12 Forum 275, 277, "A principle is a generalization so broad that it does not express all the qualifications and limitations that must be expressed in an accurate statement of a rule, or a set of rules of decision that constitute at least the framework, though not the full body, of a doctrine…doctrines are sets of explicit rules of decision – the outcomes of accommodation among competing principles". The principle of indemnity is in connection with the doctrines, for instance, doctrines of insurable interest and subrogation regulating its different propositions.
[36] John Lowry and Philip Rawlings, *Insurance Law: Doctrines and Principles* (Oxford: Hart, 2nd edn, 2005).
[37] Howard Bennett, *The Law of Marine Insurance*, (Oxford: Oxford University Press, 2nd edn, 2006).
[38] Jonathan Gilman, Robert Merkin, Claire Blanchard, and Mark Templeman, *Arnould's Law of Marine Insurance and Average* (London: Sweet & Maxwell, 18th edn, 2013).

principle of indemnity is also linked with discussions on the insurable interest.[39] Hodges has used a case study approach to elaborate on further aspects of the indemnity principle, including the contract of indemnity, indemnity against gaming and wagering, indemnity in double insurance and subrogation in marine insurance law.[40] Similar aspects of the indemnity principle have been covered by Ivamy under a broader scope of insurance law.[41] Rose has examined the indemnity principle of marine insurance law and practice in a well-organized manner.[42] Rose's book is of the view that quantifying the indemnity includes not only the measure of indemnity, but also the object of the indemnity, valuation of the insured subject matter, including cargo, as well as indemnity in valued and unvalued policies and others. Lewis has summarised that the measure of indemnity can be ascertained by identifying whether the loss covered by the insurance policy was caused by a risk covered in the policy, and then to put a value on each head of the loss.[43]

In Chinese law, Si has focused on the time limit for the insurer to indemnify the assured under the principle of indemnity in marine insurance law.[44] Wang has analysed three aspects of the indemnity principle in marine insurance law, namely prompt indemnity, sufficient indemnity and indemnity of the actual loss.[45] The indemnity principle in marine insurance has been referred to under the measure of indemnity, subrogation, insurable interest, right of contribution in double insurance, and an issue not usually

[39] See *e.g.* Birds, Lynch and Miles (n 31 above).
[40] Susan Hodges, *Cases and Materials on Marine Insurance Law* (London: Cavendish Publishing Limited, 1999), p 1-38.
[41] Edward Richard Hardy Ivamy, *General Principles of Insurance Law* (London: Butterworths, 6th edn, 1993), p 510-536.
[42] Francis D Rose, *Marine Insurance: Law and Practice* (London: Informa, 2013).
[43] Lewis (n 31 above), p 275.
[44] Si (n 31 above).
[45] Wang Pengnan (n 26).

included in the indemnity principle in English insurance law, namely, abandonment.[46] Li has examined the indemnity principle in both Chinese insurance law and Chinese civil law against the background of so-called "multiple insurance".[47] Wang has analysed the indemnity principle in both marine insurance law and insurance law so as to harmonise the Chinese insurance legal regime.[48]

Of particular note, a devoted academic work on the indemnity principle has been carried out by Noussia in a comparative way that includes the laws of England, Greece, Norway, France, USA, Canada and Australia; noteworthy is that this study focuses on the marine insurance contract.[49] Zhu has also adopted a comparative approach to studying the indemnity principle under Chinese and English marine insurance law.[50]

However, there has been no dedicated research into application of the different propositions of the principle of indemnity in the insurance of goods in multimodal transport. Therefore, this study will focus on a discussion of the principle of indemnity in the context of the insurance of goods in multimodal transport, from three particular propositions : (1) the object of indemnity, which refers to the parties who are entitled to be indemnified; (2) the content of indemnity, namely the sum recoverable from the insurance; and (3) the aftermath of indemnity, which is the insurer's right to prevent any unjust enrichment of the assured.

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[46] See e.g. Zhang Wenbin, *On principle of indemnity in marine insurance law* (Master's Thesis, Wuhan University, 2004); Zhu (n 31 above).
[47] Li Jialin, *The indemnity principle in multiple insurance* (Master's Thesis, Southwest University of Political Science and Law, 2008).
[48] Wang Haibo (n 26 above).
[49] Kyriaki Noussia, *The principle of indemnity in marine insurance contracts, a comparative approach* (Berlin: Springer, 2007).
[50] Zhu (n 31 above).

Regarding these three propositions, the above studies indicate that the core of the indemnity principle lies with the method of measuring the sum recoverable, namely the content of indemnity. The underlying reason for the measure of indemnity can be found in contract law, since insurance is a special form of contract. Actually, the measure of indemnity under insurance law adopts an approach similar to contractual indemnity, which refers in particular to the indemnity clauses in non-insurance contracts. This is partly due to homogeneity between contract law and insurance law. In other words, insurance indemnity is rooted in the soil of contractual indemnity.[51] Both insurance indemnity and contractual indemnity are, by their very nature, a mechanism for risk allocation between the contractual parties, under which the indemnifier will pay the indemnitee a sum of money to put the indemnitee back into the financial position he would have been in had particular losses not occurred to him.[52] Under an insurance contract, the indemnifier is the insurer, and the indemnitee is the assured.[53] The sum recoverable is what the indemnifier pays to the indemnitee, and this is what thus shapes the content of the indemnity principle. Accordingly, under both insurance law and

[51] Wayne Courtney, *Contractual indemnities* (Oxford and Portland, Oregon, Hart Publishing, 2014).
[52] n 13 above, p 20.
[53] As with contractual indemnity, insurance indemnity includes both preventive indemnity and compensatory indemnity, the former emphasizing on holding harmless the indemnified from suffering damage, and the latter stressing on the promise of compensation for the loss. This classification is prompted by the *Firma C-Trade SA v Newcastle Protection and Indemnity Associations* (The *Fanti*) (No 2) [1991] 2 AC 1, and *Ventouris v Mountain* (The *Italia Express*) (No 2) [1992] 2 Lloyd's Rep 281. The classification matters when deciding whether the insurer is liable for consequential loss when the insurer fails to indemnity the assured promptly. *See* n 51 above, p 30-3 for more details on the two types of indemnity. Yet, there are also differences between insurance indemnity and contractual indemnity. The main difference is that insurance indemnity is unilateral from the insurer to the assured as determined by the virtual mechanism of insurance, whereas contractual indemnity is often mutual between both parties. *See* also *ibid*, p 18.

contract law, the purpose of indemnity is to put the indemnitee back into the position he would have been in had the loss not occurred.[54]

Furthermore, the object and aftermath of indemnity principle are embodied by in the doctrines of insurable interest and subrogation. Firstly, insurable interest places a limit on those parties entitled to be indemnified, which is the object of indemnity. Insurable interest ensures that only those who have an interest in the insured subject-matter and hence suffer loss arising from the destruction of or damage to the insured subject-matter will be indemnified. This doctrine not only confines the indemnitee but also limits the extent of the sum recoverable.[55] Secondly, subrogation regulates the aftermath of indemnity. The insurer's right of subrogation prevents the assured from recovering more than his loss from both the insurer and a liable third party, if any.[56] According to *Burnand v Rodocanachi*,[57] the general rule of law is that where there is a contract of indemnity and a loss happens, anything which reduces or diminishes that loss, or reduces or diminishes "the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to which he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back". Therefore, subrogation is said to be a corollary to the principle of indemnity regulating the aftermath of indemnity so as to avoid the unjust enrichment of the assured.

[54] According to *Callaghan v Dominion Insurance* [1997] 2 Lloyd's Rep 541, the insurance indemnity is to put the assured back into the same position in which he would have been had the event not occurred.
[55] Bowen L.J. in *Castellain v Preston* (1883) 11 QB 380, 397 pointed out that "only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss".
[56] *Ibid*, 387.
[57] (1882) 7 AC 333.

Nevertheless, specific rules applicable to propositions of the principle of indemnity may sometimes vary between marine and non-marine insurance law. However, in any event the operation of the above-discussed three propositions should be consistent with the fundamental principle of indemnity, which is to put the assured back into the same position in which he would have been had the insured contingency not occurred.[58] Furthermore, both the insurer and the assured's reasonable expectations as identified above should also be honoured, since it is their reasonable expectations that determine the content of the contractual obligations,[59] which, under an insurance contract, is essentially the payment of insurance indemnity against the insured contingencies as promised.[60]

Research Objectives and Thesis Structure

This research aims to investigate the application of the indemnity principle in the insurance of goods in multimodal transport in China, through a comparative study with English insurance law. It mainly examines the object, content and aftermath of indemnity and evaluates whether or not the operation of these three propositions comply with the fundamental principle of indemnity and meet the reasonable expectations of the assured and the insurer.

In order to fulfil its research aim, this thesis shall achieve the following five research objectives:

[58] *Callaghan v Dominion Insurance Co* [1997] 2 Lloyd's Rep 541, 544.
[59] Hugh Collins, *The law of contract*, 4th edn (London: LexisNexis UK, 4th edn, 2003), p 223.
[60] Clarke (n 31 above), p 353-54.

1) To analyse whether contemporary practice can provide insurance coverage for goods in multimodal transport which meets contractual parties' reasonable expectations;
2) To identify the nature of cargo insurance in multimodal transport through an investigation into the classification of insurance contracts and the applicable insurance law;
3) To identify the object of indemnity, namely the parties having insurable interests in goods in multimodal transport, and the hardships arising from current multimodal transport practice in recognising their insurable interests;
4) To discuss the content of indemnity, namely, the sum recoverable by the assured in the event of total or partial loss of goods in multimodal transport under both valued and unvalued policies, with emphasis on the distinct issues that may arise under multimodal transport;
5) To examine the aftermath of indemnity by the operation of the insurer's right of subrogation against a liable third party and his entitlement of recoupment against the assured, to ensure that there is no unjust enrichment of the assured after having been indemnified by the insurer.

This thesis is structured into two interrelated parts. Part I analyses the nature of the insurance of goods in multimodal transport based on a review of the contemporary practices in insuring goods in multimodal transport. The analysis lays a good foundation for the subsequent discussions of specific propositions of indemnity. Part II offers a

comprehensive analysis of propositions of the indemnity principle in the context of the insurance of goods in multimodal transport in China, from the perspective of the object of indemnity, content of indemnity, and aftermath of indemnity, with necessary reference to the English insurance law.

After this introduction, Chapter 2, as the only chapter in Part I of this thesis, mainly discusses three aspects: 1) a critical evaluation of contemporary practice in insuring goods in multimodal transport in both English and Chinese markets in meeting both the insurer and assured's reasonable expectations; 2) classification of the insurance of goods in multimodal transport according to its primary risks covered; and 3) the application of law for both marine and non-marine insurance contracts, in order to pave the way for further discussions regarding operation of the three propositions of the indemnity principle in the context of multimodal transport. This chapter will achieve objectives 1 and 2 as stated above.

In order to satisfy objectives 3 to 5, Part II, in Chapters 3 to 5 respectively, examines whether the application of the three propositions in the insurance of goods in multimodal transport comply with the fundamental principle of indemnity. Chapter 3 discusses the parties entitled to be indemnified in the insurance of goods in multimodal transport. Under the indemnity principle, the assured must suffer a loss of the insured cargo in which he had an interest in order to be indemnified. Chapter 3 identifies the parties having an insurable interest in goods in multimodal transport, and addresses problems in establishing their respective insurable interests. Chapter 4 concerns the content of the indemnity principle — the measure of indemnity. The measure of indemnity is impacted by the types of loss, valuation of the insured subject-matter,

measurement of loss, and deductions applied thereto. The focus of Chapter 4 is thus to explain a four-step framework for measuring the sum recoverable under Chinese law, through a comparative analysis with English insurance law on the measurement of loss. This chapter also questions the application of the constructive total loss principle originating from marine insurance law to the insurance of goods in multimodal transport. Chapter 5 investigates the extent to which the insurer's right of subrogation against a liable third party, if any, impacts the aftermath of indemnity. There are two conventional limbs to the insurer's right; one is subrogation recovery against a liable third party, and the other is recoupment from the assured. This chapter explains the preconditions for the insurer to exercise his rights of subrogation, and investigates the legal basis for subrogation under Chinese law. Finally, it points out possible problems that can be encountered by an insurer in subrogation under the insurance of goods in multimodal transport, and proposes tentative solutions.

Research Methods

The following are the main methods employed in acquiring an in-depth understanding of the insurance of goods in multimodal transport and application thereto of the indemnity principle.

(i) Literature review and desk research:

The adopted literature review and desk research mainly involved consulting secondary sources, comprising textbooks, monographs, edited books, periodicals, industrial and organizational reports, theses, news reports and other reliable publications. This study

refers to documents in the areas of insurance law, marine insurance law, multimodal transport, freight forwarding, international carriage of goods by sea, and international carriage of goods by air, road and rail. These secondary sources facilitate the understanding and evaluation of contemporary insurance practice, and direct further research to relevant primary sources, such as legislations, legal cases and records of legislations in analysing the nature of insurance policies.[61] The diversity and flexibility of documents in the secondary sources make this approach suitable for the preliminary stage of legal research that also includes a few primary sources.[62]

A comprehensive literature review has been conducted for the three main parts of this research, these being: 1) the indemnity principle; 2) multimodal transport; and 3) cargo insurance in multimodal transport. Since there is thus far no dedicated research into the insurance of goods in multimodal transport, consultation of these secondary sources is thus adopted carefully in Part I for an exploratory discussion on the classification of insurance contracts and applicable law, and then in Part II to gain a comprehensive understanding of the indemnity principle in Chinese law. In particular, desk research is employed to conduct preliminary research into insurable interest, measure of indemnity and subrogation, as well as to identify potential problems during the application of the indemnity principle in the context of multimodal transport.

(ii) Legal case study

[61] Enid Campbell, Lee Poh-York and Joycey Tooher, *Legal research: materials and methods* (Sydney: LBC Information Services, 4th edn, 1996), p 5.
[62] Kent C Olson, *Principles of legal research* (Saint Paul: West Academic Publishing, 2nd edn, 2015), p 254.

English law belongs to the case law system, which obeys the doctrine of precedent because of *stare decisis*.[63] Under the rules of precedent, rules and principles in the precedent must be followed, if not otherwise distinguished or overruled, in similar subsequent cases. Thus, English judicial decisions are indispensable to the study of the law and practice of cargo insurance in the context of multimodal transport. For the English legal case study, this part consults reported legal cases from the database of *Westlaw* and *i-law* (Informa).

Although Chinese law does not have a rule similar to the doctrine of precedent, the Supreme People's Court is able to release guiding cases[64] for courts of the lower hierarchy to consult when hearing similar cases. Lower courts also consult the judgments of its superior courts. Furthermore, cases from courts in a lower hierarchy represent the judicial practice within a particular geographic scope and therefore may, to a certain extent, influence the practice of courts at a similar level. It is thus necessary to involve Chinese judicial decisions in this legal case study. The materials for the legal case study for this part are acquired from the database of *pkulaw*, supplemented with cases recorded from a secondary source.

The employed legal case study covers the domain of insurance law, marine insurance law and contract law. In Chapter 2, the legal case study is the main method adopted to identify the deficiencies of contemporary insurance practice and to seek for clarifications on insurance legislations. In Part II, because of the large number of judicial insurance decisions on the indemnity principle, a legal case study is employed to investigate the indemnity principle. This method is also employed in Chapter 3 to

[63] Rupert Cross and J W Harris, *Precedent in English Law* (Oxford: Clarendon Press, 4th edn, 1991), p 3-7.
[64] Available at http://www.court.gov.cn/shenpan-gengduo-77.html (visited 12 Jul 2018).

identify parties with an insurable interest in goods in multimodal transport, and illustrates the problems with being indemnified by the insurer. Chapter 4 consults a substantial number of judicial cases in order to establish rules for calculating the sum recoverable in the insurance of goods in multimodal transport, or alternatively, carriage of goods by sea, air, rail and road. A legal case study is also applied in Chapter 5 to illustrate the allocative rules for subrogation recoveries.

(iii) Comparative study

"Scientific study of law must primarily consist of comparative observation and analysis…"[65] One of the approaches, as suggested by Professor Tetley, for carrying out a comparative study of maritime law is to compare the laws of different nations.[66] In addition, a comparative study is devoted to critically analysing the internal coherence and fairness.[67]

English law, similar to its impact in other jurisdictions, also has a profound impact on Chinese marine insurance law and practice[68]. Nevertheless, Chinese law in this area has its own uniqueness, mainly attributed to its interplay with the general insurance law. Thus, the purpose of this comparative study is to gain an in-depth understanding of the indemnity principle and its internal coherence between the Chinese general and marine insurance law. The comparative study also helps to evaluate the fairness of the Chinese

[65] Hessel E Yntema, "Comparative legal research: Some remarks on looking out of the cave" (1956) 7 *Michigan Law Review* 899, 903.
[66] William Tetley and Yvon Blais (ed), *International Maritime and Admiralty Law* (Montreal: International Shipping Publications, 2002) p xv.
[67] Mark Van Hoecke (ed), *Methodologies of legal research: which kind of method for what kind of discipline*? Chapter 9 (Oxford: Hart Publishing, 2011), p 155.
[68] According to the members of the working group that drafts the Chinese Maritime Code, Chapter 12 of the Chinese Maritime Code has mainly originated from the MIA 1906 for its great impact in the global insurance market. See Si Yuzhuo (ed), *Zhonghua Renmin Gongheguo Haishangfa Wenda* (Beijing: China Communications Publishing, 1993), pp.4

law in respect of application of the three identified propositions of the indemnity principle in the context of cargo insurance in multimodal transport, from the perspective of meeting both the insurer and the assured's reasonable expectations, and of the principle of indemnity.

A comparative study is also adopted where the two countries adopt clearly distinct approaches regarding the specific application of the indemnity principle. This method is used when inquiring into the classification of insurance and the application of marine insurance law in Chapter 2, the permissible interests in Chapter 3, the valuation in Chapter 4, and the nature of subrogation in Chapter 5.

This thesis mainly investigates legislation and jurisprudence on the indemnity principle in China in comparison with the English insurance law. For Chinese law, literature used in this comparative study include pertinent legislations, Interpretations issued by the Supreme People's Court, judicial cases, and scholarly works. As to English law, the discussion will be mainly based on the Marine Insurance Act (MIA) 1906, the Insurance Act 2015, contract law, judicial cases and scholarly works.

(iv) Empirical study

An empirical study is adopted to understand contemporary industry practices to insure goods in multimodal transport, as well as various stakeholders' perceptions on typical issues arising from the application of the indemnity principle in the context of multimodal transport. This empirical study chooses the form of interview, since this

method allows the answers to be clarified and perceptions to be explored in depth.[69] The richness in responses mainly helps to reinforce our understanding of market practices.

Reponses have been collected through snowballing, which is commonly used when the respondents are experts.[70] This empirical study has conducted 8 interviews with interviewees who are at manager level or above, specialists engaged in either cargo underwriting or the logistics business with respect to both container cargo and project cargo in multimodal transport. The interviewees come from three different groups: Chinese state-owned multimodal transport operators, cargo underwriters (both international and Chinese state-owned), and a Chinese commodity importer. Informed consent was obtained from all the interviewees before conducting the interviews. Among them, five interviews were conducted via video calls and the rest were conducted in a face-to-face meeting. The average length of the 8 interviews was approximately 43 minutes.

For each interview, the questions are categorised into three parts: 1) available insurance policies to insure goods in multimodal transport for Chapter 2; 2) parties with insurable interests in goods in multimodal transport under Chapter 3; and 3) usage of valued and unvalued cargo policies for ascertaining the measure of indemnity in Chapter 4.[71] The interviewees' responses were recorded, transcribed and summarised further to support the analysis for this study. The comprehensive transcript is not attached in this thesis for

[69] Hilary Arksey and Peter Knight, *Interviews for social scientists* (London: Sage, 1999), p 33-35.
[70] Snowballing or chain sampling is a particularly useful approach for dispersed and small populations. *See* Jane Ritchie and Jane Lewis (eds), Qualitative research practice: a guide for social science students and researchers (London: Sage, 2003), p 94.
[71] See Appendix II for the interview protocol. Additional questions were asked based on the specific responses of each interviewee.

reasons of confidentiality. However, direct quotations are used to demonstrate current market practice when discussing controversial issues in Chapters 2, 3 and 4.

PART I: INSURANCE OF GOODS IN MULTIMODAL TRANSPORT: CURRENT PRACTICE AND NATURE

CHAPTER 2

INSURING GOODS IN MULTIMODAL TRANSPORT: PROBLEMS WITH CURRENT PRACTICE

This chapter analyses current common practice in insuring goods in multimodal transport in the English and Chinese insurance markets. It examines contemporary insurance contracts, relevant judicial precedents, insurance law and perceptions of the contractual parties, and questions the comprehensiveness of such insurance contracts in insuring goods in multimodal transport. This chapter also investigates the classification of the contract of insurance against loss of and damage to goods in multimodal transport, and the application of the Chinese marine insurance law through a comparative study with English law. It concludes that, whilst the classification of the insurance of goods in multimodal transport and the application of marine insurance law depend dichotomously on the employment of a sea leg in Chinese law, the Marine Insurance Act 1906 in the English law would arguably apply, as the insurance practice inclines to regard the carriage of goods by air, road or rail as "adventure analogous to marine adventure".

2.1 Introduction

Traditional cargo policies insure risks primarily in association with one transport mode. To cope with the increasing development of multimodal transport, traditional marine cargo insurance policies have been expanded to provide a "warehouse-to-warehouse"

cover. A similar "warehouse-to-warehouse" cover can also be found in insurance policies for goods transported by air, road and rail.[1] A cautious party in the multimodal transport of goods may also choose to purchase insurance separately for each transport leg, so that he is protected for the entire transit. In addition, the insurance market has developed insurance products for goods in transit. The insurance of goods in transit covers the loss of or damage to cargo sustained during transit, irrespective of the employed modes of transit.[2] Accordingly, goods in multimodal transport may be insured by: 1) a cargo policy for unimodal transport with the "warehouse-to-warehouse" cover;[3] 2) a combination of multiple policies for unimodal transport;[4] or 3) a collective policy irrespective of the employed modes of transport.[5] However, it is still unclear whether any of these can in all cases provide comprehensive coverage for goods in multimodal transport which meets the reasonable expectation of the insurer and assured.

Compared to unimodal transport, multimodal transport is a more sophisticated way of transporting goods from door to door; multimodal transport may entail greater risks that can arise from not only sea, air, rail, road, but also storage during consolidation, distribution and the switching of the means of conveyance.[6] Accordingly, the assureds

[1] Clause 5.1 of the Institute Cargo Clauses (Air) (excluding sendings by post) 1/1/82 provides the 'warehouse-to-warehouse' cover for the insurance of goods transported by air. *See* also Baris Soyer and Andrew Tettenborn (ed), *Carriage of Goods by Sea, Land and Air: Uni-modal and Multi-modal Transport in the 21st Century*, Chapter 16 (New York: Taylor and Francis, 2013), p 288, for the 'warehouse-to-warehouse' cover in rail and road transport.
[2] Lord Justice Mance, Iain Goldrein QC and Robert Merkin (eds), *Insurance Disputes*, Chapter 20 (London and Hong Kong: LLP, 2nd edn, 2003), p 587.
[3] An example in this regard is the Institute Cargo Clauses 1982 and 2009.
[4] An example is that goods in a 'sea-rail' transport are insured for the sea and rail leg respectively.
[5] According to the response to Part I (1) of the empirical study, an example is an open cargo policy for the entire transit of goods, sometimes being referred to as stock throughput. This option is preferred by high-tech companies or when the insured cargo requires multiple storage in the transit.
[6] When underwriting cargo insurance, the employment of multimodal transport affects the insurers' assessment of the risk. *See* Swiss Re, "Marine facultative excess of loss. 2009 Figure 8 Cargo rating platform", p 14, available at http://media.cgd.swissre.com/documents/pub_marine_facultative_en.pdf (visited 12 Jul 2018).

of cargo polices for multimodal transport call for a more comprehensive coverage about the scope of risks insured and the period of cover. In return, the insurers may expect a higher premium for underwriting more risks.

Depending on the nature of the event on which the sum insured becomes payable, the insurance may be classified as a marine insurance or non-marine insurance. Depending on the employed modes of transport, multimodal transport could entail a combination of perils arising from the sea, air, road and rail legs.[7] Thus, it is difficult to categorize insurance of goods in multimodal transport into either marine or non-marine insurance.

The difficulty in classifying the insurance of goods in multimodal transport leads to a further dilemma in the applicable law. There is a historic demarcation of marine and non-marine insurance law. Under Chinese law, Chapter 12 of the Maritime Code for the People's Republic of China (Chinese Maritime Code)[8] is applicable to a marine insurance contract as a special law, and the Insurance Law of the People's Republic of China (Chinese Insurance Law)[9] as general law, whereas contracts that are not marine insurance contracts should apply the Chinese Insurance Law. The Supreme People's Court (SPC) has also issued respective interpretations for issues arising from marine insurance contracts and others. In English law, the Marine Insurance Act (MIA) 1906 is the most comprehensive act to codify judicial decisions and market practices in marine insurance law. MIA 1906 was not changed for more than a hundred years until the

[7] Article 1 (1) of the United Nations Convention on International Multimodal Transport of Goods (not in force) provides that multimodal transport is the carriage of goods by at least two different modes of transport on the basis of a single multimodal transport contract.
[8] The Chinese Maritime Code was promulgated in 1992. Its Chapter 12 is designated to regulate marine insurance contracts.
[9] The Chinese Insurance Law is the general insurance legislation for matters of both personal and property insurance contracts. It was enacted in 1995 and has thus far undergone several amendments, in 2002, 2009 and 2015.

Insurance Act 2015 was published. The Insurance Act 2015 is applicable to both marine insurance contracts and contracts that are not.[10] However, the Insurance Act 2015 covers issues that are far less comprehensive comparing to MIA 1906.[11] So, for issues unchanged by the Insurance Act 2015, MIA 1906 shall continue to be applicable.

Divergence in the applicable law may result in differences between marine and non-marine insurance contracts under both Chinese and English law. One of the most noticeable differences is the measure of indemnity impacted by the application of the principle of average in under-insurance, constructive total loss, and valuation of the insured subject-matter. Meanwhile, since the insurance of goods in multimodal transport may or may not be one of marine insurance, it is arbitrary to simply apply or deny, divisibly or as a whole, the application of marine insurance law.

Given the above, this Chapter will first consider cargo policies for the conveyance of sea, air, rail and road respectively, and analyse whether or not they, individually or in a combined form, can provide insurance cover for the multimodal transport of goods that meets the assured and insurer's reasonable expectations. The analysis is further validated by the findings in the empirical study. Since marine insurance is a well-defined type of insurance, this chapter will then assess whether insurance of goods in multimodal transport can fall within the scope of "marine insurance", and the application of the marine insurance law to the insurance of goods in multimodal transport under Chinese and English insurance law.

[10] A non-consumer insurance is a contract of insurance that is not a consumer insurance contract. A consumer insurance contract is defined in the Consumer Insurance (Disclosure and Representations) Act 2012, and is a contract where the insured is an individual who enters into the contract wholly or mainly for purposes unrelated to his business.

[11] The Insurance Act 2015 is confined to sections relating to the duty of fair presentation, warranties and remedies for fraudulent claims.

2.2 Contemporary policies insuring goods in multimodal transport

In the English insurance market, the standard forms used to insure goods are mainly the Institute Cargo Clauses (ICC); and, as a matter of fact the ICC has been widely accepted in the global marine insurance market.[12] In the area of non-marine insurance, the Joint Cargo Committee, an institution consisting of leading underwriters from both Lloyd's of London and the International Underwriting Association of London companies, issued standard clauses for special cargoes in transit and air cargoes, which have also had a profound impact on the worldwide insurance market.

Chinese insurance market also rises rapidly along with the increase of the international trade activities. The ICC can be used to insure importing and exporting goods in China.[13] In addition to that, the People's Insurance Company of China (PICC), as a state-owned insurance company, is the leading cargo underwriter in China and has issued China Insurance Clauses for goods carried by different modes of transit mainly based on the ICC 1963.[14]

It is the freedom of the contracting parties to choose any applicable law. British standard cargo policies normally choose English law as the law that shall apply to the concerned

[12] UNCTAD, *Types of marine cargo insurance*, UNCTAD/INS/20, 5. Nevertheless, other insurance markets also issue their own standard cargo policy forms. For instance, in the Chinese cargo insurance market, ICC and the Chinese Insurance Clauses drafted by the People's Insurance Company of China are mainly used. *See* Guiming Liu, Jian Liang and Dongdong Cai, '*The People's Republic of China Law and Practice*' Chapter 13 in John Dunt (ed.), *International Cargo Insurance* (Informa, London, 2012), 450; In the Japanese market, the Tokio Marine & Fire Insurance Co Ltd underwrites international marine cargo business on English policy forms subject to the Institute Cargo Clauses. See John Dunt, '*The history of marine cargo insurance'*, Chapter 1 in John Dunt (ed.), *International Cargo Insurance* (Informa, London, 2012), 5.

[13] Dunt, *ibid*, p 450.

[14] *Ibid*; ICC 1963 has three sets of clauses: ICC (All risks), ICC (W.A) and ICC (F.P.A), all with a 'warehouse-to-warehouse' cover.

insurance policy.[15] By contrast, there is no such express law and practice clause in the standard cargo policies designed by PICC. As it is in the field of contracts, the closest connection doctrine shall apply under Chinese law.[16] SPC has promulgated 2007 Rules to concretize the doctrine of closest connection; in which Article 5 (2) (h) specifies that insurance contracts should be governed by the law of the insurer's domicile. Therefore, in the case of any dispute arising from the PICC insurance policy, "the law of the insurer's domicile" that means Chinese law may apply.

2.2.1 Policy for unimodal transport with "warehouse-to-warehouse" cover

(i) Marine

The ancient form of marine policy dates back to at least the sixteenth century,[17] but it was not until the introduction of ICC 1912 that marine insurance policies began to also insure inland risks in addition to maritime risks. The 1982 and 2009 versions of the ICC are currently used in insuring marine cargo. ICC 1982 and 2009 are labelled as A, B and C for their different scope of insurance coverage. ICC (A) has the widest cover, while ICC (B) and (C) cover fewer types of risk.

One of the main differences between ICC 1982 and ICC 2009 is their duration of covers. ICC 1982 insures the period of time from when the insured subject-matter leaves the warehouse to the time of delivery at the final warehouse;[18] whereas ICC 2009 extends the cover further, from the time when the insured subject-matter is first moved in the

[15] Clause 19 of ICC 1982 and ICC 2009.
[16] Yu Shuhong, Xiao Yongping and Wang Baoshi, "The Closet Connection Doctrine in the Conflict of Laws in China" (2009) 2 *Chinese Journal of International Law* 423.
[17] *Middows Ltd v Robertson and Other Cases* [1940] 68 CA 45, p 63.
[18] For instance, Clause 8.1 of the ICC (A) 1982.

warehouse to the completion of unloading at the destination.[19] In either version, the duration of cover is provided in the transit clause, and ICC (A), (B) and (C) adopt the identical transit clause. The "warehouse-to-warehouse" cover enables the ICC to insure the loss of or damage to goods in both the course of sea carriage and the associated inland transit.

Chinese insurance market also uses the ICC.[20] Meanwhile, the China Insurance Clauses are more and more commonly used. The main marine cargo policies in China Insurance Clauses are Ocean Marine Cargo Clauses (OMCC) 1981 and 2009.[21] The main risks of OMCC policies include FPA (Free from Particular Average), WA (With Average) and All Risks.[22] The All Risks of OMCC is similar to ICC (A); but they are not identical. Similar to ICC, the risks covered in OMCC are mainly maritime risks, with associated inland risks.[23]

(ii) Air

The ICC provides another set of clauses to insure air cargoes. ICC (Air) (excluding sendings by Post) insures against the loss of or damage to air cargo, with a similar scope

[19] For instance, Clause 8.1 of the ICC (A) 2009 provides that "this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at place of storage for the purpose of immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit… and terminates on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance..." Clause 6.1 of ICC (Air) 2009 is almost identical with Clause 8 of ICC 2009.
[20] Dunt (n 12 above).
[21] Wang Pengnan, *Haishang Baoxian Fetongfa Xianglun (Research on the contract of marine insurance)* (Dalian: Dalian haishi daxue chubanshe, 3rd edn, 2010), pp.153; Fu Tingzhong, *Baoxianfa lun (Research on Insurance Law)* (Beijing: Tsing Hua University Press, 2011), pp. 182. Chinese commercial law tends to have different sets of rules for foreign-related issues and domestic ones. Domestic Waterway and Land Cargo Transportation Insurance Clauses is designed for the domestic marine cargo insurance. Considering the usual cross-border nature of multimodal transport, domestic marine cargo insurance is not the focus of this chapter. This chapter will concentrate on the OMCC for foreign-related cargo insurance.
[22] Please refer to the Appendix VII for a sample of OMCC policies.
[23] Wang (n 21 above).

of coverage to that of ICC (A). The only difference in this regard is that ICC (Air) (excluding sendings by Post) excludes loss or damage caused by unfitness of the aircraft or conveyance to fit in with the air transport practice, whereas ICC (A) excludes unseaworthiness of the vessel.

ICC (Air) (excluding sendings by Post) was also published in 1982 and later in 2009. These two versions of policy form adopt transit clauses similar to ICC 1982 and 2009 respectively. Their transit clauses are modified in accordance with features of air transport practice.[24] The "warehouse-to-warehouse" cover enables ICC (Air) (excluding sendings by Post) to insure goods transited in modes not limited to air carriage.

In Chinese insurance market, the PICC offers Air Transportation Cargo Insurance Clauses to insure commercial air cargoes. Both as important components of China Insurance Clauses, Air Transportation Cargo Insurance Clauses are very similar to OMCC.

(iii) Rail and Road

The Joint Cargo Committee does not have designated insurance policy forms for goods in rail or road transit. However, it is necessary to mention that some other insurance markets, such as it in China, offer dedicated policies for goods in transit by rail, road, or a combination thereof, for the loss of or damage to goods occurring during inland transport.

In the Chinese insurance market, the PICC provides Overland Transportation Risk and Overland Transportation All Risks to cover the loss of or damage to goods carried by

[24] *See* n 26 for the differences between the transit clauses in ICC (Air) (excluding sendings by Post) and the ICC.

train and truck. Insurance policies for carriage by road and rail (inland transit) are also on a "warehouse-to-warehouse" cover basis, using a transit clause similar to ICC 1982,[25] which makes them eligible to insure risks arising from more than one mode of transport.

(iv) Limitations to the insurance of goods in multimodal transport

Although cargo policies for the conveyance of sea, air, rail and road can provide protection for goods transited in more than one mode through their "warehouse-to-warehouse" cover, they are sometimes insufficient to cover the whole multimodal transport. The key lies in their duration of cover as contemplated in the transit clause. The construction of the transit clause was thoroughly discussed in the context of the ICC. By adopting essentially the same transit clause as the ICC, other cargo policies have inherited the same drawbacks in insuring goods in multimodal transport.[26] Since the Chinese Insurance Clauses are also based on ICC, this chapter will use the transit clause of the ICC as an example to illustrate the difficulties in using policies designed mainly for unimodal transport to insure goods in multimodal transport in both English and Chinese insurance market.

A standard transit clause is composed of three parts, namely: 1) the attachment of risks; 2) ordinary course of transit; and 3) termination of risks.

The risks need to attach so that any loss of or damage to the goods occurring thereafter is eligible for indemnification. In ICC 2009, the risks attach earlier than in ICC 1982.

[25] Soyer and Tettenborn (n 1 above), p 288.
[26] Slight differences remain. In the transit clause of ICC (Air) (excluding sendings by Post), "premise" is also regarded as one of the places of storage. Also, the cover will terminate on the expiry of 30 days after unloading the insured goods from the aircraft at the final place of discharge. This 30-day limit is a much shorter period in comparison to the 60-day limit under ICC 1982 and ICC 2009, considering the fast pace of air transport.

According to Clause 8.1 of ICC 1982, the insurance "attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit." It therefore leaves the risks of the assured uncovered in circumstances where the loss occurs at the warehouse.[27] However, as far as the cargo interest is concerned, the transit risks begin when goods are in the custody of the carrier.[28] There are a number of cargo operations, such as consolidation and stowage, which sometimes take place at the warehouse.[29] In multimodal transport, the shipped goods are not necessarily in full container loads (FCL). In case of a less than full container load (LCL), the freight forwarder or multimodal transport operator (MTO) will group cargoes from a number of shippers to make up a full container load. During such consolidation, if a fire occurs that causes damage to the cargo, the damage is not covered, since the fire happened at the warehouse. Whereas in ICC 2009, the insurance attaches from the time that the subject-matter insured is first moved in the warehouse or at the place of storage for the purpose of immediate loading into the carrying vehicle for the commencement of transit.[30] Therefore, unlike ICC 1982, transit risks within the warehouse are covered under ICC 2009. However, the cover of ICC 2009 cannot be further extended to the pre-transit period when goods are temporarily stored in the holding area within a warehouse prior to transit on vehicles.[31] Also, an assured who intends to have the goods insured during the prior inland transport may feel prejudiced

[27] *Re Traders and General Insurance Association, Limited* [1924] 2 Ch. 187; For a detailed discussion on whether the transit clause in ICC (A) is sufficient to cover risks in multimodal transport, please *see* Soyer and Tettenborn (n 1 above), p 288.
[28] Norman Palmer, *Palmer on Bailment* (London: Sweet & Maxwell, 3rd edn, 2009), p 927.
[29] These cargo operations may include loading, consolidation and stowage, and temporary storage.
[30] Clause 8.1 of ICC 2009.
[31] Richards Hogg Lindley, "Institute Cargo Clauses 2009: a comparison of the 1982 and 2009 clauses with additional commentary", available at https://www.ctplc.com/media/72243/Institute-Cargo-Clauses-2009.pdf (visited 12 Jul 2018).

by the insurer because the duration of cover provided in the standard transit clause does not include the inland transport.[32]

The most effective way to extend the duration of cover to the pre-transit period, and thus avoid potential disputes over the cover of inland transport, would be to modify the attachment of risks in the transit clause. Also, when determining the time at which the risks are attached, the standard transit clause should be construed along with other clauses in the insurance policy. In *Eurodale Manufacturing Limited v Ecclesiastical Insurance Office Plc*, the cargo insurance policy incorporated a "voyages clause", which enables the policy to cover risks starting from the time when the goods are in the custody of the seller and the assured or his agent in the warehouse.[33] Similarly, in *Wunsche Handelsgesellschaft International mbH v Tai Ping Insurance Co Ltd*, the policy incorporated a clause stating "including from ex-factory in the People's Republic of China to warehouse in Hamburg" in addition to the "warehouse-to-warehouse" clause. Lord Justice Atkin pointed out that the choice of a marine policy is no indication that it must have been intended that all aspects prior to some short land transportation were excluded.[34] It was held that the righteous construction on the duration of cover includes the period when goods were transited from the inland factory to the final warehouse.[35]

After the attachment of risks, the cover of both ICC 1982 and 2009 continues during "the ordinary course of transit".[36] Restricting the cover to perils during the ordinary course of transit accordingly allows the insurer to make a fair assessment of risks and

[32] *Wunsche Handelsgesellschaft International mbH v Tai Ping Insurance Co Ltd* [1998] 2 Lloyd's Rep 8.
[33] [2003] EWCA Civ 203.
[34] *Wunsche* (n 32 above), p 14; *see* for example Lord Justice Atkin at p.248 supported in the House of Lords by Lord Buckmaster at p.77.
[35] *Ibid*.
[36] Clause 8.1 of ICC (A) 1982 and ICC (A) 2009.

premiums. In *SCA (Freight) Ltd v Gibson*,[37] the court laid down the test of "normal course of transit" as being the reasonable furtherance of the carriage of the goods to the ultimate destination. The test permits a certain degree of deviation and disruption. The cover continues during "delay beyond the control of the assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment."[38] It is a question of degree as to what is or is not included in reasonable furtherance of the carriage of goods.[39] Also, "ordinary course of transit" does not suggest that the goods should be continuously in motion. Cargo insurance policies also cover goods against loss or damage "whilst temporarily housed during the course of transit".[40] The temporary storage is again a question of degree. In *Eurodale Manufacturing Limited v Ecclesiastical Insurance Office Plc*,[41] cargo was stolen from the warehouse whilst it was on hold prior to its onward transportation. This would normally be for a few hours, but in fact, due to a bank holiday weekend, it was held there for three days. The court held that the loss should also be covered under the "transit insurance". However, the insurance policy would not cover such loss in a case where the assured's goods remained on the assured's property long after delivery under the retention of title term.[42]

The termination of cover is also different under ICC 1982 and ICC 2009. In ICC 1982, insurance will be terminated on the occurrence of one of the following events,

[37] [1974] 2 Lloyd's Rep 533.
[38] Clause 8.3 of ICC (A) 1982.
[39] Soyer and Tettenborn (n 1 above), p 291.
[40] *Crows Transport Ltd v Phoenix Assurance Co Ltd* [1965] 1 WLR 383.
[41] [2003] EWCA Civ 203.
[42] *Ibid*, 449.

whichever occurs first: (1) delivery to the named warehouse or place of storage at the destination, (2) delivery to another designated warehouse or place of storage for storage out of the ordinary course of transit or for allocation or distribution, and (3) the expiry of 60 days after completion of discharge of the insured goods from the oversea vessel at the port of discharge. There have been disputes as to the completion of delivery for the purpose of terminating the risks under ICC 1982.[43] ICC 2009 avoids those disputes by specifying in Clauses 8.1.1 and 8.1.2 that the cover is terminated on the completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage designated in the insurance contract or elected by the assured or their employees. Clause 8.1.3 of ICC 2009 further provides a new condition whereby the cover should terminate if the goods are in the carrying vehicle or other conveyance or container for storage other than in the ordinary course of transit. In addition, both ICC 1982 and 2009 contain a long-stop provision to provide successive insurance coverage for goods separately insured for each transport leg by terminating the insurance "on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge", before the goods have reached the final warehouse named or designated.[44] When goods are insured separately for different legs of the transport, there may be a gap at the transhipment place; long-stop provision can provide a 60-day successive cover for the goods while they are being kept at the transhipment area, after being discharged from the oversea vessel.

[43] *John Martin of London Ltd v Russell* [1906] 1 Lloyd's Rep 554; *Bayview Motors Ltd v Mitsui Fire & Marine Insurance Co Ltd* [2002] EWCA Civ 1605.
[44] Clause 8.1.3 of ICC 1982 and Clause 8.1.4 of ICC 2009.

The problem relating to the termination of risks in the context of multimodal transport is the expression "final warehouse or place of storage". The expression "final warehouse" implies that there may be a warehouse which is not final. According to *John Martin of London Ltd v Russell*, a transit shed is not a final warehouse, so that putting goods in a transit shed did not terminate the insurance.[45] The transit shed is a shed in which goods are temporarily placed pending some further movement to some other final place, as the word "transit" itself implies its transitory character.[46] The meaning of final warehouse is subject to the practice and customs at the place of delivery for the type of goods in transit. However, in multimodal transport, it is unclear whether final warehouse refers to the warehouse at the end of the sea carriage or that at the end of the entire multimodal transit. It is therefore recommended to clarify the meaning of "final warehouse or place of storage" in the transit clause of the insurance policy.

It is difficult for "warehouse-to-warehouse" cover to undertake risks during both the pre-transit period and all associated inland transport without other clauses to support such. In the empirical study, six interviewees have given an effective score for the comprehensiveness of the coverage provided by cargo policies for unimodal transport (Option 1). The result shows that the perceived level of comprehensiveness of Option 1 varies largely from "not very comprehensive" to "extremely comprehensive".[47] This is partly due to the different risks that are concerned by the interviewees. For example, one interviewee who has rated Option 1 as "extremely comprehensive" is a grain importer in China whose cargoes are usually on a routine journey with short overland transit and

[45] [1906] 1 Lloyd's Rep 554.
[46] *Ibid.*
[47] The average score of the level of comprehensiveness of option 1 is 3.67 (between comprehensive and very comprehensive). But there is a high variance in the results, with a Standard Deviation at 1.21.

period of storage. The other interviewee who has rated option 1 as "not very comprehensive" because the majority of their business concerns multimodal transport for various types of cargos located in different places. Cargo policies mainly for unimodal transport are not always satisfactory in meeting the expectations of the assured for a comprehensive coverage especially in the context of multimodal transport. Supplementary clauses or a tailor-made transit clause is one option for the assured to insure goods in multimodal transport,[48] although this comes with a price.

Nevertheless, it would be inconvenient for the assured to have to take out separate policies to insure goods in each transport leg (Option 2). For instance, a consignment of frozen meat from Uruguay to Chengdu, China can be carried by sea from Uruguay to Ningbo, China, and then by rail from Ningbo to Chengdu.[49] This consignment can be insured by two insurance policies for the sea leg from Uruguay to Ningbo, and the rail leg from Ningbo to Chengdu.

The empirical study shows that the coverage of Option 2 is rated as nearly very comprehensive.[50] But the containerized transport undermined the feasibility of this insurance arrangement. There would exist gaps in the insurance cover, which could cause disputes, if arises, as to when and where risk attaches under each policy.[51] Under containerized multimodal transport, it is practically impossible to have goods inspected at the end of each transport leg. Thus, in the event of loss, it would be difficult to

[48] *Eurodale Manufacturing Limited v Ecclesiastical Insurance Office Plc*, [2003] EWCA Civ 203; *Wunsche* n 32 above).
[49] Available at http://www.sse.net.cn/cninfo/HotInfo/201703/t20170321_1287067.jsp (visited 12 Jul 2018).
[50] The data analysis shows that average level of comprehensiveness of Option 2 is 3.75 with a Standard Deviation at 0.50. These results come from 4 interviewees who have given effective rating for option 2.
[51] n 2 above, p 591.

determine whether or not the loss is attributed to the insured perils of a particular insurance policy, and whether or not the loss is within the duration of a particular insurance policy. This would result in hardship in any subsequent insurance claim.

2.2.2 Insurance of goods in transit

Given the incomprehensiveness of the duration and risks covered under cargo insurance for unimodal transport, and the difficulty in claiming against the insurer when insuring each transport leg separately, the insurance market needs a type of insurance that covers the loss of or damage to goods at any stage of transit, including during transit by sea, air, rail, road and any combination thereof (Option 3). The insurance market provides bespoke insurance products covering loss of or damage to goods in transit, and since insurance for goods in transit does not specify the employed transit mode, it can successfully insure goods in multimodal transport. For instance, in Belgium, the Cargo Insurance Policy of Antwerp 2004 insures goods during transport by sea or inland waterways, by air, by transit on land, and in intermediate storage.[52] In Chinese insurance market, the PICC also provides policies against the risks arising from different transport modes together.[53]

The terms of the insurance policy could be a mixture of bespoke clauses catering for the assured's needs and standard clauses of policies used mainly for unimodal transport. It is usually in the form of an open cover and is extended to cover temporary storage during

[52] There are three insurance conditions of the Cargo Insurance Policy of Antwerp (dd 20.04.2004, PE 100): Free of Particular Average, Full Conditions of Antwerp and All Risks. Transit risks during the transport of sea, inland water, air and land are covered according to Article 6.2, 6.5 of the Free of Particular Average. More transit risks are covered under the Full Conditions of Antwerp and All Risks.

[53] Li Yuliang, Chi Juan (ed.), *Guoji huowu yunshu yu baoxian* (*International cargo transport and insurance*) (Beijing: Tsing Hua University, 2005), pp. 185. Results of the empirical study also support this statement.

the transit.[54] The typical advantages noted from the interviewees of the empirical study include:

i) Commercial convenience: Insurance of goods in transit avoids the insurer and the assured to negotiating the policy terms and premiums each shipment. This would largely save the transaction costs when the assured's business involves regular transit of cargo.

ii) Coverage against risks arising from cargo allocation and distribution: The primary differences with insurance of goods in transit and unimodal cargo policies is that the former does not have limitations as to the time period in storage, whereas in the latter, the coverage of the policy can be terminated beyond 60 days of storage during transit.[55] Thus, insurance of goods in transit is more suitable for the assureds whose cargo involves multiple storage or distribution during the transit.

Six interviewees participating the empirical study all have rated this option as "very comprehensive". However, it has also been clarified that the comprehensiveness of the traditional cargo policies for unimodal transport depends on the factual matrix, especially the match between coverage provided and risks expected. When rating the comprehensiveness of the insurance coverage, two interviewees have emphasised that the rating depends on the risks which the assured expected to insure.[56]

[54] Responses to question Part I (1) of the empirical study.
[55] See e.g. Clause 8.1.3 of ICC (A) 1982.
[56] Interview 4 stated that "it depends on the (assured's) situation. If it is a fairly simple transit risk, with a little bit temporary storage in it, then perhaps a cargo policy with usual extensions that you would have on that cargo policy will equally rate a five (extremely comprehensive). But if it is a lot of storage, a lot of internal transit, it would rate a one (not comprehensive at all) perhaps because it would not be adequate to

The assured and the insurer have the freedom to incorporate policy forms as they see fit. However, attention should be paid to maintaining consistency between the incorporated clauses and the bespoke clauses.[57] Moreover, a more comprehensive insurance solution can be reflected in a higher premium given the trade-off between these two. [58] The insurer's expectation of receiving the premium is also honored as the price to pay for the assured's expectation of coverage.

2.3 Classification of insurance for goods in multimodal transport

Insurance can be classified according to the nature of the event on which the sum insured becomes payable.[59] According to this classification, marine insurance is one type of insurance in which the sum insured becomes payable on the happening of marine perils, whereas non-marine insurance is insurance where the sum insured is payable upon the happening of non-marine perils. Since insurance for multimodal transport is to cover against perils of the sea, inland water, air, rail and road, it is interesting to now discuss whether the insurance of goods in a multimodal transport of goods context can be considered as "marine insurance".

2.3.1 Marine insurance as defined: a comparative study

cover the risks that they (the assureds) have". Similarly, interview 8 also expressed that "(the rating) depends on how the insurance policy is designed, whether it can meet the need of our project."

[57] *Eurodale* (n 48 above).

[58] Baris Soyer and Andrew Tettenborn (n 1 above) (ed), p 307. However, a higher premium is not necessarily charged for a more comprehensive cover. As one interviewee of the empirical study stated that "it is difficult to do that (charge a higher premium for a more comprehensive cover) because of the weak bargaining power of the insurer given the competition in the underwriting market".

[59] Edward Richard Hardy Ivamy, *General Principles of Insurance Law* (London: Butterworths, 6th edn, 1993), p 7.

Marine insurance is a relatively well-defined and explained type of insurance. The marine insurance contract under the Chapter 12 of the Chinese Maritime Code is defined as "a contract whereby the insurer, undertakes, as agreed, to indemnify the loss to the subject-matter insured and the liability of the insured caused by perils covered by the insurance against the payment of an insurance premium by the insured".[60] This definition emphasises on the perils covered. The covered perils should be "any maritime perils", as well as "perils occurring in inland rivers or on land which is related to a maritime adventure".[61] However, the core of this definition - "maritime perils" and perils "related to a maritime adventure" is not sufficiently illustrated, leaving the definition of marine insurance unclear. Since Chapter 12 of the Chinese Maritime Code is influenced the English insurance law,[62] which adopts a similar approach in defining the marine insurance contract, a comparative study with the English law can shed some light on the proper understanding of marine insurance contract in Chinese law.

The most frequently quoted definition of marine insurance in English insurance law can be found in section 1 of the MIA 1906.

> "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in a manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

[60] Article 216 of the Chinese Maritime Code.
[61] Article 216 of the Chinese Maritime Code.
[62] Yang Jingyu, "A note on the draft paper of the Maritime Code of the People's Republic of China, delivered at the 26th meeting of the 7th Standing Committee of the National People's Congress" on 23 June 1992 by the Secretary of the State Council Legislative Affairs Office of the State Council, available at http://www.npc.gov.cn/wxzl/gongbao/1992-06/23/content_1479244.htm (visited 17 Dec 2018), and Si Yuzhuo (ed), *Zhonghua Renmin Gongheguo Haishangfa Wenda* (Beijing: China Communications Publishing, 1993), pp.4.

This definition refers to "marine adventure". Section 3 (2) amplifies the meaning of "marine adventure" through three kinds of subject of a contract of marine insurance. One that could concern the insurance of goods in multimodal transport is in section 3 (2) (a), that there is a marine adventure where any goods or other movables are exposed to maritime perils.[63] Section 3 also defines "maritime perils" as follows:

> " 'Maritime perils' means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy."

The listed perils are not exclusive, since, apart from those listed, maritime perils mean the perils "consequent on, or incidental to, the navigation of the sea". [64] As Mr Justice Mustill held in The *Captain Panagos DP*,[65] the test to determine if a policy is a contract of marine insurance is not whether the policy looks like a traditional marine insurance, nor whether the cover resembles the listed perils at the end of section 3, but rather, whether the perils insured under that policy are, at least in the main, "consequent on or incidental to the navigation of the sea". Perils "consequent on or incidental to the navigation of the sea" are perils which arise because a sea voyage has been undertaken. This phrase is wider than the perils of the sea. As Mr. Justice Mustill explained in his judgment, the bursting of a ship's boiler is not a peril of the sea. Yet "the risk of such an

[63] According to Section 3 (2), other subjects of a contract of marine insurance could be the earning or acquisition of any freight or pecuniary benefit endangered by the exposure of insurable property to maritime perils and liability to a third party by reason of maritime perils.
[64] *Continental Illinois National Bank & Trust Co of Chicago v Bathurst (The Captain Panagos DP)* [1985] 1 Lloyd's Rep 625, 631.
[65] *Ibid*.

event taking place while the ship is on passage can properly be characterized as 'incidental to the navigation of the sea'". If the perils insured under the policy are, at least in the main, "consequent on or incidental to the navigation of the sea", the policy, despite its forms, serves in an albeit unorthodox way to insure a marine adventure; and that, accordingly, it is a contract of marine insurance within the meaning of section 1 of MIA 1906.[66]

At the same time, section 2 (1) of MIA 1906 extends the scope of marine insurance. Section 2 (1) provides that "[a] contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage." Section 2 (1) opens another door for insurance contracts that have not originally met the definition in section 1 to be recognized as one of a marine insurance contract. There is more discussion below on this topic.

2.3.2 Insurance of goods in multimodal transport

Multimodal transport is a combination of at least two of the following modes of transport: sea, inland water, rail, road and air. Depending on the modes involved, multimodal transport can be with or without a sea leg. The former type of multimodal transport is commonly referred to as "maritime plus".[67]

(i) Multimodal transport with a sea leg

[66] *Ibid*.
[67] The term "maritime plus" is used by the Working Group III of UNCITRAL for the drafting of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, also known as the "Rotterdam Rules", referring to the carriage of goods wholly or partly by sea. See A/CN.9/WG/III/WP.29, p 5.

Although the marine insurance in Chinese law includes insurance against both marine risks and the mixed sea and land risks, there is no further explanation on "maritime perils" in Chinese Maritime Code or judicial practice. Also, it is unclear whether there is any requirement on the substantial risks covered by the insurance against mixed sea and land risks. Pursuant to Article 216 of the Chinese Maritime Code, a contract of insurance of goods carried by "maritime plus" transport is a marine insurance contract since the perils covered in such insurance contract are "perils occurring in inland rivers or on land which is related to a maritime adventure". Thus, classification of insurance of goods in multimodal transport is simply dependent on the employment of a sea leg in China.

In English law, however, there are two approaches to determine whether the contract of insurance covering loss of or damage to goods arising from a sea voyage and other modes of carriage is a marine insurance contract. Apart from the requirements provided in the definition in MIA 1906, the English common law furnishes with detailed guidance on the classification of the insurance of goods in multimodal transport.

A contract of insurance of goods under "maritime plus" falls within the definition of a marine insurance contract under section 1 of MIA 1906 provided that the insured goods are, at least in the main, exposed to maritime perils. The test adopted in The *Captain Panagos DP*,[68] as discussed above, includes the phrase "in the main", which suggests that the classification of the policy is largely a question of degree. Yet the problem remains as to how to decide the "degree", especially in the context of multimodal transport, where the adventure may consist partly of a journey by land or air and partly

[68] *Continental* (n 64 above).

of one by sea. It was suggested that the matter of degree depends on the primary coverage conferred by the policy.[69] This issue was addressed in the following two cases. In *Leon v Casey*,[70] goods were insured under a policy with a "warehouse-to-warehouse" cover for goods transited from Cairo to Alexandria by lorry and subsequently to Jaffa by ship. The court held that this policy is substantially one of marine insurance. The test applied in deciding whether the nature of insurance for a voyage partly by land or air and partly by sea is a marine insurance does not depend on the circumstances in which the loss occurred, whether on sea or on land, but on whether the contract is substantially a contract relating to a marine adventure and that this is a question of fact.[71] In another case, *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Ins (Australia) Ltd*,[72] the court ruled that the policy was not a marine policy because the significant part of the carriage insured was not sea carriage. In this case, the goods were for the transit risks – by road, rail, sea, air parcel, post, from places in Australia to places in Australia using many means of conveyance. Without any evidence presented to illustrate the importance of the transit risk as involved the carriage of goods by sea in the context of the whole policy, the court held: "[a]n examination of the terms of the policy indicates that it is but one small part of the one section of the cover afforded. It cannot be said, therefore, that the policy, viewed in its entirety, is one which indemnified the assured against losses which are substantially incident to marine adventure".[73]

[69] Robert Merkin and Raoul Colinvaux, *Colinvaux and Merkin's insurance contract law* (London: Sweet & Maxwell, 2002), p 10144.
[70] [1932] CA 576
[71] [1932] 2 KB 576 (CA).
[72] (1986) 160 CLR 226.
[73] *Ibid*, 243.

Even if the insured goods in "maritime-plus" are not exposed to risks substantially incidental to marine adventure, section 2 (1) of MIA 1906 would still recognize such insurance contract as being one of marine insurance. Section 2 (1) dropped the requirement on the nature of substantial risks covered in the insurance contract and thus covers risks arising from "maritime plus". The purpose of section 2 (1) in extending the scope of marine insurance as defined in section 1 is to allow insurance contracts that do not fall within the definition in section 1 to be recognized in section 2 (1). Unlike marine insurance contracts under section 1, marine insurance contracts under section 2 (1) of MIA 1906 do not have to substantially cover perils consequent on or incidental to the navigation of the sea. Without requirements as to the primary coverage of the policy, it would suffice if the insured perils are a mixture of sea and land risks. The "warehouse-to-warehouse" cover is an example of the express term to extend the coverage from the sea voyage to inland voyages.[74] Thus, under section 2 (1), an insurance contract with a "warehouse-to-warehouse" cover for goods carried by "maritime plus" transport would be a contract of marine insurance.

(ii) Multimodal transport without a sea leg

Under Chinese law, insurance covering risks arising from the carriage of goods by air, road and rail is not related to a maritime adventure and is not a marine insurance as defined in Article 216 of the Chinese Maritime Code.

In English law, such insurance is not a marine insurance neither, as defined in MIA 1906. On the one hand, it is not a marine insurance contract under section 1 of MIA

[74] The 'warehouse-to-warehouse' cover insures the risks of the inland voyages, namely the transit from the warehouse at the place of origin to the vessel and the transit from the vessel to the warehouse at the place of destination.

1906, because the insured goods conveyed by road, rail and air, are not exposed to perils consequent on or incidental to the navigation of the sea. On the other hand, such insurance does not fall under the wider scope of marine insurance in section 2 (1) of MIA 1906, because there is no sea leg involved, so the insurance is not against "losses on inland waters or any land risk which may be incidental to any sea voyage".

One further issue may arise that considers whether the losses on inland waters have to be "incidental to any sea voyage" so as to be a contract of marine insurance under section 2 (1), or whether losses purely on inland waters could be one of a contract of marine insurance.[75]

An attempt was made to address this issue in the Australian case of *Gibbs v Mercantile Mutual Ins (Australia) Ltd*.[76] In this case, the assured was insured against a third party's liability arising from negligence in the navigation of his craft at the Swan River. The court needed to decide whether the insurance is one of marine insurance under the Australian Marine Insurance Act 1909, an Act which is essentially the same as MIA 1906 in the English law. The court upheld that the area of the Swan River is an estuary, and thus falls within the definition of the sea within the ebb and flow of the tide, rather than being inland waters. Thus, liabilities arising from the negligent operation of the craft at the Swan River are actually risks incident to marine adventure. This approach unintentionally bypassed the issue of whether insurance against losses on inland waters

[75] Francis D Rose, *Marine Insurance: Law and Practice* (London: Informa, 2013), p 8 that: "[t]he precise application of the Act (MIA 1906) to losses on inland waters is also unclear. One possible construction is that a marine insurance contract can be extended to losses on inland waters…which may be incidental to any sea voyage….Alternatively, the contract could apply to any (insured) losses occurring on inland waters even though not 'incidental to any sea voyage."

[76] [2003] HCA 39; [2003] 199 ALR 497. For the detailed discussion of this case, please also *see* Kate Lewins, "Drawing a line in the sand (or the seabed) – just where is the boundary between marine insurance and general insurance? The Australian High Court decides" (2004) Mar *Journal of Business Law* 262.

have to be incidental to any sea voyage. Nevertheless, the court also concluded that negligent operation of a vessel causing injury to the assured being towed behind the vessel is a peril consequent on or incidental to the navigation of the sea, regardless of where the injury happened.[77] According to the court, the risk of negligent operation of a vessel is maritime in nature — even if the loss happened in inland waters, the insured perils are maritime perils. Moreover, the case provides that insurance against risks on inland waters that are incidental to a sea voyage falls within the scope of section 7 of the Australian Marine Insurance Act 1909,[78] the equivalent of section 1 of MIA 1906.[79] As section 1 of MIA 1906 is identical with section 7 of the Australian Marine Insurance Act 1909, a similar conclusion can be reached according to English law. Since the losses insured under section 2 (1) of MIA 1906 shall be different from those under section 1 of MIA 1906, the losses on inland waters under section 2 (1) of MIA 1906 shall include losses that are not incident to marine adventure. However, there has not been any reported case concerning the insurance of goods transported partly by inland waters and partly by air, road or rail. Thus, it is still unclear as to whether a contract of insurance of goods transported partly by inland waters and partly by air, road or rail is a contract of marine insurance or not.

2.4 The Application of the marine insurance law

[77] *Ibid.*
[78] Section 7 of the Australian Marine Insurance Act 1909 provides that "a contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure".
[79] [2003] HCA 39; [2003] 199 ALR 497, 199.

China is a civil law country. The primary legal sources are from legislation. In China, there are legislations for marine insurance and general insurance contracts. Chinese Insurance Law 2015 is a general law, which applies to all insurance contacts. Chapter 12 of Chinese Maritime Code is the special law designated to marine insurance contracts. Where any conflicts between the two laws, Chapter 12 of Chinese Maritime Code, as the special law, prevails.[80]

Clearly, Chapter 12 of the Chinese Maritime Code will apply as the special law to a contract of marine insurance. As discussed above, a contract insuring goods in a "maritime plus" transport is a contract of marine insurance under Article 216 of the Chinese Maritime Code. Hence, the set of Chinese marine insurance law including Chapter 12 of the Chinese Maritime Code, SPC interpretations for issues arising from maritime disputes, and the Special Maritime Procedure Law of the People's Republic of China (the Chinese Maritime Procedure Law) shall be applicable. A contract of insurance of goods conveyed by road, rail and air is not a marine insurance contract as provided under the Chinese Maritime Code and it shall be governed by the general insurance law in China.

In English law, similarly, a contract insuring goods in a "maritime plus" transport is a contract of marine insurance either under section 1 or section 2 (1) of MIA 1906, and MIA 1906 shall be applicable. However, the notable difference between the Chinese and English law regarding the application of marine insurance law is that the MIA 1906 could be applicable to a contract of insurance of goods in multimodal transport without a sea leg. In English law, even though not being a contract of marine insurance, it is

[80] Article 182 of Chinese Insurance Law 2015.

arguable that MIA 1906 is applicable according to section 2 (2) MIA 1906, which provides that

"[w]here a ship in course of building, or the launch of a ship, or any adventure analogous to a marine adventure, is covered by a policy in the form of a marine policy, the provisions of this Act, in so far as applicable, shall apply thereto; but, except as by this section provided, nothing in this Act shall alter or affect any rule of law applicable to any contract of insurance other than a contract of marine insurance as by this Act defined".

The wording "in so far as applicable" in section 2 (2) of MIA 1906 limits the full application of MIA 1906 to non-marine insurance contracts.[81] There are certain principles in marine insurance, such as General Average and Both to Blame Collision, which clearly do not apply to insurance of goods in other modes of transport. It is unclear how far MIA 1906, if applicable, could be applied to the insurance of goods in a journey without a sea leg.

That MIA 1906 is applicable to a certain insurance contract does not mean that such insurance contract is by nature a marine insurance contract. Rather, once the conditions in section 2 (2) of MIA 1906 are met, MIA 1906 can apply. Section 2 (2) of MIA 1906 have two conditions: first, the covered adventure is analogous to a marine adventure; and second, the policy must be in the form of a marine policy.

[81] But it is sometimes problematic to decide to what extent MIA 1906 is applicable to an insurance contract under section 2 (2). In *State of Netherland v Youell* [1998] 1 Lloyd's Rep 236, Phillip L J suggested that the sue and labour provisions in MIA 1906 should not be extended to a shipbuilding insurance contract.

The insured adventure should be an "adventure analogous to a marine adventure"; but the breadth of the expression "remains a matter for further elucidation".[82] The phrase "adventure analogous to a marine adventure" follows an explicit reference to shipbuilding and ship repair. Professor Rose is of the view that it is unclear whether the insured subject-matter needs to be exposed to risks analogous to ship building and repair.[83] Mr Dunt believes that the word "any" opens up the categories of contract that may be analogous, including carriage of goods by land and air.[84] As Mr Dunt analysed, the carriage of cargo by road or rail entails perils which also exist in sea carriage,[85] and that these perils are analogous, so that capsizing during sea carriage is the same as the overturning of a land conveyance. Insurance practice inclines to employ broad explanations, and considers transit of inland movement and aviation as "adventure analogous to a marine adventure", as once summarised in A Handbook to Marine Insurance.[86] The Law Commission stated in its consultation paper that adventure analogous to a marine adventure is not confined to activities involving ships or the navigation of water, by expressly acknowledging that "air cargo insurance could be treated as marine insurance" since the insurers are of the view that a modern air journey is analogous to a marine adventure.[87] Nevertheless, there is thus far no judicial

[82] n 75 above, p 10.
[83] *Ibid*, p 8-9.
[84] John Dunt, *Marine Cargo Insurance* (Abingdon and New York: Informa, 2nd edn, 2016), p 13.
[85] Such as fire and theft.
[86] Victor Dover, *A Handbook to Marine Insurance* (London: Witherby, 8th edn, 1982), p 322 provides that "[t]he expression 'analogous to marine adventure' is in practice interpreted broadly. Insurances are freely effected, and expressed in marine insurance policy form, on securities from one inland place to another, on goods by land conveyance where only an interior transit is contemplated, and by parcel post. Sending by air is also commonly insured in marine policy form. In such circumstances, the provisions of the Marine Insurance Act 1906 are construed so that such policies are treated as policies of marine insurance and, except as otherwise provided in the policy, are interpreted as policies of marine insurance, e.g., in calculating the measure of indemnity in case of loss."
[87] The Law Commission and Scottish Law Commission, The Second Joint Consultation Paper on *Insurance Contract Law: Post Contract Duties and Other Issues*, para 16.16 available at

precedents confirming this insurance practice, and whether or not carriage of goods by air, road and rail are "analogous to a marine adventure" still waits for further verification in insurance law.

The meaning of the second condition, "in the form of a marine policy", is open-ended.[88] Section 2 (1) is silent about the form of the policy. Section 30 of MIA 1906 states that a policy may be in the form of the First Schedule to this Act, which is the traditional SG Form. ICC is also recognized as a form of marine insurance.[89] In fact, a marine policy does not have to take any particular form. MIA 1906 simply requires the form of marine policy to contain the name of the assured, subject-matter insured, the voyage or period of time covered, the sum insured, the name of the insurer and the signature by or on behalf of the insurer.[90] These requirements are also seen in non-marine polices and thus are not enough to distinguish between the form of a marine policy and that of a non-marine policy.[91] The Law Commission pointed out that the purpose of section 2(2) "was to allow the parties to designate certain types of insurance as marine insurance if they

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https://www.scotlawcom.gov.uk/files/3113/2429/7329/dp152.pdf (visited 12 Jul 2018) provides that "[t]he 1906 Act was enacted before the commercial exploitation of air travel. It may be that section 2 (2) is confined to activities involving ships or water, but insurers have told us that a modern air journey is seen as analogous to a marine adventure in 1906. On this basis, it is possible that air cargo insurance could be treated as marine insurance".

[88] Jonathan Gilman, Robert Merkin, Claire Blanchard, and Mark Templeman, *Arnould's Law of Marine Insurance and Average* (London: Sweet & Maxwell, 18th edn, 2013), p 3; In *Continental* (n 64 above) p 631, Mr Justice Mustill commented "a policy in the form of a marine policy" in section 2(2) as to "[w]hat these words mean, I do not know".

[89] As per Lord Diplock in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* (The *Al Wahab*) [1983] 2 Lloyd's Rep 365 in the case regarding the Institute War Clause, the whole of the provisions of the statute (MIA 1906) are directed to determining what are the mutual rights and obligations of parties to a contract of marine insurance, whether the clauses of the contract are in the obsolete language of the Lloyd's SG policy, or whether they are in the up-to-date language of the Institute War and Strike Clauses that were attached to the policy.

[90] Section 23 and 24 of MIA 1906.

[91] n 87 above stated that "[a]s we have seen, under the Act all that is required is that the policy states the name of the assured and is signed by or on behalf of the insurer. Many non-marine policies would do this: we do not think this would be enough to take 'the form of a marine policy'."

wished to do so".[92] Mustill J emphasised in *The Captain Panagos DP* that the test to determine whether a policy is a marine policy is not dependent on whether the policy looks like a traditional marine policy.[93] In *Leon v Casey,* the policy does not adopt the common form of a Lloyd's policy of marine insurance, yet was regarded as being in the form of a marine insurance policy.[94] When intended by the party, there should be little obstacle in recognizing the various policy forms insuring goods in transit to be in the form of a marine policy under section 2 (1) of MIA 1906.

2.5 Conclusion

English and Chinese insurance market provide similar insurance solutions for the stakeholders of goods in multimodal transport. This chapter reveals that cargo policies for unimodal transport with 'warehouse-to-warehouse cover' or separate cargo policies for each transport mode would provide certain coverage for goods in multimodal transport. However, their inadequacy and impracticability cannot be overlooked. Collective cargo insurance policies for all transit modes, whether underwritten on a voyage or open cover basis, could ensure comprehensive protection for goods in multimodal transport. Yet, a trade-off for comprehensive cover can be the higher premium. Attention should be paid to the risks expected by the assured in the particular transit when arranging the cargo insurance.

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[92] *Ibid,* para 16.23.
[93] *Continental* (n 64 above) p 631.
[94] [1932] CA 576. In this case, goods are insured on an open cover basis in a stamped policy in the form of a Lloyd's policy of marine insurance, where the assured would declare the adventures week by week. For the record of adventures concerned in this case, the policy bears on the outside the words "Lloyd's London July 24 1931. Steamers as specified. Voyages as specified", "Insured, Leon…by the steamship Lotus. Voyage from Cairo to Jaffa" and a 'warehouse-to-warehouse' clause.

The classification of cargo policies in multimodal transport and its applicable law depends on whether a sea leg is involved. Insurance for goods transited in "maritime plus" is a marine insurance, as defined both under Article 216 of the Chinese Maritime Code and either section 1 or section 2 (1) of MIA 1906. Thus, these two pieces of legislation are certainly applicable. Whereas insurance for goods in a journey without a sea leg is not a contract of marine insurance, the Chinese and English approaches are different. Chinese Maritime Code does not extend its application scope to insurance against risks in the adventure analogous to marine adventure. Therefore, Chinese Maritime Code cannot regulate the insurance of goods in a journey without a sea leg, and the Chinese Insurance Law shall apply thereto. In English law, MIA 1906 may still be applicable, provided that the adventure is analogous to a marine adventure and that the policy is written in the form of a marine policy. But it is also unclear how far MIA 1906 would be applicable to these policies. Although insurance practice inclines to treat the carriage of goods by both air and land conveyance as adventure analogous to marine adventure, this practice requires confirmation in the form of law.

Due to the lack of a clear legal framework, it is thus still challenging for both the assured and the insurer to predict their rights and standing in the event of disputes arising from insurance of goods in multimodal transport without a sea leg, especially regarding the propositions of the principle of indemnity. While waiting for clear guidance to be established, it is recommended that parties involved carefully choose the law and practice from marine insurance and incorporate them within their insurance contracts, especially provisions that are distinct from those within the legal regime of non-marine insurance contracts.

PART II: APPLICATION OF INDEMNITY PRINCIPLE IN CARGO INSURANCE IN MULTIMODAL TRANSPORT

CHAPTER 3

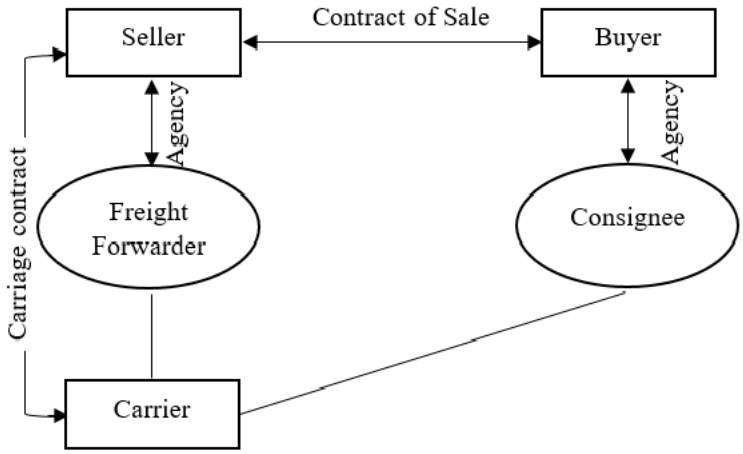
INSURABLE INTEREST IN GOODS IN MULTIMODAL TRANSPORT IN CHINESE LAW

This chapter investigates the object of indemnity principle by answering the question who is entitled to be indemnified under the insurable interest doctrine. Current statutory provisions in China on insurable interest are too vague to determine whether a specific interest is insurable. To guide judicial practice, this doctrine was reinforced with an interpretation by the Supreme People's Court. Despite efforts made, though, current rules are still not entirely satisfactory for determining clearly who has an insurable interest under Chinese law. With the development of international commerce and multimodal transport, conflicts between the aim of preventing gambling and allowing legitimate business are increasing when applying the insurable interest doctrine. This chapter advocates a pecuniary interest approach to recognising the insurable interest under property insurance. By employing this approach, it attempts to clarify the rightful parties having an insurable interest in goods under multimodal transport.

3.1 Introduction

Parties involved in the multimodal transport of goods are multiple. In a typical carriage of goods in multimodal transport, three groups of parties are involved, i.e. the cargo interests (the seller or buyer, depending on the type of trade), the carrier (and/or actual carriers), and the agent (the freight forwarder). As presented in Diagram 1 below, goods in multimodal transport are usually initiated by the contract of sale between the seller and the buyer, facilitated by the freight forwarder, delivered by the carrier and finally shipped to the consignee.

Diagram 3-1: Stakeholders of goods in multimodal transport



Whilst the parties are free to take out insurance, receiving the insurance indemnity is subject to strict constraints imposed by the insurable interest doctrine. Insurable interest is a recognised relationship between the assured and the insured subject-matter, so that in the event of loss upon the contingency insured against, only the assured who has suffered a loss can be indemnified under the insurance contract. In this way, insurance contracts are distinguished from gaming and wagering, under which the indemnitee has a chance to benefit from insured incidents that are not harmful to his position or enjoyment. Should the indemnitee have no interest in the insured subject-matter at all, the loss of or damage to the insured subject-matter would not constitute any financial detriment or deprive his expected benefit thereto. Indemnifying such party would put him in a better position before the occurrence of insured contingencies; this is contradictory to the fundamental principle of indemnity. Therefore, the doctrine of insurable interest is an important proposition regulating the object of indemnity.[1]

[1] Furthermore, the insurable interest also directly impacts the amount recoverable from the insurer, namely the content of indemnity since the indemnity principle operates so as to reimburse the loss of the indemnitee's interests in the insured subject-matter. Detailed discussion on the relationship between the

As discussed in Chapter 2, the classification of cargo insurance in multimodal transport into marine and non-marine insurance contract depends on the insured voyage in question. Yet, dilemma in the laws applicable to the insurable interest doctrine is not prominent in China. The Chinese Insurance Law is the general insurance legislation for matters of both personal and property insurance contracts. As a special law for matters relating to the marine insurance contract, Chapter 12 of the Chinese Maritime Code lacks a specific definition of the insurable interest. The intention of such absence was to leave the universally recognised insurable interest principle to the general insurance legislation, namely, the Chinese Insurance Law.[2] Currently, the Chinese Insurance law is the primary source for the insurable interest doctrine for both marine and non-marine insurance contracts.

However, a more prominent problem in this regard is the absence of clear guidance on what interests are insurable. The Chinese Insurance Law provides the prevailing definition of insurable interest. It was enacted in 1995 and has thus far undergone several amendments, in 2002, 2009 and 2015. Article 12 of the Chinese Insurance Law 2015 provides a definition of insurable interest, regrettably in a rather obscure fashion. Furthermore, given the specialties of maritime transport and marine perils, it is also necessary to question how well the insurable interest provisions of general insurance law function in marine insurance business. The on-going discussions about the reforming of insurable interest doctrine suggests two solutions, either to introduce a separate

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insurable interest and the content of indemnity is not within the scope of this chapter. For the discussion of this issue, *see* Section 4.5.3 of Chapter 4.

[2] Alberto Monti, "The Law of Insurance Contracts in PRC: A Comparative Analysis of Policyholder's Right" (2001) 1 *Global Jurist Topics* 4, 10.

insurable interest to the Chinese Maritime Code, or to clarify its definition under the Chinese Insurance Law.

There has been campaign for both solutions. On one hand, the Fourth Civil Tribunal of the SPC responsible for hearing maritime cases expressed that such absence is an issue waiting to be resolved by the Chinese maritime law reform.[3] The activities of amending the Chinese Maritime Code, launched in recent years, have opened a window to address this problem. On the other hand, more substantive progress has been made in reforming insurable interest under the Chinese Insurance Law, and this solution is better in achieving the coordination of marine and non-marine insurance law. So far, the SPC has promulgated three interpretations on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China. All three interpretations more or less contain provisions to address practical problems arising from the exercise of the insurable interest doctrine.

Although these Interpretations from the SPC have effectively clarified several issues encountered in judicial practice, they leave one of the fundamental questions unanswered, that is, what types of legal relationship between the assured and the insured subject-matter are insurable — in other words, what the requirements are for a permissible insurable interest. While a clear definition of insurable interest is still absent in Chinese law, Article 8 of the Consultation Paper of the SPC Interpretation IV complicates this issue even more by expressly declining the carrier's insurable interest in the goods carried.

[3] The media reply of the Fourth Court of the SPC on *Provisions of the Supreme People's Court on Several Issues about the Trail of Cases Concerning Marine Insurance Disputes*, available at http://pkulaw.cn/CLI.AR.1830 (visited 12 Jul 2018).

Without a well-established definition of insurable interest, it is difficult for the various stakeholders in multimodal transport to arrange cargo insurance and predict their merits of being indemnified in the event of cargo damage or loss. Current definition of insurable interest leaves many questions unanswered. For instance, when the goods are transferred from the seller to the buyer and the loss happens during the transit, which one of them has the insurable interest and is thus entitled to be indemnified by the assured? Is it the party has the ownership of the goods, or the one bears the risks? Does the carrier or the freight forwarder have the insurable interest in the goods as a bailee or an agent in Chinese law?

Given the above situation, Chapter 2 revisits the doctrine of insurable interest against the background of the insurance of goods in multimodal transport. It starts with illustrating the doctrine of insurable interest, with emphasis on the permissible interests under the current Chinese legal framework. Next, this chapter investigates two approaches to recognizing the permissible interests in Chinese law. Through a comparative study of English law, this chapter advocates a pecuniary interest approach to be recognised in Chinese insurance law. Lastly, the pecuniary interest approach is tested by applying it in addressing the major problems involved in the insurance of goods in multimodal transport.

3.2 Current regulations covering the insurable interest doctrine in China

As a civil law country, the doctrine of insurable interest in China is mainly contained in a list of legislations and subsequent interpretations issued by the SPC.[4] This chapter

[4] For the laws on the insurable interest in goods in multimodal transport, China has promulgated both national legislations and judicial interpretations. For the national legislations, the National People's

focuses on the law provisions applicable to the insurance of goods in multimodal transport.

The Chinese Insurance Law regulates both personal[5] and property insurance contracts.[6] The subject matter of the insurance of goods in multimodal transport is property; the section on property insurance contracts in the Chinese Insurance Law shall thus be applicable. The Chinese Contract Law sets the common provisions for all types of contracts, including insurance contracts. Without any relevant provisions in the Chinese Insurance Law and Chinese Maritime Code, the Chinese Contract Law shall apply.[7] Chapter 12 of the Chinese Maritime Code is designated to regulate marine insurance contracts. For issues relating to marine insurance contracts, Chapter 12 of the Chinese Maritime Code shall prevail.[8]

Thus far there have also been three Interpretations, issued by the SPC in 2009, 2013 and 2015 respectively, relating to the insurable interest doctrine, to guide the trial of insurance disputes.[9] The consultation paper of the fourth Interpretation was released recently in September 2017, and its provisions are still under debate.

In property insurance, the insurable interest doctrine encompasses the following three key aspects: (1) what interests are insurable (the permissible interests); (2) when shall

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Congress and its Standing Committee have issued the Chinese Insurance Law 2015, the Chinese Contract Law 1999, and the Chinese Maritime Code 1992. As for the judicial interpretations, the SPC has promulgated Interpretation I, II and III on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China in 2009, 2013 and 2015 successively.

[5] According to Article 12(3) of the Chinese Insurance Law 2015, the insurance of a person is the type of insurance where the person's life and body are the insured subject-matter.

[6] Property insurance means the type of insurance where properties and the interests therein are the insured subject-matter, as per Article 12(4) of the Chinese Insurance Law 2015.

[7] Article 1 of the Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes.

[8] Article 182 of the Chinese Insurance Law 2015.

[9] The third Interpretations concerns issues arising from the contract of personal insurance, and thus will not be discussed in this chapter.

the party / parties have the insurable interest (the time when the interest is required), and (3) what are the consequences of insurance contracts that lack an insurable interest.

Before analysing the first question, it is necessary to first clarify the latter two. The time when the assured must have the insurable interest was first specified in Article 12 of the SPC Interpretation I 2009, that the assured of the property insurance contract shall have the insurable interest in respect of the insured subject-matter *when an insured event occurs*. This provision has since then remained in the subsequent amendments of the Chinese Insurance Law.[10] In addition, Article 48 of the SPC Interpretation I 2009 firstly established that an assured of a property insurance contract that does not have an insurable interest is not entitled to an indemnity payment from the insurer. Article 48 of the Chinese Insurance Law of both 2009 and 2015 reiterated that the assured of a property insurance contract *may not make a claim to the insurer for indemnity payments* without an insurable interest.[11] Lacking an insurable interest does not impact the validity of the insurance contract under Chinese law.[12]

[10] Chinese insurance law is largely affected by the laws of other countries in this regard. It is almost universal among the insurance laws of other jurisdictions in developed economies that the assured of property insurance (or indemnity insurance as it is so classified in other jurisdictions) must have an insurable interest at the time of loss. The discussion in this regard is often related to two kinds of timing: it could be the time when the assured actually suffers a loss, or the time when the insured event occurs. In most cases, the assured suffers an instant loss after the happening of the insured event. However, if the loss is not immediate but is postponed for a period after the occurrence of the insured event, it is unclear whether the time of loss is the time when the assured suffers a loss or when the insured event occurs. Chinese law specifies the time of loss as the moment when an insured event occurs under the property insurance contract.

[11] Although such consequence seems to be consistent with the law commonly adopted in many other jurisdictions, it has encountered many objections when firstly introduced to China. *See* Song Xiaoming, Liu Zhumei, Liu Chongli, "A Note on the Interpretation I of the Supreme People's Court on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China," *People's Judicature*, Vol. 21 (2009), pp. 29-35.

[12] The majority of Chinese scholars hold this view. *See* Johanna Hjalmarsson and Dingjing Huang (ed), *Insurance Law in China* (Abingdon, Oxon: informa, 2015), p 287.

3.3 Permissible interests in China

Article 12 of the Chinese Insurance Law 2015 states that insurable interest is the legally recognised interest of the applicant or the assured[13] in the insured subject-matter. A literal interpretation of this definition highlights the legality of the insurable interest, precluding illegal interests. However, not all legal relationships between the assured and the insured subject-matter are insurable, inasmuch as the loss of the insured subject-matter would directly prejudice the position or enjoyment of the assured. The legality test is too broad to provide guidance as to what kinds of interest are insurable and what are not, calling for additional constraints. This confusingly simplistic test has raised discussions regarding what constraints should be added, resulting in different understandings of the permissible interests in Chinese law.[14]

As the special law for matters concerning marine insurance contracts, the Chinese Maritime Code prevails over the Chinese Insurance Law.[15] Although the Chinese Maritime Code does not contain an elaborated definition of insurable interest for marine insurance contracts, there has been an attempt to explain the insurable interest in the marine insurance contract. In the Answers of the SPC on the Practical Issues on Foreign-Related Commercial Maritime Trial I released in 2008, the SPC points out that the insurable interest in marine insurance contracts is the legal pecuniary connections between the assured and the insured subject-matter; parties with an insurable interest in

[13] Article 10 and 12(5) of the Chinese Insurance Law provide that the applicant, sometimes called the proposer, is the party who enters into the contract with the insurer, while the assured is the party to be indemnified by the insurer. The applicant and the assured could be the same person or organization. Chinese insurance law uses the word "insured". The difference between insured and assured is omitted in this chapter.

[14] Please refer to section 3.4.2 of this chapter.

[15] Article 182 of the Chinese Insurance Law 2015. There are 41 articles from the Chinese Maritime Code in Chapter 12 for issues relating to marine insurance contracts.

marine insurance contracts include the owner, mortgagor, insurer of the ship, buyer, seller, insurer of the goods and the party with the right of lien on the bill of lading.[16] However, the attempt at clarification in the above documentation merely serves as practical guidance rather than the law for court practice. Thus, one still must refer to the general Chinese Insurance Law when explaining insurance interest in marine insurance contracts.

SPC Interpretation II 2013 clearly pointed out that when multiple assureds insure the same insured subject-matter, all the assureds are entitled to be indemnified within the scope of their respective insurable interest.[17] Interpretation II also acknowledges the insurable interests of the user, leaser and carrier,[18] but it does not clarify their insurable interests in the property.

Since the definition of insurable interest is too vague to indicate the kinds of interests in property that are insurable, there have been arguments on the insurable interest of parties who, although they may not own the insured subject-matter, have legitimate needs to insure against their own risks arising from the occurrence of the insured contingencies.

[16] Question 157 of the Answers of the SPC on the Practical Issues on Foreign-Related Commercial Maritime Trial I.
[17] Article 1 of the SPC Interpretation II.
[18] The media reply of the Second Civil Court of the SPC on *Provisions on the SPC Interpretation II 2013*, available at http://www.court.gov.cn/shenpan-xiangqing-5426.html (visited 12 Jul 2018).

3.4 Different approaches in defining permissible interests: a comparative study

In China, insurance was once an alien concept originating in foreign countries. Influenced by foreign law and practice, China has now established its own insurance legal framework, as illustrated above.

English insurance law has had a wide impact in other jurisdictions due to England's historical economic predominance and its continuing leading role in insurance placement. A comparative study of English law can provide a valuable reference to the development of Chinese insurance law. Thus, this section adopts a comparative study to investigate what types of interests are insurable in China.

3.4.1 English approach

The permissible interests under English law have undergone many changes, ranging from a strict to a more liberal approach, especially with the development of case law in light of commercial needs and the enactment of the Gambling Act 2005.[19]

The classic definition of insurable interest was established in *Lucena v Craufurd*.[20] Lord Eldon provided a narrow test by restraining the permissible interests to *the property or the contractual right* on the insured subject-matter.[21] Noticeably, Lawrence J's *dictum* in

[19] There is a divergence between marine and non-marine insurance law regarding the application of the insurable interest doctrine. *See* Gary Meggitt, "Insurable interest – the doctrine that would not die" (2015) 35 *Legal Studies* 280.
[20] (1806) 2 Bos & PNR 269.
[21] According to Lord Eldon, insurable interest is "a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party".

the same case contemplated a wide test of insurable interest which allowed the *factual expectation* of benefit or loss.[22]

The Marine Insurance Act (MIA) 1906, which codifies previous case laws, prefers the narrow test given by Lord Eldon, yet with slight discrepancies. According to Section 5(2) of MIA 1906, insurable interest is a *"legal or equitable relation"* between the assured and the insurable property at risk, and in particular it includes relationships where the assured "may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof".[23] The spectrum of permissible interests under this section is broader than a proprietary interest contemplated by Lord Eldon, since Section 5 also includes the legal rights conferred by common law or equity.[24] However, the definition in the MIA 1906 failed to cover all types of insurable interests, and the adopted legal and equitable test are commented on as "to be in need of review".[25] Applying the test in Section 5 of MIA 1906, *Macaura v Northern Assurance Co Ltd*[26] held that the assured sole shareholder of the timber of a limited company had no insurable interest in the destroyed timber owned by the company because he had neither any right to the property as creditor nor any interest in the timber, regardless that the assured did actually have a real economic interest in the timber.

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[22] Mr Justice Lawrence said that "to be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction".
[23] Section 5(2), MIA 1906.
[24] Meixian Song, "Insurable interest in the law of marine insurance" (2011) 1 *Southampton Student Law Review* 75, 76; Johanna Hjalmarsson, "Legal or equitable relationship to insured subject-matter as a determinant of insurable interest – the approaches of English and Swedish law" (2008*) Lloyd's Maritime and Commercial Law Quarterly* 97, 98.
[25] John Birds, "Insurable interest – orthodox and unorthodox approaches" (2006) Mar *Journal of Business Law* 224, 227.
[26] [1925] AC 619.

Notwithstanding the decisions in earlier cases, the courts have been reluctant to reject an assured's claim solely on the ground of lacking an insurable interest, not only to meet the needs of the changing insurance market but also fearing that insurers would abuse the narrow test of permissible interest and use it as a technical defence to resist claims from the assured without real merit.[27] Discussion and reforms have been carried out towards establishing a modern definition of insurable interest with a more liberal approach to the permissible interests.

In recent cases, the courts have demonstrated strong consideration for commercial convenience in recognition of the assured's insurable interest. *Feasey v Sun Life Assurance Co of Canada*[28] is the leading case in modern insurance law which established that the mere existence of *economic interest* is sufficient to establish an insurable interest. Lord Justice Waller grouped the authorities of insurable interest into four categories. In Group 4, he pointed out that "something less than a legal or equitable or even simply a pecuniary interest has been thought to be sufficient".[29] The test in *Feasey* is similar to the wide test of insurable interest in Lawrence J's *dictum* in *Lucena v Craufurd.*[30] Despite the criticisms following the *Feasey* case, this case established a new trend in recognizing permissible interests.

[27] Brett MR in *Inglis v Stock (*1884) 12 QB 564, p 571; *The Moonacre* [1992] 2 Lloyd's Rep 501; Mance J in *The Cepheus Shipping Corporation v Guardian Royal Exchange Assurance Plc (The Capricorn)* [1995] 1 Lloyd's Rep 622, p 641.
[28] *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885.
[29] *Ibid*.
[30] (1806) 2 Bos & PNR 269.

The Gambling Act 2005, to a certain extent, reinforces the implications of the wide test of permissible interests.[31] By repealing Section 18 of the Gaming Act 1845, the Gambling Act 2005 unintendedly discarded the requirement of insurable interest in indemnity insurance contracts.[32] Given the new development in preventing gambling legislation, the test of permissible interest needs to be explained in a liberal and relaxed approach. In 2016, as part of the Law Commission's outcome in reforming English insurance law, the Draft Insurable Interest Bill was promulgated aiming to replace the previous strict definition of the insurable interest with a wide definition for insurance other than life-related.[33] Yet the proposal raised in the Draft Insurable Interest Bill awaits implementation.

Despite the efforts made, doubts remain as to what kinds of interest in the insured subject-matter shall be allowed or excluded in English law, or in other words, there is no precise panacea for deciding on the permissible insurable interests.[34]

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[31] It is noteworthy that the Gambling Act 2005 is not applicable to marine insurance contracts. For a detailed discussion on the impact of the Gaming Act 2005 on the insurable interest doctrine, *see* Chris Nicoll, "Insurable interest: as intended?" (2008) 5 *Journal of Business Law* 432.

[32] Section 18 of the Gaming Act 1845 used to provide that indemnity insurances without an insurable interest were void; Section 335 of the Gaming Act 2005 states that "the fact that a contract relates to gambling shall not prevent its enforcement".

[33] Section 3(3) of the Draft Insurable Interest Bill 2016 stated that "the circumstances in which an insured has an insurable interest in a subject matter include, in particular, circumstances where the insured (a) has a right in it, (b) has a right arising out of a contract in respect of it, (c) has possession or custody of it, or (d) will suffer economic loss if the insured event relating to it occurs."

[34] There has also been discussions regarding the necessity of retaining the insurable interest doctrine in English law. *See* The Law Commission, Issues paper 4 on *Insurable interest*, available at https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/ICL4_Insurable_Interest.pdf (visited 12 Jul 2018), and The Law Commission and Scottish Law Commission, The Second Joint Consultation Paper on *Insurance Contract Law: Post Contract Duties and Other Issues*, available at https://www.scotlawcom.gov.uk/files/3113/2429/7329/dp152.pdf (visited 12 Jul 2018); *See* also n 19 above for a discussion about merits in retaining the insurable interest doctrine in English law.

3.4.2 Attempts in Chinese law

There are dissenting views from both law practitioners and academia about the legal rights that give rise to an insurable interest in Chinese law. One view is the *legal relationship approach*, where the relationship between the assured and the insured subject-matter should be legal, definite and pecuniary.[35] Under this view, the insurable legal relationship is similar to the narrow test in English law. It is believed that the purpose of the legislators in drafting Article 12 of the Chinese Insurance Law is to strictly limit insurable interest to a direct relationship with the insured subject-matter.[36]

Admittedly, the legal relationship approach can provide a clear and workable standard in judging the permissible interest so as to prevent gambling. But this approach is criticised as being too conservative[37] to allow legitimate business in the modern economy. On one hand, the emphasis on "a direct relationship" implies a rigid confinement that the insurable interest should be based upon the property right on the insured subject-matter, precluding the contractual relationship.[38] Under this confinement, property rights of the owner, depositor, lessor, contractor, carrier, and mortgagor are direct interests in the insured subject-matter and are thus insurable; the creditors' rights, which usually arise from the contract and tort, should not be insurable, since what they directly relate to are

[35] Wang Pengnan, *Haishang Boxian Hetongfa Xianglun (Research on the contract of marine insurance)* (Dalian: Dalian haishi daxue chubanshe, 4th edn, 2017), pp. 28.
[36] Dong Kaijun, *Zhonghua renmin gongheguo baoxianfa shiyi* (*Interpretation on the Chinese Insurance Law*) (Beijing: Zhongguo jihua chubanshe, 1999), pp. 653.
[37] n 12 above, p 97.
[38] According to Article 2 (3) of the Property Law of the People's Republic of China, the property right means exclusive right of direct control enjoyed by the holder according to law over a specific property, which consists of the right of ownership, the usufruct and security interest on property.

the debtor or debtor's performance, rather than the insured property.[39] This exclusion impedes a group of stakeholders who have actually suffered a pecuniary loss due to the happening of the insured incident from being indemnified by the insurer.

Another view is the *economic relationship approach*[40] or *pecuniary interest approach.* This approach mirrors the wide test of insurable interest in recent English law. Under this approach, the permissible interests can arise from property, contractual and pecuniary interest in the insured subject-matter.

Actually, there have already been several attempts towards establishing the pecuniary interest approach in China. This is the approach adopted by one of the most authoritative books regarding the legislation background for insurance law of the People's Republic of China in 1995,[41] which suggests that legal expectation on the pecuniary gain based on a contractual relationship is insurable. According to this book, the permissible insurable interest under property insurance should include "(1) the owner of or the manager who stands legally recognised as having pecuniary interests in the insured property; (2) the party who is legally entitled to possess the insured property, including the depository and the carrier; and (3) the party who, although not possessing the goods, has a legal

[39] When illustrating insurable interest, most examples given are interests arising from property rights, such as ownership, possession, mortgage and co-ownership, as well as the right of lien on the cargo and bill of lading.

[40] Si Yuzhuo, *Haishangfa zhuanlun* (*Maritime Law Monograph)* (Beijing: Zhongguo renmin daxue chubanshe, 2007).

[41] Bian Yaowu, Li Fei and Wang Chaoying (ed.), *Zhonghua renmin gongheguo baoxianfa shiyi (Interpretation of the Insurance Law of the People's Republic of China)* (Beijing: Falv chubanshe, 1996), Preface. This book is written by the members of Legislative Affairs of the Standing Committee of the National People's Congress in charge of the drafting of the 1995 Chinese Insurance law. Before the 1995 Chinese Insurance Law, there are several segmented regulations since the founding of the People's Republic of China, such as the expired Regulations of the Property Insurance Contract of the People's Republic of China in 1983, and the Provisional Regulations Governing the Administration of Insurance Enterprises in 1985 both adopted by the State Council.

expectation of obtaining pecuniary interest in the goods."[42] The first and third provisions support the pecuniary interest approach by admitting the legally recognised pecuniary interests and the party's legal expectation of pecuniary gain resulting from the safety of the goods. Although this view is based on the 1995 Chinese Insurance Law, the 2015 Chinese Insurance Law adopts the same definition of insurable interest as in 1995. Thus, this explanation shall similarly apply to interpret the permissible insurable interests under the 2015 Chinese Insurance Law. Also, a Consultation Paper from the SPC in 2003 suggested that insurable interest could arise from (1) property right, (2) contract and (3) civil liabilities;[43] accordingly, the permissible interests are not limited to property rights.

Regrettably, those attempts have not been officially adopted by the subsequent Chinese Insurance Law, nor by the SPC Interpretation 2013.[44] This was a missed opportunity for clarifying the meaning of insurable interest in Chinese law.

3.5 Pecuniary interest approach and its advantages

Whilst most of the Chinese scholars seem to have reached a consensus that the insurable interest should be broadly defined to embrace economic interest so as to meet the needs of modern commerce,[45] there still lacks thorough discussion of the embedded

[42] *Ibid*.
[43] Article 1(2) of the Consultation Paper from the Supreme People's Court on several issues about the trial of cases concerning insurance disputes.
[44] Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes.
[45] HY Yeo, Y Jiao and J Chen, "Insurable interest rule for property insurance in the People's Republic of China" (2009) 8 *Journal of Business Law* 776, 792; Wang Darong, "Principle of economic interest should be applied in marine insurance in China," *Annual China Maritime Law*, Vol. 12, (2001), pp. 32-43.

components of permissible interests under the pecuniary interest approach. The unclear spectrum of permissible interests under this approach leads to confusion in practice, noticeably in complex scenarios where there are multiple stakeholders in the insured subject-matter.[46]

3.5.1 Analytical basis

For the pecuniary interest approach to work smoothly in juridical practice, its components should be clear, compatible with other laws in China, and sensible so that this approach is consistent with the indemnity principle and meets both parties' reasonable expectations. This chapter considers the permissible interests which may consist of these two general categories:

(i) Legally recognised right

Within this first category of legally recognised right, it can arise from: 1) property rights, 2) contractual relationships, 3) liability, and 4) other legal pecuniary interest.

For the property rights, current arguments supporting the pecuniary interest approach are not clear about what types of property right are insurable, which results in confusion in practice in recognizing the insurable interest, for instance, that based on possession.[47] In fact, as specified in the Property Law of the People's Republic of China (Chinese Property Law), property rights are limited to ownership. However, others, including usufruct, guarantee and mortgage, pledgee's rights, and possession, should also be insurable. Moreover, the interests arising from contractual relationship and liability are equally insurable.

[46] *See* section 3.6.2 and 3.6.3 of this chapter.
[47] *See* section 3.6.2 of this chapter.

"Other legal pecuniary interest" is a catch-all component in the pecuniary interest approach in order to preserve some leeway for novel legal relationships arising from future commercial practice. In modern commerce, the relationship between a person and a property is no longer limited to property, contractual rights or liability.[48] For instance, a sole shareholder also has an insurable interest in the property of a company. There are other interests that may generate pecuniary interest. To strike a balance between preventing gambling and allowing legitimate business, there should be two strict constraints for other interests to be insurable: the interests should be legal, namely not against public interest or the mandatory law; and the interests should be pecuniary in nature so as to preclude having a purely emotional attachment with the insured subject-matter.

(ii) Direct factual expectation

Apart from the above rights, permissible interests can also arise from a direct factual expectation where the assured reasonably expects to directly benefit from the existence of and be prejudiced by the destruction of the insured subject-matter, subject to the legality test.

The tests of the expectation of financial gain or loss of the assured are *direct* and *factual*. Firstly, the link between the expectation of the assured and the happening of the insured events should be direct. Consequential or remote loss by the assured is not insurable. Secondly, the expectation should be factual, so that any reasonable person under the same circumstances of the assured would expect the potential gain or loss attributed to

[48] Yeo *et al* (n 45 above), p 792.

the insured event. The judgment of insurable interest on this ground should not enjoy the benefit of hindsight after the happening of the insured peril.

3.5.2 Advantages

The pecuniary interest approach is effective in achieving the goal of preventing gambling without hampering legitimate business. Firstly, the pecuniary interest approach is consistent with the indemnity principle. The indemnitee has suffered a loss either arising from his legally recognised rights in the insured subject-matter or the deprival of his direct factual expectation. The purpose of confining insurable interest to merely property rights in the insured subject-matter is not in any way expressed or implied within the Chinese Insurance Law. The property right approach fails to protect the reasonable expectations of the assured whose financial gain is undermined by the occurrence of the insured contingency. It discourages parties who have the legitimate purpose of using insurance to secure their potential risks. Should the permissible interests be confined to relationships that are already protected by law, the insurance system becomes merely an alternative replacement for the remedy system in law.[49]

Secondly, the pecuniary interest approach is in line with the reasonable expectations of the assured. The primary expectation of the assured under the insurance contract is to be indemnified for his loss, namely his expectation of obtaining direct pecuniary benefit should the loss not have happened. Hence, admitting the assured's pecuniary interest in the insured subject-matter as permissible in the first place honours the expectation of the assured that the loss of such interest can be indemnified later by the insurer.

[49] Wang (n 45 above), pp. 38.

Thirdly, including pecuniary interest also reflects changes of Chinese judicial practice. As a matter of fact, a few Chinese courts have started treating the pecuniary interest as insurable.[50] A Consultation Paper from the SPC in 2003, as discussed above, revealed its inclination towards including a definable pecuniary interest into the spectrum of insurable interest.

Fourthly, the pecuniary interest approach can also serve its purpose in preventing gambling under the guise of insurance.[51] Pay-outs under both the insurance and gambling are both speculative, depending on the occurrence of agreed contingencies. The essential difference between gambling and insurance is that insurance is a contract of indemnity while gambling is not. Under an insurance contract, only the one with permissible interests in the insured subject-matter is allowed to be indemnified, since the occurrence of the contingency to the subject-matter will prejudice his position for which the insurance will then indemnify. On the contrary, it is a form of gambling by allowing the one without any interests in the insured subject-matter to wager on the occurrence of the contingency and then benefit from it, since the occurrence of the contingency does not bring any loss to him. The pecuniary interest approach ensures that the indemnitee has suffered a loss either arising from his legally recognised rights in the insured subject-matter or the deprival of his direct factual expectation. Adopting the wider pecuniary interest approach does not contradict with the aim in combating gambling.

[50] For instance, in one case, the court admits the insurable interest of the unregistered bareboat charterer in the ship because of the charterer's pecuniary link with the insured ship. *See* Si (n 40 above), pp. 339.
[51] When drafting the first Chinese insurance law in 1995, legislators expressly pointedly out that one effect of establishing the insurable interest doctrine is to prevent gambling. *See* n 41 above, pp.27.

3.6 Application in the context of the insurance of goods in multimodal transport

Multimodal transport of goods involves the interests of multiple parties. Such stakeholders are motivated and are able to purchase insurance against their respective risks in the goods, based on different grounds. In order to be indemnified by the insurer, the critical question is whether each party has an insurable interest in the goods. This section adopts the pecuniary interest approach to address the insurable interests of the seller or buyer, the carrier and the freight forwarder in the context of insurance of goods in multimodal transport.

3.6.1 Whether the seller or buyer has the insurable interest?

As an absolute and exclusive property right, the ownership of the insured subject-matter is naturally insurable. However, in the meantime, the ownership is transferable. A typical scenario is the sale of goods. Along with the change of ownership, the seller who once had the insurable interest in goods may cease to have it and the buyer would acquire the insurable interest. Chinese legislation is not clear about when the buyer acquires the insurable interest. Built upon two ways of interpreting the permissible interests as discussed above, Chinese judicial practice has also developed two approaches to ascertaining whether or not the seller or the buyer in the contract of sale, who may also be the shipper or consignee in the carriage contract, has an insurable interest.

(i) Two approaches

The first approach is related to the ownership or title to the goods. In one case, the court decided that the seller had the insurable interest because he held the original bill of

lading at the time of loss when the insured event occurred,[52] despite the fact that the risk had been transferred to the buyer.[53] Since the bill of lading is a document against the presentation of which the carrier undertakes to deliver the goods, the holder of the bill of lading is assumed to have the title to the goods,[54] and thus the insurable interest. This approach focuses on the property right of the insured goods, which is virtually rooted in the legal relationship approach of the insurable interest as discussed above. However, it is only applicable when a document of title, such as the bill of lading, is issued during the carriage of goods. In multimodal transport, there may not always be a bill of lading; for instance, when the air carriage is included as part of multimodal transport, the air waybill may be issued,[55] yet the air waybill is not a document of title. Therefore, similar to the legal relationship approach to defining the insurable interest, the first approach here is arguably too rigid to apply to goods delivered under various documentation.

The second approach focuses on the possession or the risk of the goods. In *Mep Systems Pte Ltd v China Pacific Insurance Company*, it was held that the seller has the insurable interest since he bears the risks at the occurrence of the insured accident.[56] This second approach is actually consistent with the pecuniary interest approach in defining the permissible insurable interest, as discussed above. The risk is the obligation to continue performing the contract, either to deliver the goods by the seller or make payment by the buyer, in the event of the loss of goods without the fault of either party. In this

[52] Under Article 12(2) of the Chinese Insurance Law, the assured of property insurance shall have an insurable interest in respect of the insured subject-matter when an insured event occurs.
[53] *Shouguang City Dong Yu Hong Xiang Timber Company Ltd v PICC (Lianyungang)* (2014) *Hu Hai Fa Shang Chu Zi* Number 620; another case also adopted the title of goods approach, ruling that the consignee has the insurable interest since he holds the original bill of lading. *See* also *Shanghai Jin Rong Xiang Development Ltd v China Pacific Insurance Company (Shanghai)* (2012) *Hu Hai Fa Shang Chu Zi* Number 116.
[54] Article 71 of the Chinese Maritime Code 1993.
[55] Article 5 of the Montreal version of the Amended Convention.
[56] (2013) *Hu Hai Fa Shang Chu Zi* Number 1371.

circumstance, it is the party at risk who has no remedies under the contract of sale and will be directly prejudiced by destruction of the insured goods. Although the party at risk may not necessarily hold the title to the insured subject-matter, a reasonable person in this position would expect that his pecuniary interest will be prejudiced due to the occurrence of the cargo loss. Hence, it is more reasonable, as the pecuniary interest approach, that the party who bears the risk should have the insurable interest which allows him to be indemnified under the insurance contract.

(ii) Transfer of risks in multimodal transport

Whether the buyer or the seller bears the risk is indicated by their respective consequences upon the non-delivery of goods without either party being at fault. The consequences are tangled by the parties' duties, rights and remedies under the contract of sale[57] in a subtle and complicated fashion. A more explicit way to specify the transfer of risks is to incorporate an express term between the seller and the buyer.

To adopt the International Commercial Terms (INCOTERMS) is a common way to specify the intentions of the parties to transfer the risks under international sale of goods contracts. The INCOTERMS have become voluntary standards in the international sale of goods. Recent versions were published in 2000 and 2010. Under Chinese law, INCOTERMS apply as international customs.[58]

Due to the dominance of seaborne trade, there have been many judicial cases regarding the insurable interest of goods sold using INCOTERMS for marine transport. Both

[57] Such as the seller's right to claim payment and the buyer's right to resist payment or to demand its return. *See* L S Sealy, "'Risk' in the law of sale" (1972) 31 *Cambridge Law Journal* 225, 226-227; in a normal situation, the buyer has an insurable interest from the moment when the risk passes to him; *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* [1991] 105 FLR 381, p 387.
[58] Article 42(2)(3) of the Chinese Civil Law.

"Cost, Insurance, and Freight (CIF)" and "Free on Board (FOB)" in INCOTERMS 2000 and 2010 are widely seen in the sale of goods carried by purely marine or "maritime plus" transport, the latter being the most common type of multimodal transport of goods. Under the CIF and FOB contract in INCOTERMS 2000, risks are not transferred from the seller to the buyer until the cargo has passed the ship's rail at the port of shipment. Accordingly, it has been held that, without any agreement otherwise, the seller has the insurable interest before the cargo passes the ship's rail, and the buyer has the insurable interest thereafter.[59] But in the new CIF and FOB in INCOTERMS 2010, the risk passes when goods are on board the ship, and the buyer would have the *prima facie* insurable interest in the goods by then. However, if a multimodal transport of goods does not include a sea leg, these common terms in INCOTERMS cannot apply in deciding when the risks pass, since there is neither a ship nor a ship's rail involved in the transit.

With the development of containerised transport, INCOTERMS 2010 issued seven terms that can be used for any mode or modes of transport, which of course includes multimodal transport.[60] For example, Free Carrier (FCA) in INCOTERMS 2010 is particularly recommended for any trade employing multimodal transport.[61] Under FCA, the seller delivers the goods to either the carrier or another person nominated by the buyer at the seller's premises, or another named place. If the named place is the seller's premises, the seller's delivery is completed when goods have been loaded on the means of transport provided by the buyer; in any other cases, delivery is completed when goods

[59] *Anderson v Morice* (1876) 3 Asp MLC 290; *Inglis* (n 27 above).
[60] The seven INCOTERMS are EXW (Ex Works), FCA (Free Carrier), CPT (Carriage Paid To), CIP (Carriage And Insurance Paid To), DAT (Delivered At Terminal), DAP (Delivered At Place) and DDP (Delivered Duty Paid).
[61] Jan Ramberg, *ICC guide to Incoterms 2010: understanding and practical use* (Paris: ICC Services Publications, 2011), p 97.

are placed at the disposal of the carrier or other person nominated by the buyer on the seller's means of transport ready for unloading.[62] The seller is only responsible for the pre-carriage, which usually starts from a point of inland transport to the carriers. In contrast to FOB, the delivery in FCA is moved to the point where the goods are delivered to the carrier, either at his cargo terminal or to a vehicle sent to pick up the goods after they have been containerised or otherwise assembled in transport units at the seller's premises;[63] the buyer shall bear the risk after such delivery is completed. Therefore, the buyer has the insurable interest after the goods are delivered to the carrier or other nominees

Multimodal transport of goods serves for international trade, which commonly involves buyer and seller. Meanwhile, the transfer of risk and transfer of property are the two related and highly important issues between the parties. Transfer of property right is an issue which is dealt with differently among different jurisdictions; in contrast, the transfer of risks is universally coordinated under INCOTERMS. As analysed above, the application of INCOTERMS is apparently in favour of the risk approach in recognising the insurable interest during the change of ownership of the insured subject-matter. As analysed above, the risk approach is consistent with the pecuniary interest approach in recognizing insurable interest. Thus, under the pecuniary interest approach, both the seller and buyer from different jurisdictions can better predict whether they would be indemnified from the insurance of goods, regardless of which national law the insurance contract is subject to.

[62] INCOTERMS 2010 FCA A4 (a) and (b).
[63] n 61 above, p 100.

Under the above INCOTERMS, however, neither the seller nor the buyer has the insurable interest for the whole duration of insurance cover. As discussed in Chapter 2, the duration of cover is determined by the transit clause where the insurance normally attaches when the goods leave the warehouse and terminates upon the delivery to the warehouse in the destination.[64] Thus, for instance, the assured seller under the CIF and FOB under INCOTERMS 2010 is presumably entitled to be indemnified for the loss occurred after the goods firstly leave the designated warehouse until on board the ship, whilst the assured buyer under the same INCOTERMS can be indemnified for the loss occurred thereafter until the goods delivered to the final warehouse. Since the time when the insurable interest is required is when an insured event occurs, insurance attached long before the assured buyer actually bears of the risk of the goods under the contract of sale, and the insurance cover terminates after the assured seller no longer bears the risks. To precisely reflect the transit risk borne by the seller or buyer, the standard transit clause of the ICC are sometimes amended by special clauses.[65]

The cargo policy is also assignable from the buyer to the seller, unless otherwise stated in the insurance contract. Both the legislations for general insurance and marine insurance have express requirements in this regard, under which the assignee shall assume the rights and obligations of the assignor, including the right of being indemnified by the insurer. But the assignment under the two legislations is effective upon different requirements. Article 49 of the Chinese Insurance Law provides that where the insured subject matter is transferred, the assured and transferee shall *notify* the

[64] Clause 8.1 of ICC (A) 1982.
[65] For example, the Extension of the insurance (FCA Incoterms 2000) for purchase transport postpones the attachment of cover to the moment when the risk for the goods passes, according to the term of delivery, from the seller to the buyer. There are other special clauses for goods sold under other INCOTERMS. Available at https://www.pohjola.fi/loso/1338741.pdf (visited 11 Dec 2019).

insurer; exceptions are given to cargo insurance contracts. Article 229 of the Chinese Maritime Code further clarifies that a contract of marine insurance for the carriage of goods by sea may be assigned by the assured by *endorsement* or otherwise. But when the goods in multimodal transport are sold from the seller to the buyer, it is not clear, due to the above difference in marine and non-marine insurance law, whether the rights and obligations under the insurance contract are assigned to the buyer upon notification or endorsement. Article 229 of the Chinese Maritime Code is only applicable when the insurance of goods in a "maritime plus" transport. However, it is inexplicit whether assigning the insured goods in multimodal transport without a sea leg is also subject to endorsement. Furthermore, the types of assignment under the Article 49 of the Chinese Insurance Law and Article 229 of the Chinese Maritime Code are different, the former being the assignment of the insured subject matter under the policy, whereas the later meaning the assignment of the insurance policy. Nonetheless, in either type of assignment, the right of being indemnified by the assignee is subject to the existence of his insurable interest when an insured event occurs.

3.6.2 Carrier's insurable interest in goods

The carrier under a contract for the multimodal transport of goods refers to both the multimodal transport operator (MTO) with whom the shipper directly contracts for the delivery of the goods, and the actual carriers who personally perform one or multiple legs of the transport. When the carrier is the assured, it is of utmost importance to identify whether the insurance policy in question is against the goods or for the carrier's

liability.[66] Whilst it is commonly understood that the carrier's liability in relation to the goods is the carrier's main concern, the carrier's insurable interest in the goods should not be overlooked.

(i) Carriers as the bailee

In English law, several cases have established that the carrier as the bailee is entitled to insure the full value of the goods carried.[67] The carriers' insurable interest in goods is based on their right of possession.[68] The carrier can purchase insurance and recover the full value of the goods in case of loss or damage. In doing so, he meanwhile must hold any such additional sum recovered on trust for the bailor.[69]

The carrier's interest in insuring for the goods is not clear in Chinese law. There are two main reasons behind this. Firstly, the Chinese legislations are ambiguous with regard to insurable interest based on possession. Although property rights are insurable, the current definition of insurable interest is unclear about whether such possession is insurable as a property right. Secondly, there is no equivalent mechanism of bailment as mature as it is in English law. In China, the possessory right is protected under the Chinese Property Law. But this is different from bailment in English law. In English law,

[66] It is a process of interpretation which mainly depended on the ordinary meaning of the words used, as well as any other evidence of intention to be found in the policy itself. *See* Norman Palmer, *Bailment* (North Ryde: Law Book Co, 2009), p 1948.

[67] Lord Campbell explained that to enable the bailee to insure the goods in his trust would be commercially convenient (in *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E&B 870, p 880).

[68] *Tomlinson v Hepburn* [1966] AC 451; *Petrofina v Magnaload* [1983] 2 QB 91, p 96 held that despite the fact that the bailee may by contract to exclude his legal liability for the loss or damage to the goods in particular circumstances, he is responsible for the goods in a general sense.

[69] *Waters* (n 67 above). In this case, the court held that the warehouseman is entitled to recover the full value of the goods, although the owner of the goods gave no orders to insure the goods and was unaware of their insurance. The warehouseman is regarded as trustees of the remainder for those parties who have the ulterior interest in the property. ICC concerns a "not to inure" clause which excludes the benefit of the carrier or other bailee under the policy, and prevents the sum recoverable being paid to the carrier, unless there is contract otherwise provided. For a carrier who wish to insure under ICC is recommended to amend this clause to fit his intention.

the carrier as the bailee can not only insure goods under his possession, but can also hold the excess recovered beyond his interest in trust for the bailor, whereas the Chinese law on bailment is silent about the carrier's interest in the additional sum. Without clear justification, there is a danger that the carrier may gain extra benefit from the cargo insurance if he is indemnified for the full value of the goods, as this may be greater than his actual loss, depending on the extent of his liability.

While Chinese law practitioners continue to debate about the permissible interests, the SPC tends to decline the insurable interest of the carrier and other bailees in the insured property.[70] Recently, the Consultation Paper of Interpretation IV from the SPC also inclines toward rejecting the insurable interest of the carrier.[71] According to Article 8 of the Consultation paper of SPC Interpretation IV, the court shall support the insurer's defence against the carrier's insurable interest in the goods.[72] Its underlying rationale is that a carrier who intends to purchase insurance to transfer his risks should take out liability insurance arising from the loss of goods, rather than property insurance. This is an unfortunate provision that confuses the insured subject-matter with regard to liability insurance and property insurance.

Firstly, the carrier also has a legally recognised insurable interest in the goods carried. If the pecuniary interest approach were to be applied, the legally recognised rights can arise from property rights, which include possession. Both legislations and judicial

[70] In a similar situation regarding the bailee's insurable interest as reported in the 15th Group of Guiding Cases issued by SPC, the contractor of a building contract is held to only have the insurable interest in his liability arising from the building contract and thus he shall purchase liability insurance, [2016] Fa zi 449, Case Number 74.

[71] Consultation paper on the Interpretation IV of the Supreme People's Court on *Several Issues concerning the Application of the Insurance Law of the People's Republic of China* (Interpretation IV), available at http://www.court.gov.cn/zixun-xiangqing-62352.html (visited 12 Jul 2018)

[72] Nevertheless, the insurer shall be partially liable for his fault in underwriting cargo insurance for the carrier.

practice support such an implication. The possessory interest of the carrier is recognised in both the Chinese Property Law and the Chinese Contract Law.[73] In fact, a considerable amount of judicial practice also validates the insurable interest of the carrier and other parties having a possessory interest in the goods.[74] In this regard, then, Article 8 of the SPC's recent consultation paper does not truly reflect existing judicial practice, and also contradicts the prevailing legislations in China.

Secondly, the unnecessary confinement in the above-mentioned Article 8 creates a potential mix-up between the subject-matter of the property insurance and the liability insurance contract. There is a great difference between liability insurance and cargo insurance. The insured subject-matter in the former is the carrier's liability for the transport of goods, while in the latter type of insurance it is the goods in transit. Therefore, the basis for calculating their insurance premium would be different. Moreover, under liability insurance, the carrier is entitled to be indemnified when his liability, either contractual or in tort, has been established. In contrast, in cargo insurance, the carrier is to be indemnified upon the loss of or damage to the goods.[75] It is thus inappropriate and unnecessary for the law to intervene and confine the carrier's choice of insurance to liability insurance only. In fact, as early as in the SPC Interpretation II 2013, multiple interests in the same insured subject-matter is allowed.[76]

[73] Chapter 19 of the Chinese property law; Chapter 17, 19 and 20 of the Chinese Contract Law.
[74] *CPIC Shanghai v Hanwen* (2007) *Hu Yi Zhong Min San Shang (Zhong) Zi* Number 290, the court held that a storage company had an insurable interest in the cargo by reason of its similarity to bailment. *See* also John Dunt (ed), *International Cargo Insurance*, Chapter 12 (London: Informa, 2012), p 441.
[75] For instance, in a case where the cargoes are damaged due to an Act of God, the carrier will exclude his liability under the carriage contract, referring to Article 4(2)(d) of the Hague Visby Rules, if applicable. In contrast, cargo damage or loss due to an Act of God is normally not excluded under an "all risks" insurance policy.
[76] Article 1 of the SPC Interpretation II.

There is nothing preventing the cargo owner from insuring on his goods in conjunction with the carrier's insurance on the same shipment of goods.

Since there are dissenting views about the carrier's insurable interest in goods, interviews have been carried out to investigate perceptions of both the insurer and assured on this issue.[77] According to the responses received, the primary motivations for the carrier to insure goods as the assured or co-assured is to allow himself to be indemnified for the cargo loss and prevent himself from being subrogated by the cargo underwriter. Without any wilful misconduct of the assured, the insurer is generally liable to indemnify the assured carrier. Also, to prevent the misdirected arrow, the insurer is barred from subrogating against the co-assured carrier. On the other hand, liability insurance products provided in the Chinese insurance market are not preferred by the carrier in multimodal transport for two reasons. Firstly, cargo liability caused by the acts of god is likely to be excluded in many liability insurance for multimodal transport in China. When the multimodal transport operator is not protected by the same exemptions in the mandatory liability conventions for the carriage of goods, such as the Hague Visby Rules, he would still be liable to the shipper for such loss. Hence, there would be a gap between the carrier's liability and the scope of coverage of such liability insurance. Secondly, the calculative base of the premium in liability insurance is unfavourable to carriers comparing to it in cargo insurance. The premium of liability insurance is usually based on the carrier's annual revenue, whilst the premium of cargo insurance is based on the cargo value. Although the carrier's annual revenue should be lower than the

[77] *See* Questions in Part II of the empirical study.

aggregated cargo value he shipped per year, the rate used to calculate the premium in cargo insurance is much lower than it in liability insurance.[78]

However, some interviewees have also expressed concerns regarding the potential moral hazards. The first concern is that the carrier does not own the insured subject-matter and thus does not have the insurable interest in the goods. But as stated above, possessory interests in goods can also be insured. The second concern is the inconsistency between monetary loss suffered by the carrier and indemnity under the cargo policy. As one interviewee illustrated that if a carrier insures a machine of 5 million US dollars and the freight may be 100,000 US dollars, trying for make a 5 million US dollars claim under the cargo policy whilst the loss of freight is only 100,000 US dollars is not consistent with the principle of indemnity. This concern can be well addressed by the deduction imposed by the insurable interest as regard to the final sum recoverable.[79] The last concern is about the practicability of the carrier insuring goods. The clients of the carrier would possibly ship a wide species of goods, and some goods, such as goods that are fragile, can be excluded from the insurer's liability. It would be impractical to draft a policy that comprehensively lists out in advance what goods are covered and what are not. Nonetheless, this problem is not unique when the carrier insures goods; it can also arise when the assured cargo owner trades a variety of goods.[80]

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[78] One interviewee compared the premium under the two types of insurance and stated that "normally, the premium for an import and export cargo is 0.04% of the cargo value. Of course, the current premium rate is much lower than this. If you convert this premium into liability insurance, the premium rate is about 0.7%...and in practice, the insurer of the liability insurance may even charge a higher premium…" Nonetheless, since liability insurance covers not only the liability arising of cargo damages but also other third-party liabilities, such conversion is not entirely accurate. But still it is a strong motivation for the carriers or multimodal transport operators who are price-sensitive.

[79] *See* section 4.5.3.

[80] In practice, cargo policies often specify the covered goods in a general category, subject to individual declaration.

As noted from the interviewees, measures have also been taken by the insurer to ensure this practice is not contradictory to the principle of indemnity. Firstly, to prevent the carrier from being indemnified more than his loss, insurer will only pay the assured carrier upon either the presentation of the proof of payment from the carrier to the cargo owner or a settlement agreement between them. Secondly, there is a condition in the insurance policy to prevent double claims from both the carrier and cargo owners, by providing that the insurer's obligations of indemnity are released after having indemnified the specified payee, and no further claims will be accepted under the policy.

(ii) The pervasive interest of actual carriers as the performing party

If the MTO does not personally deliver the goods to the destination, the party personally performing such carriage is known as the actual carrier, the sub-carrier, or the "performing party".[81] As discussed above, being the bailee of the goods, an actual carrier can take out separate insurances against the loss of goods actually carried by him, or the MTO could effect a single cargo policy to cover the whole transport for each actual carrier. Effecting a single policy achieves commercial convenience,[82] but it would however invite discussion about the actual carrier's insurable interest in goods for the whole multimodal transport. The answer to this question is pivotal for subrogation, and for the insurer's defence to decline the claim based on wilful misconduct of the actual

[81] The performing party means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. *See* Art 1(6)(a), the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules).
[82] *Petrofina* (n 68 above).

carrier, since the actual carrier could be the assured of the insurance of goods in multimodal transport.[83]

There is a lack of guidance in Chinese law for this issue, since the carrier's insurable interest in the goods is still under discussion. In English law, the courts recognise the pervasive interest of sub-contractors. Pervasive interest exists in a composite policy[84] when separate interests are nonetheless pervasive and relate to the entire property, albeit from different angles. The issue of pervasive interest was raised, yet not thoroughly discussed, in a marine insurance case in English law.[85] This issue however has been thoroughly discussed in terms of construction insurance, another scenario concerning the insurable interest of sub-contractors, where the head contractor often effects insurance on the whole construction site for himself and the sub-contractors. In *Petrofina v Magnaload*, the court upheld the pervasive interest of all sub-contractors throughout the construction site. The pervasive interest of sub-contractors is built upon legal precedents showing that the bailee is entitled to insure the full value of the insured subject-matter even if he may have no liability to the owner.[86] The position of a sub-contractor in relation to the whole contract works is sufficiently similar to that of a

[83] *Netherlands v Youell & Anor* [1997] CLC 938. This is an insurance for the building of two submarines, where both the navy and the shipyard are named as the assured in the insurance policy. The insurer alleged that the damage to the submarines was due to the wilful misconduct of the assured shipyard, which excludes the liability on the insurer according to section 55(2)(a) and 78(4) of the MIA 1906.

[84] A composite policy combines the separate interests into one insurance contract, such as in the case of a mortgagee and owner; in contrast, joint insurance concerns only one joint interest, and often exists in the case of joint owners of a property. *Commonwealth Construction Co Ltd v Imperial Oil* Ltd (1977) 69 DLR (3rd) 558, p 139E; Sir Wilfred Greene MR in *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd* [1940] 2 KB 388, pp 404-405. *See* also Jonathan Gilman, Robert Merkin, Claire Blanchard, and Mark Templeman, *Arnould's Law of Marine Insurance and Average* (London: Sweet & Maxwell, 18th edn, 2013), para 341.

[85] *Netherland* (n 83 above). In this case, the court considered whether there is a pervasive interest between the navy and the shipyard in an insurance of the building of two submarines. Judge Lloyd was not sure whether it is common ground that such insurance policies are likewise policies on property under which each of the co-assured has a pervasive interest to claim up to the total value of the submarines.

[86] *Waters* (n 67 above); *Tomlinson* (n 68 above).

bailee in relation to goods bailed. Moreover, allowing sub-contractors to be able to insure the loss of or damage to the whole contract works in a single policy also makes sense from a commercial point of view. Otherwise, each sub-contractor would be compelled to take out his own separate policy. This would mean, at the very least, extra paperwork; at worst it could lead to overlapping claims and cross claims in the event of an accident.[87] Nevertheless, the establishment of a pervasive interest is subject to rigorous qualifications. In *Deepak Fertilisers and Petrochemical Corporation v ICI Chemicals & Polymers Ltd*,[88] the court held that the subcontractors have a pervasive interest if they might lose the opportunity to do the work and to be remunerated for it if the property were damaged or destroyed. There are also arguments on the need for establishing an additional link between the subcontractor and the insured subject-matter other than potential liability.[89]

Applying the pecuniary interest approach, it is plausible that in China the actual carriers in multimodal transport also have a pervasive interest in the goods.[90] Admittedly, allowing all actual carriers to jointly insure goods in multimodal transport would achieve commercial convenience, which is believed to be the true basis of pervasive

[87] *Petrofina* (n 68 above), p 96.
[88] [1999] 1 Lloyd's Rep 387, p 399.
[89] *Feasey* (n 28 above).
[90] As yet, examples of a pervasive interest in cargo insurance are rarer than in construction insurance. There are two main reasons behind this. Firstly, the carriage of goods in multimodal transport may be subcontracted more than once, even after the conclusion of the multimodal transport contract, particularly in land transport. In practice, it is very challenging to name all subcontractors in the policy when effecting the insurance. Secondly, naming all sub-contractors as the assureds means that the insurer cannot enjoy his subrogation right against the liable sub-contractor. The insurer's high exposure to the risk will thus be eventually reflected in the premium. It is uneconomic to jointly insure for all actual carriers in a single cargo policy. Accordingly, a more common approach is for the MTO to take out cargo insurance for the entire multimodal transport, and for the sub-carriers to purchase insurance for their own accounts and purposes.

interest.[91] Moreover, each actual carrier's interest in the goods is separate for their respective transport leg, but "pervasive" for the entire carriage. Multimodal transport, in most cases, is a joint project between all actual carriers having one common goal, which is the safety of the goods during the transit period. Given the difficulties in locating the loss, should it occur in one particular transport leg, the loss of goods in this particular leg would jeopardise the opportunity of the actual carriers of other legs to perform their duties and be remunerated for it, subject to the construction of the policy; this would account for a direct and factual expectation under the pecuniary interest approach.

Nevertheless, the real problem here is that the legal basis for having a pervasive interest under Chinese law is not as solid as it is under English law. The actual carrier who was subcontracted by the MTO enjoys the property interest of the insured goods based on possession. But, as discussed above, Chinese law lacks a mechanism justifying an additional sum insured that exceeds the carrier's liability. It is still open to debate as to whether the carrier is entitled to insure the full value of the insured property. Whereas in English law the pervasive interest is built on legal precedents that the carrier is entitled to insure the goods up to their full value, there is no such legal basis in China for the pervasive interest of actual carriers.

3.6.3 Freight forwarder

The freight forwarder can be an intermediary between the cargo interest and the carrier. He arranges carriage of goods on behalf of his customer. Very often, under the same veil, the freight forwarder acts as the agent to purchase cargo insurance on behalf of the

[91] Ahmed T Olubajo, "Pervasive insurance interest: a reappraisal" (2004) 20 *Constructive Law Journal* 45.

shipper.[92] But in this case, the assured is the shipper. The focus of this section is whether the freight forwarder has an insurable interest in the goods in multimodal transport based on his own connection with the insured subject-matter.

Neither the Chinese Insurance Law nor the Chinese Maritime Code expressly recognise the insurable interest of freight forwarders. This ambiguity in the law is partly due to the different identities of the freight forwarder in the carriage contract. The freight forwarder is sometimes regarded as the carrier, rather than the agent of the cargo interest;[93] in this case, he has an insurable interest in goods carried based on possession under the pecuniary interest approach. The advent of multimodal transport has induced freight forwarders to take on greater responsibilities. Some forwarders have started to engage in businesses which have traditionally been provided by the carrier, such as tallying, weighing, packing, warehousing, pick-up, delivery, and physical distribution.[94] They may even organise the whole transport as a carrier. The boundary between the freight forwarder and carrier is thus blurry in multimodal transport. When the freight forwarder is regarded as the carrier, he has the insurable interest in the goods as the bailee.

The freight forwarder's insurable interest in goods as an agent is plausible in existing Chinese judicial practice. In *Orient Building Materials Supply America v PICC Yichang Wujia District*, the Wuhan Maritime Court stipulated that the freight forwarder of the

[92] For example, in *Granville Oils and Chemicals Limited v Davies Turner & Co Limited* (2003) EWCA Civ 570, the freight forwarder arranges insurance cover for the goods of his customer, a paint manufacturer, under ICC (A) terms from Kuwait to the manufacturer's premises in UK.
[93] The Chinese Supreme Court issued an interpretation to determine whether a marine freight forwarding contractual relationship is established. *See* Provisions of the Supreme People's Court on several Issues concerning the trial of cases of disputes over marine freight forwarding, *Fa Shi* (2012) Number 3.
[94] Ralph D Wit, *Multimodal transport: carrier liability and documentation* (London: LLP, 1995), p 21.

cargo does not possess an insurable interest in the goods.[95] In this case, the freight forwarder acted as the agent of the shipper to insure the goods carried. However, without disclosing the shipper to the insurer, the freight forwarder entered into the insurance contract with the insurer in his own name. The court declined the insurable interest of the freight forwarder.[96] Nevertheless, sufficient explanations were lacking in this case. No reported cases can be found in other courts declining the insurable interest of freight forwarders. The prospects for the freight forwarder's insurable interest remain unclear. The basis for the freight forwarder's insurable interest in goods as an agent depends very much on the underlying contract between the freight forwarder and his customer. Even applying the pecuniary interest approach, it is necessary to look into the rights and obligations of the freight forwarder on the delivery of the goods in order to decide whether the freight forwarder has contractual or other legal pecuniary interests.

3.7 Conclusion

Having an insurable interest is one of the prerequisites of being indemnified by the insurer. However, the insurable interest doctrine in China is regrettably simplistic for determining whether a specific interest is insurable. The various stakeholders in multimodal transport are sometimes confused by the inconsistent judicial practices regarding their insurable interests in the goods.

[95] (2011) *Wu Hai Fa Shang Zi* Number 8.

[96] However, the court still found the insurer liable to indemnify the loss of the goods. After denying the insurable interest of the freight forwarder, the court however decided that the insurance contract should be regarded as directly entered into between the shipper and the insurer and that the freight forwarder did not break the duty of non-disclosure by not disclosing the shipper to the insurer. Since the shipper has the insurable interest in the goods, the insurer is therefore still liable for indemnifying the loss of the goods.

Chapter 3 provides an analytical basis for the pecuniary interest approach and finds that this approach is consistent with both reasonable expectations of the parties and the principle of indemnity. Application of the pecuniary interest approach to cargo insurable under multimodal transport is also able to effectively justify the insurable interest, not only of the cargo interest itself, but also of the carrier and the freight forwarder.

The development of commercial insurance products is inseparable from the support of a clear and amicable legal and insurance regulation. To efficiently support the development of multimodal transport, it is important for Chinese law to consider the pecuniary interest approach, which, as discussed in this chapter, is more compatible with present commercial reality driven by the needs of stakeholders in multimodal transport.

CHAPTER 4

MEASURE OF INDEMNITY UNDER CARGO INSURANCE IN MULTIMODAL TRANSPORT UNDER CHINESE INSURANCE LAW

Chapter 4 focuses on the content of indemnity by analysing the sum recoverable for the entitled assured identified in the last chapter. Under the principle of indemnity, the assured should be strictly indemnified for his loss upon the happening of the insured contingencies. Due to the historical divergence between marine and non-marine insurance, rules for determining the sum recoverable under these two categories are different. Since, in multimodal transport, the insurance of goods shall be against both marine and non-marine perils, the question may arise as to how, in this context, to calculate the measure of indemnity and, further, which measurement among marine and non-marine insurance is better in achieving the goals of indemnity. This chapter attempts to propose a coordinated four-step framework for measuring the sum recoverable under Chinese insurance law. It shows that great uncertainties still exist in defining, valuing, measuring, and applying any deductions upon the loss of goods in multimodal transport.

4.1 Introduction

Insurance of goods in multimodal transport is a contract of indemnity, under which the assured whose interest is adversely impacted by the insured risks shall be fully indemnified. The sum recoverable from the insurer is called the measure of indemnity,

which is a term that originates from marine insurance.[1] However, it is also known by other names.[2] In the property insurance in China, the term used is "indemnity payment".[3] Regardless of its various names, the measure of indemnity in this thesis refers to the sum recoverable for the assured in respect of a loss for which he is insured in the insurance policy.

Regrettably, contemporary legislations in China do not provide clear and comprehensive guidance for determining the measure of indemnity. For general insurance law, the measure of indemnity is simply regulated by Article 55 of the Chinese Insurance Law. As for marine insurance, though, pertinent provisions are scattered throughout Articles 245 to 247, 219, 220, 238 and 240 of the Chinese Maritime Code. However, none of these provisions is explicit about the measurement of a partial loss. Much room is left subject to the individual insurance contract and the courts' discretion.

In addition, there are also conflicts between Chapter 12 of the Chinese Maritime Code which mainly migrated from the rules of English insurance law and the Chinese Insurance Law which is mainly home-grown. When drafting the current Chinese Maritime Code in the 1980s, the working group has referred well-recognised

[1] Edward Richard Hardy Ivamy, *Dictionary of Insurance Law* (London: Butterworths, 1981), p 81.
[2] Conventionally, the measurement of loss is more often used with reference to a payment under the insurance policy. For example, *see* John Birds, *Birds' Modern Insurance Law* (London: Sweet & Maxwell, 2016), Chapter 15. Measure of indemnity is also used in the context of other types of insurance referring to the sum payable to the assured after the occurrence of the insured event. For example, the measure of indemnity is used in the context of property insurance. *See* Kenneth Cannar, *Essential Cases in Insurance Law* (Cambridge: Woodhead-Faulkner, 1985), p 61; this term is used in a general insurance sense in Robert Merkin and Judith P Summer, *Colinvaux's Law of Insurance* (London: Sweet & Maxwell, 10th edn, 2014), p 517.
[3] Indemnity payment is covered under Article 55 and Article 56 of the Chinese Insurance Law. However, there is no equivalent term used in the Chinese Maritime Code.

international conventions, customs and laws from other countries.[4] According to the members of the working group that drafts the Chinese Maritime Code, Chapter 12 of the Chinese Maritime Code has mainly originated from the MIA 1906 for its great impact in the global insurance market.[5] The current Chinese Insurance Law, on the contrary, mainly evolves from the series of earlier national ordinances.[6] The distinct developing paths of marine and non-marine insurance law result in different approaches in determining the measure of indemnity.

Due to this divergence of marine and non-marine insurance, there is a dilemma as to the applicable law when determining the measure of indemnity of goods in multimodal transport.[7] In either approach of marine and non-marine insurance, the measurement should comply with the fundamental principle of indemnity and honour both parties' reasonable expectations.

[4] Yang Jingyu, "A note on the draft paper of the Maritime Code of the People's Republic of China, delivered at the 26th meeting of the 7th Standing Committee of the National People's Congress" on 23 June 1992 by the Secretary of the State Council Legislative Affairs Office of the State Council, available at http://www.npc.gov.cn/wxzl/gongbao/1992-06/23/content_1479244.htm (visited 17 Dec 2018).

[5] Si Yuzhuo (ed), *Zhonghua Renmin Gongheguo Haishangfa Wenda* (Beijing: China Communications Publishing, 1993), pp.4

[6] In the early stage, the insurance law in China has been mainly impacted by the law of Japan in the late Qing Dynasty, and the law of Soviet Union during the period of 1949 and 1956. Rules of modern insurance law firstly emerged under the regulation of the contract law in 1981, and was later replenished through a series of ordinances for property insurance, insurance company, and marine insurance. It was only until the 1995 when China has promulgated the first general legislation regarding the modern insurance law in the 14th meeting of the 8th Standing Committee of the National People's Congress. For more details regarding the history of the Chinese insurance law, please *see* Fu Tingzhong, *Research on insurance Law* (Beijing: Tsinghua University Press, 2011), pp.25-29.

[7] Whilst the Chinese Insurance Law, being the general law, applies to such insurance contracts, Chapter 12 of the Chinese Maritime Code shall prevail with respect to marine insurance matters. Indemnity payment is covered under Article 55 and Article 56 of the Chinese Insurance Law. Article 182 of the Chinese Insurance Law provides that, with respect to matters which the Chinese Maritime Code does not specify, the Chinese Insurance Law shall be applicable.

Firstly, under the principle of indemnity, the amount to be indemnified is similar to contractual indemnity which is to put the indemnitee back to the position he would have been *had the loss not occurred*.[8] *Callaghan v Dominion Insurance Co* provides that

"it is an agreement by the insurer to confer on the insured a contractual right which, *prima facie*, comes into existence immediately when loss is suffered by the happening of an event insured against, to be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position".[9]

Secondly, indemnity is essentially the performance of the insurer's obligation as promised that raises the assured's expectation. The content of indemnity should also be subject to agreed conditions that impact the assured' expectation of the indemnity and the insurer's expectation of the premium. To honour both parties' reasonable expectations, the measure of indemnity is also subject to any contractual deductions that the assured expected to bear.

Therefore, four steps are used to calculate the sum payable under an indemnity insurance contract: (1) identifying the nature of the loss, (2) ascertaining the value of the insured subject-matter by its monetary value, (3) measuring the loss for indemnification, and (4) applying deductions that both parties expected. Chapter 4 hence aims to map the measure of indemnity by following this four-step framework under the insurance of goods in multimodal transport. In cases where the measure of indemnity varies between marine and general insurance law, this chapter attempts to make recommendations

[8] This is actually modified from the tortious approach of damages which is to put the indemnitee in the position as if the tort did not take place.
[9] [1997] 2 Lloyd's Rep 541, 544.

towards a set of more consistent rules of measurement which are faithful to contractual approach of indemnity.

4.2 Identifying the nature of the loss

Loss normally refers to the destruction or damage, the decrease in value, and temporary or permanent restriction of using the insured subject-matter. There should exist an eligible loss for indemnification.[10] Types of loss also matter because of their difference regarding the measure of indemnity. Thus, the first step to calculate the sum recoverable is to determine the type of loss.

4.2.1 Partial loss

The general Chinese Insurance Law does not contain a definition of partial loss; its definition can only be found in Chapter 12 of the Chinese Maritime Code. Influenced by English insurance law, Chapter 12 of the Chinese Maritime Code provides that any loss other than an actual total loss or a constructive total loss is a partial loss.[11] However, in both countries there is a grey area resulting from this dichotomy, and problems sometimes arise in deciding whether the loss is total or partial, mainly because the scope of total loss is not well defined.[12]

[10] There have been several cases establishing the requirements for a loss to be indemnified in English law. For a detailed discussion, see Merkin *et al* (n 2 above). However, there are comprehensive requirements in the Chinese legislations also.
[11] Article 247 of the Chinese Maritime Code.
[12] Please refer to section 4.6 of this chapter for an illustration of this problem.

It is commonly recognised that there are three types of partial loss, namely, total loss of part of the goods, damage to the whole of the goods, and damage to part of the goods. Their respective measure of indemnity is covered in the later part of this chapter.

4.2.2 Total loss

The definition of total loss is also absent in the Chinese Insurance Law. Relevant provisions are provided only in Chapter 12 of the Chinese Maritime Code as a special law. Similar to the English marine insurance law, total loss in the Chinese marine insurance law is also categorised into actual total loss and constructive total loss.

Article 245 of the Chinese Maritime Code provides a definition of actual total loss, as follows:

> "…where after the occurrence of a peril insured against the subject matter insured is lost or is so seriously damaged that it is completely deprived of its original structure and usage or the insured is deprived of the possession thereof, it shall constitute an actual total loss."

The extent of damage in the insured subject-matter must be serious under a total loss. Loss of possession can also constitute an actual total loss in Chinese law. The definition under Article 245 does not emphasise the absolute irrecoverability of the insured subject-matter, whereas this is often the case in English insurance law.[13]

Marine insurance acknowledges another category of total loss - constructive total loss, where the cost of recovering the insured subject-matter exceeds its value when

[13] In English law, if the insured subject-matter can be repaired or reached, no matter how severely damaged, the loss is only partial. See Merkin *et al* (n 2 above), para 10.003.

recovered. When the goods have suffered a constructive total loss, the assured normally has the right to elect either to treat the loss as a partial loss or treat the loss as if it were an actual total loss by giving a notice of abandonment to the insurers.

Constructive total loss of a cargo is distinguished from that of a ship under the Chinese Maritime Code. According to Article 246, constructive total loss includes generally two scenarios: firstly, actual total loss is considered to be unavoidable after the cargo has suffered a peril insured against; or secondly, the expenses that would be incurred for avoiding total actual loss plus that for forwarding the cargo to its destination would exceed its insured value. Since constructive total loss is a peculiar rule in marine insurance, is it interesting to question whether there is a constructive total loss in the insurance of goods in multimodal transport.[14]

4.3 Ascertaining the value of the insured subject-matter

The value of the insured subject-matter can be either agreed in the insurance policy or assessed *ad hoc*. Depending on whether or not the value of the insured subject-matter was agreed in the insurance contract, insurance policies can be divided into valued and unvalued policies. Both Article 55 of the Chinese Insurance Law and Article 219 of the Chinese Maritime Code contain pertinent descriptions of a valued and unvalued policy when illustrating the measure of indemnity. However, valuation under an unvalued policy is different among these two pieces of legislation. This impose uncertainties for the measurement under the insurance of goods in multimodal transport.

[14] See section 4.6 of this chapter.

4.3.1 Valued policy

The definitions of a valued policy can be found in Article 55 (1) of the Chinese Insurance Law and Article 219 of the Chinese Maritime Code. A valued policy under the Chinese Insurance Law is a policy "where the *proposer* and the insurer have agreed on the *insured value* of the insured subject matter and specified the value in the contract".[15] Valued policies under the Chinese Maritime Code are those where "the *insurable value* of the subject matter insured" has been agreed upon "between the insurer and the *insured*".[16] There are two noticeable inconsistencies between these two pieces of legislation.

The first inconsistency exists in the terms used to refer to the value of the insured subject-matter. The value of the insured subject-matter fixed in the Chinese Insurance Law is referred as the "insured value", whereas in the Chinese Maritime Code it is the "insurable value".[17] The essence of a valued policy under both legislations is to fix the value of the insured subject-matter and use the agreed value for the measure of indemnity. However, the usage of different terms sometimes causes confusion in the measure of indemnity, as illustrated in Section 4.3.3 of this chapter below.

The second inconsistency is about who is in the position to fix the value of the insured subject-matter with the insurer. In the Chinese Insurance Law, it is the proposer who can agree with the insurer on the value of the insured subject-matter, whereas in the Chinese Maritime Code, the party who can fix the value of the insured subject-matter with the

[15] Article 55 of the Chinese Insurance Law.
[16] Article 219 of the Chinese Maritime Code.
[17] Interestingly, Article 220 of Chinese Maritime Code provides that the "insured amount" shall be agreed upon between the insurer and the assured. The "insured amount" in Article 220 is similar to the meaning of the "sum insured" in the English insurance law.

insurer becomes the assured. This inconsistency is caused by the variance between the two legislations in terms of the parties to the insurance contract. The Chinese Insurance Law establish a "three-contracting-party" system, under which the proposer is the party who enters into an insurance contract with an insurer,[18] and the assured enjoys the benefit of the insurance.[19] In most cases, the proposer is also the assured if his property is covered by the insurance contract after concluding the insurance contract.[20] But the proposer can also be the agent of the assured in the property insurance or the permitted parties in life insurance,[21] and this is when the conflicts occur. Since the contract is entered into between the proposer and the insurer, the proposer should be the party who is entitled to fix the value of the insured subject-matter. However, being influenced by the MIA 1906 in English law, the Chinese Maritime Code does not have such a role player as the proposer — the insurer and the assured are the only contracting parties in marine insurance.[22] Under the Chinese Maritime Code, it is therefore the assured who can agree with the insurer on the value of the insured subject-matter.

4.3.2 Unvalued policy

Chinese law treats a policy where the value of the insured subject-matter has not already been agreed upon in the contract as an unvalued policy. Unvalued policies are not frequently used in cargo insurance. As demonstrated by the feedback of the empirical study, the usage of unvalued policy has been rated as "not very often" or "not often at

[18] Article 10 (2) of the Chinese Insurance Law.
[19] Article 12 (5) of the Chinese Insurance Law.
[20] Article 12 (5) of the Chinese Insurance Law.
[21] *See* Bian Yaowu, Li Fei and Wang Chaoying (ed.), *Zhonghua renmin gongheguo baoxianfa shiyi (Interpretation of the Insurance Law of the People's Republic of China)* (Beijing: Falv chubanshe, 1996), pp. 17. When the proposer is not the assured, he is also required to have an insurable interest in the insured subject matter as per Article 12 (6) of the Chinese Insurance Law.
[22] Article 55 (1) of the Chinese Insurance Law.

all".[23] However, valuation of the insured subject-matter is still important because it impacts the ascertainment of the extent of loss under a partial loss.

According to Article 55 (2) of the Chinese Insurance Law, an unvalued policy is a policy where the *proposer* and the insurer have not agreed upon the *insured value* of the insured subject-matter. In Article 219 of the Chinese Maritime Code, an unvalued policy refers to a policy where no *insurable value* has been agreed upon between the insurer and the *assured*. Apart from inheriting the above-mentioned two inconsistencies, more importantly, these two pieces of legislation adopt differing approaches to ascertaining the value of the insured subject-matter.

Article 55 (2) of the Chinese Insurance Law establishes the general principle that the *actual value* of the insured subject-matter *at the time when the insured event occurred* should be used for the measure of indemnity. But in the special law for marine insurance contracts, Article 219 (2) of the Chinese Maritime Code provides that the insurable value of the cargo is the *invoice value* of the trading commodity.[24] In most of the cases where the insured goods are for sale, the invoice value is the amount that the seller would obtain, or that the buyer is obligated to pay, should the goods arrive safely at the destination. The possible profit gained from the trading of the goods is irrelevant to measuring the loss of the assured. This invoice value approach could achieve certainty

[23] *See* Questions Part III (1) of the interview protocol. Yet, confusions sometimes occur as to whether a policy is a valued policy or unvalued policy, attributing to the mix-up between the policy limit and the agreed value of the insured subject-matter. A policy merely containing the policy limit without fixing the value of the insured subject-matter is not a valued policy. Whether a particular figure in a policy represents an agreed value or a sum insured should depend upon the policy terms interpreted by both parties' reasonable expectation that whether the figure was intended to be used in the valuation of the insured subject-matter *See Kyzuna Investments Ltd v Ocean Marine Mutual Insurance Association (Europe)* [2000] Lloyd's Rep 513.

[24] Article 219 (2) of the Chinese Maritime Code.

in valuing the insured goods.[25] Nonetheless, in a rare case where the insured cargo is not for sale, no invoice is available. Thus, Article 219 (2) of the Chinese Maritime Code supplements that the insurable value of non-trade goods is the *CIF value at the place of shipment* when the insurance liability commences.[26]

One notable difference between the Chinese Insurance Law and the Chinese Maritime Code is the time at which the value of the goods is ascertained. The Chinese Insurance Law uses the value at *the time when the insured event occurred*. The Chinese Maritime Code adopts a different time — *the time when the liability commences*, as influenced by the MIA 1906. This is another conflict within the Chinese insurance legal system caused by the direct migration of rules from English insurance law.

Such a divergence between marine and non-marine insurance also exists in English law. In English common law, the value of the goods is the *prima facie* market value of the goods lost at the time and place of loss, namely the resale price *at the time of loss*,[27] because this is the cost to replace the insured goods. In Section 16 (3) of MIA 1906, the insurable value in the insurance of goods is the prime cost of the property insured, plus the expense of and incidental to shipping and the charges of insurance upon the whole. Normally the prime cost of the property insured is the value of goods ascertained through trading in the market, and such trading usually occurs at or before the inception

[25] However, the invoice value is not always applicable. In *China Base Ningbo Group Co Ltd v Ningbo Zking Property & Casualty Insurance Co Ltd* (2015) *Yong Hai Fa Shang Chu Zi* Number 301, the court adopted the value of the goods declared at the customs clearance as the insurable value, rather than the invoice value. The reason for such an unusual approach to valuation is because there were two invoices issued showing different values of the insured goods. Without consistent proof of the invoice value, the customs clearance value was adopted in this case, which seems to imply that the court will prioritise the invoice value in determining the sum recoverable.

[26] Article 219 (2) of the Chinese Maritime Code provides that "the insurable value of the cargo shall be… the actual value of the non-trade goods at the place of shipment, plus freight and insurance premium when the insurance liability commences".

[27] *Wilson and Scottish Insurance Corp Re* [1920] 2 Ch. 28 and *Rice v Baxendale* (1861) 158 E.R. 407.

of risks. Thus, the insurable value of goods in marine insurance is actually the CIF value *at or before the inception of risks*.[28]

Among the above two approaches for the valuation of the insured subject-matter, valuation at the time of loss is a direct reflection of the principle of indemnity. Since the goal of indemnity is to put the indemnitee back to the position he would have been *had the loss not occurred,*[29] the valuation of the insured subject-matter is naturally the market value at the time of loss, rather than the value at the inception of the risks. Under marine insurance, the measurement seeks to restore the assured to the financial position enjoyed as at the inception of risks,[30] which seems to be a slight departure from the principle of indemnity. However, such departure is perhaps justified for the benefit of commercial convenience,[31] since it is not always easy to ascertain the actual value at the time of loss in a maritime adventure. The same reasons can also be applied to the valuation of goods in multimodal transport.

Firstly, during a long-haul transit, the loss of the insured goods can be gradual and unapparent. In multimodal transport, the actual moment when the insured event occurred is not easy to decide in subsequent claim handling. In containerised transport, without inspecting the condition of the cargo at the end of each transport leg, it is hard to define the time when the insured event actually occurred. Thus, the Chinese Maritime Code approach is more suitable and practical for multimodal transport.

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[28] However, in practice, Section 16 rarely applies, because most marine policies are valued policies. The common law approach using the market value at the time and place of loss is more commonly used to ascertain the value of the goods in unvalued insurance.
[29] *Callaghan v Dominion* [1997] 2 Lloyd's Law Rep 541, 544.
[30] Howard Bennett, *The Law of Marine Insurance*, (Oxford: Oxford University Press, 2nd edn, 2006), p 245.
[31] This ground is actually used to justify the departure of a valued policy from the indemnity principle. See *Lidgett v Secretan* (1871) LR 6 CP 616, 627-8.

Secondly, Article 55 (2) of the Chinese Insurance Law is silent about the place of valuation. Under English law, the actual value can be measured by the market value at the place[32] and at the date of loss.[33] In comparison with English common law, the valuation under the Chinese Insurance Law only stipulates the time of valuation, with no mention of the place of valuation. This creates uncertainties in circumstances where the insured subject-matter is in transit. When the insured goods are transported from place A to place B, it is very unclear as to whether the actual value is the market value at place A or place B, or even if it refers to where the insured event occurred.

Thirdly, the valuation adopted by the Chinese Insurance Law often encounters practical difficulties; instead, the courts will adopt the valuation as provided by the Chinese Maritime Code. In *Sheng Tian He International Culture Media (Beijing) Limited v Zhong Yi Property Insurance Limited Shanghai*,[34] goods transited in trucks suffered a loss. The court held that since the insurer failed to prove the market value of the insured cargo at the time of loss, the measure of loss adopts the marine insurance approach — the *invoice value when the insurance liability commences* — as an indication of the actual value at the time of loss.

4.3.3 Over-valued policy and under-insurance: validity and problems

The principle of indemnity does not conflict with the practice of fixing the value of the insured subject-matter. The agreed value of the insured subject-matter is conclusive between the parties and should be applied in calculating the amount recoverable in the

[32] *Wilson* (n 27 above).
[33] *Charles Griffin & Co Ltd v De-La-Haye* [1968] 1 Lloyd's Rep 253 and *Rice* (n 27 above).
[34] (2015) *Pu Min Liu (Shang) Chu Zi* Number 1053.

case of both total loss and partial loss.[35] However, the fixed value may not always accurately reflect the actual value of the goods insured, as the value ascertained in an unvalued policy. The insured goods could be either over-valued or under-insured, and the validity of the insurance contracts under these two scenarios is often debated.[36]

Both the Chinese Insurance Law and the Chinese Maritime Code hold a proportionate view of over-valuation, in that the portion in excess of the actual value of the insured subject-matter shall be null and void.[37] With regard to under-insurance, the same proportionate view is also adopted in both legislations.[38] Policies of under-insured goods have a good chance of being valid, although the measure of indemnity is subject to the principle of average.[39]

However, inconsistencies between the two legislations in their usage of terms appear again under the provisions of both over-valuation and under-insurance. This chapter will illustrate the problem using the circumstance of over-valuation. In Article 55 (3) of the Chinese Insurance Law, over-valuation is the case where the *sum insured* exceeds the *insured value*. But Article 220 of the Chinese Maritime Code provides that over-insurance means that the *insured amount* exceeds the *insured value*.

Firstly, by comparing the definitions under both legislations, the *insured amount* in the Chinese Maritime Code is equivalent to the *sum insured* in the Chinese Insurance Law.

[35] These rules apply to both marine and non-marine insurance and are enshrined in section 27 (3) of MIA 1906. *See* Merkin *et al* (n 2 above), para 10.019.
[36] Nonetheless, the agreed value can be re-opened under suspects of excessive valuation. *See* n 30 above, p 248-255.
[37] Article 55 (3) of the Chinese Insurance Law and Article 220 of the Chinese Maritime Code.
[38] Article 55 (4) of the Chinese Insurance Law and Article 238 of the Chinese Maritime Code.
[39] For a detailed discussion on the principle of average, please refer to section 4.5.2 of this chapter.

Secondly, the meaning of *insured value* in Article 220 of the Chinese Maritime Code is a mystery. "Insured value" is not used anywhere else or explained anywhere within this legislation, except in the provisions of over-valuation and under-insurance.[40] It is likely that the abrupt usage of "insured value" in Article 220 of the Chinese Maritime Code is influenced by Article 55 of the Chinese Insurance Law. The insured value in the Chinese Insurance Law refers to the value of the insured subject-matter in both valued and unvalued policies. But the equivalent term in the Chinese Maritime Code is "insurable value".[41] This seems to be a common translation error of the Chinese Maritime Code, since both *insured value* and *insurable value* are used referring to the same Chinese term "baoxian jiazhi".[42] For the sake of consistency, "insured value" in Article 220 of the Chinese Maritime Code should be replaced with "insurable value".

4.4 Measuring the loss

The measure of loss is primarily decided by two criteria: (i) the value of the damaged cargo; and (ii) the nature of the loss. The foundation for the former is that the agreed value should be used to measure the loss in the case of a valued policy, and that the actual value is used under an unvalued policy. As for the second criterion, whilst a total loss of goods shall be indemnified for its whole value, a partial loss involves another

[40] For discussions on the choice of terms in under-insurance, please refer to section 4.5.2 of this chapter.
[41] Article 219 of the Chinese Maritime Code.
[42] This translation can be found in the English version of the Chinese Maritime Code published by the China Legal Publishing House, the national publisher affiliated under the State Council of Legislative Affairs Office in China, *see* Maritime Law (Beijing: China Legal Publishing House, 2002), the official website of the SPC, available at the http://english.court.gov.cn/2016-04/14/content_24532980_5.htm, and the official website of the National People's Congress, available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383863.htm. Although the Chinese Maritime Code, as a piece of legislation in China, does not have an official English version, this English version is used by foreign legal practitioners and domestic scholars in understanding the Chinese Maritime Code. This translation error can be misleading for users of the English version.

task, that of deciding on the extent of the loss. As the loss is classified as either total or partial, and the value of the insured cargo may or may not have been agreed in the insurance contract, it becomes necessary to discuss the measure of indemnity under the following four scenarios respectively.

4.4.1 Total loss under a valued policy (TV)

The measure of loss under this scenario should be straightforward, since the value of the insured goods is fixed and there is thus no need to calculate the extent of the loss. In the case of a total loss under the insurance of goods in general, the assured can be indemnified with equivalent goods or with the full value of the insured goods.

However, Chinese law is not clear about the measure of indemnity. Article 55 (1) of the Chinese Insurance Law merely provides that the agreed insured value shall be the basis for calculating the amount of indemnity payment. The measure of indemnity under a valued policy therefore honours the parties' prior agreement on the valuation. Since the contracting parties have already agreed upon the valuation, the primary sum recoverable is the agreed value fixed in the policy subject to other applicable deductions. Therefore, the measure of indemnity under this scenario should be as follows:

$$Measure\ of\ loss\ (TV) = Agreed\ value$$

4.4.2 Total loss under an unvalued policy (TU)

In the case of a total loss under an unvalued policy, the measure of loss is the value of the insured goods. However, as discussed in Section 4.3 of this chapter, the Chinese Insurance Law and Chinese Maritime Code both have different approaches to valuing the insured subject-matter, which creates difficulties in measuring the loss.

$$Measure\ of\ loss\ (TU) = Value\ of\ the\ insured\ goods$$

As discussed above, the valuation under the Chinese Insurance Law is based on the *actual value at the time of the occurrence of the insured event* under an unvalued policy.[43] Yet the Chinese Maritime Code establishes that it is the *invoice value* or the *CIF value when the insurance liability commences*.[44]

4.4.3 Partial loss under a valued policy (PV)

Compared to the total loss in a valued policy, the measure of loss under this scenario involves another important factor — the extent of the loss, sometimes expressed as the ratio of depreciation. The measure of indemnity should be calculated as follow:

$$Measure\ of\ loss\ (PV) = Agreed\ value \times Extent\ of\ loss$$

The basis for this is that the agreed value should be used for valuation of the insured subject-matter, regardless of the nature of the loss. As Morris J stated in *Elcock v Thomson*,[45] "it would be strange and unnatural if an agreed value were to apply only in the event of complete destruction and not in the event of partial destruction". The Chinese Insurance Law also recognises that the agreed value shall be used to calculate the sum recoverable.[46]

It should be noted that the extent of the loss does not differ according to whether a value of the insured subject-matter has been agreed in the contract. The extent of the loss is an objective and factual judgment, so although the value of the insured subject-matter is

[43] Article 55 (2) of the Chinese Insurance Law.
[44] Article 219 (2) of the Chinese Maritime Code. As noted from answers to the questions in Part III of the Interview Protocol, the commonly used supporting documents for the valuation of the goods in transit include the contract of sale, invoice, bill of lading, or the report of surveyors appointed by the insurer.
[45] [1949] 2 KB 755
[46] Article 55 of the Chinese Insurance Law 2015.

agreed in the insurance contract, such agreement will not affect the factual judgment. Unfortunately, there are no further statutory guidance regarding the extent of loss in China. Ways of ascertaining the extent of loss are left to individual insurance contracts or the discretion of judges.

4.4.4 Partial loss under an unvalued policy (PU)

There are two tasks in ascertaining the measure of loss under this scenario: deciding on the actual value of the insured subject-matter, and assessing the extent of the loss. The measure of indemnity in this case is as follows:

$$Measure\ of\ loss\ (PU) = Actual\ value\ \times Extent\ of\ loss$$

Valuation of the insured subject-matter is different between marine and non-marine insurance contracts in China.[47] More importantly, both legislations are silent about how to ascertain the extent of loss, leaving much room in this regard for individual insurance contracts. However, as observed in reported cases, most standard policies in the Chinese insurance market for goods in inland multimodal and "maritime-plus" transport do not contain any such rules. Chinese judicial practice is therefore, by exercising judicial discretion, gradually adopting relatively consistent ways of ensuring the measurement of loss under cargo insurance.

There are three types of partial loss, namely, total loss of part of the goods, damage to the whole of the goods, and damage to part of the goods. This section will employ the case study method to analyse the measure of loss adopted by Chinese courts under the above three types of partial loss.

[47] Please refer to section 4.3.2 for more details about valuation under unvalued policy.

(i) Total loss of part of the goods

In *Zhejiang Yuanda Import and Export Co Ltd v Ningbo Tianan Insurance Co Ltd*,[48] a consignment of nickel ore was imported by the assured and underwent multimodal transport, first by ship from Indonesia to the port of Tianjin, China, followed by a journey to the warehouse in Tianjin by trucks. The invoice showed the FOB value of the goods and the freight and insurance premium to carry the goods to Tianjin. The nickel ore was insured under an "All Risks" policy with a "warehouse-to-warehouse" clause. The policy also contained a fixed insured amount. However, it was found that the nickel ore actually arrived at the warehouse with a shortage. The court held that the measure of indemnity is the actual value of the portion lost.

$$Measure\ of\ loss\ (PU\ 1) = Insurable\ value\ of\ the\ part\ lost$$

The key issue here is how to assess the actual value of the goods in multimodal transport. The court used the approach adopted in the Chinese Maritime Code. Thus, the measure of loss is the invoice value at the commencement of insurance liability plus the freight and insurance premium to carry the insured goods to the destination as the insurable value, namely the *CIF value of the part lost*.

(ii) Damage to the whole of the goods

In *Fuzhou Te Wei Chemical Co Ltd v Ningbo China Pacific Insurance Co Ltd*,[49] chemical products were shipped from Saudi Arabia to Ningbo, China. The invoice value of these chemical products is USD 1,345 per ton including freight. When the cargo arrived at Ningbo, China, it was found that all the chemical products had suffered

[48] (2008) *Yong Hai Fa Shang Chu Zi* Number 367.
[49] (2014) *Yong Hai Fa Shang Chu Zi* Number 874.

damage due to their decreased chromaticity. Also, the weight of the chemical products had decreased from 1,039.105 tons at the port of loading to 1,037.2 tons at the port of arrival. It was ascertained by the buyer that the unit price of the undamaged chemical product was CNY 11,500 but was CNY 10,000 for the damaged chemical product. Later, the damaged chemical products were actually sold for an average of CNY 10,042 per ton. The assured buyer sued the insurer for the damage to the insured goods. The measure of indemnity was as follows:

$$Measure\ of\ loss\ (PU2) = Insurable\ value\ \times \frac{Sound\ value - Damaged\ value}{Sound\ value}$$

Again, the court adopted the marine insurance approach in determining the actual value, which was held to be its CIF value as shown on the invoice. As to the extent of loss, the court held that it is the difference between the value of the sound chemical products (CNY 11,500 per ton) and the value of the damaged chemical products (CNY 10,042 per ton) bears to the value of the sound chemical products *at the place of arrival*.

In deciding the extent of loss, the Chinese court used a new value, i.e. the value at the place of *arrival* rather than the value at the place of *loss*, even though the value at the place of arrival is seldom mentioned in the legislations. Nonetheless, the approach adopted in this case is very much like that under marine insurance in English law.

Under Section 71 (3) of MIA 1906, the values used to calculate the extent of loss are also sound value and damaged value *at the place of arrival*.[50] Interestingly, it is the

[50] In Section 71 (3) of MIA 1906, the measure of indemnity is such proportion of the insurable value as the difference between the gross sound and damaged values at the place of *arrival* bears to the gross sound value. For a detailed discussion on the partial loss of goods under MIA 1906, *see* Francis D Rose, *Marine Insurance: Law and Practice* (London: Informa Law, 2004), para 22.29-22.52. Section 71 (4) of

value at the place of *arrival* that is used to measure the extent of loss rather than the place of *loss,* a criterion which is often used in MIA 1906. The reason why this section adopts the former criterion can perhaps be found in *Lewis v Rucker*, where Lord Mansfield stated that:

"If they arrive, but lessened in value through damages received at sea, the nature of an indemnity speaks demonstrably, that it must be by putting the merchant in the same condition…which he would have been in if the goods had arrived free of damage...".[51]

Thus, the value of goods that would have arrived free of damage is adopted to measure the pre-loss condition of the goods.

Another interesting issue in this Chinese case is that two possible values of the damaged goods occurred at the place of arrival: the actual resale price and the price found during the inquiry. Had the loss not occurred, the assured would have been able to resale the goods at the destination. The court adopted the actual resale price, which is can more accurately indemnify the assured for his pecuniary diminution.

(iii) Damage to part of the goods

The last case *China Base Ningbo Group Co Ltd v Ningbo Zking Property & Casualty Insurance Co Ltd*[52] shares the features of the previous two. The court held that the measure of indemnity is the proportion of the insurable value of the part lost. Thus, its measure of indemnity is as follows:

MIA 1906 also specifies the gross sound value, which is the wholesale price or, if there is no such price, the estimated value, plus freight, landing charges and duty paid beforehand.

[51] (1761) 2 Burr 1167, p 1172-1173.

[52] *China Base Ningbo* (n 25 above).

$$Measure\ of\ loss\ (PU3)$$

$$= Insurable\ value\ of the\ part\ \times \frac{Sound\ value - Damaged\ value}{Sound\ value}$$

4.4.5 Alternative ways of measuring the loss

When court discretion is applied, one can clearly notice the influence exerted by the law and practice of English marine insurance, especially in the domain of marine insurance law. Yet, as well as the above methods, English common law also employs many other feasible ways of ascertaining the measure of loss.

Market value is the general approach applied. Thus, the measure of indemnity is the proportion of the *market value* multiplied by the extent of loss. Normally, the diminution in market value before and after the occurrence of the insured event is the correct measure.[53]

For total loss under an unvalued policy, in English common law the measure of indemnity can also be the *replacement value*. For cargo insurance in particular, the assured may be indemnified for the cost of replacing the damaged cargo with undamaged cargo at the current market price.

When the insured subject-matter under partial loss is capable of being repaired, the *cost of restoring* the insured goods to their pre-loss condition would also be considered as the correct indemnity for the partial loss. Any betterment gained from the repair of the insured goods will be deducted. Problems can occur when the cost of repair is greater than the market value of the goods even before the loss, so that it is economically not

[53] *Quorum AS v Schramm* [2002] 1 Lloyd's Rep IR 292.

worth repairing. This is the particular problem in non-marine insurance, where there is no such concept as a constructive total loss.[54]

To determine which one of the above methods of measurement is correct depends on the intention of the assured with regard to the insured cargo, since being indemnified is the primary expectation of the assured, and the applied methods of measurement vary according to the different expectations of assureds. Normally, when the cargo is capable of being repaired, the measurement would be the cost of repair.[55] But if the intention of the assured regarding the insured cargo is to resell it on the market, the correct measurement is no longer the repair cost but the diminution of the market value of the cargo after the loss.[56]

4.5 Applying any deductions

The measure of loss is merely the primary sum recoverable, whereas the final sum is subject to further deductions imposed by both the insurance law and the contract. Commonly applied deductions under cargo insurance in multimodal transport are the policy limit, the principle of average in the case of under-insurance, the extent of the assured's insurable interest, and the deductibles.[57]

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[54] For a detailed discussion on its implications for cargo insurance in multimodal transport, please refer to section 4.6 of this chapter.
[55] *Westminster Fire v Glasgow Provident* (1883) 13 AC 669, p 713.
[56] *Quorum* (n 53 above).
[57] Besides these deductions, betterment is another possible deduction applicable to circumstances where the cost of replacement or cost of repair is used to ascertain the insurable value of the insured subject-matter. Since the cost of replacement and the cost of repair are rarely used in multimodal transport, betterment is not discussed within this chapter. For a detailed discussion on betterment, *see* Merkin *et al* (n 2 above), para 10.129-130.

4.5.1 Policy limit

The policy limit sets down the maximum amount recoverable. Finding an insurance contract without a policy limit is unlikely, since setting down the ceiling of the amount recoverable is one important criterion by which the insurer can assess his exposure in underwriting the risks, and thus calculate an appropriate premium.

In marine insurance, the maximum amount recoverable is referred as the *insured amount*.[58] The insured amount can be, and usually is, agreed upon between the insurer and the assured.[59] In this case, the court inclines to honour the agreed amount as the maximum amount recoverable. For example, in *Jie Yang City Rong Cheng District General Grain Company v PICC Yi Zheng City*, the goods insured for inland water transport had a market value of 1.27 million CNY, and an insured amount of 1.20 million CNY.[60] The court used the insured amount as the sum payable, since Article 238 of the Chinese Maritime Code explicitly limits the insurer's indemnification to the insured amount.

When the fixed insured amount is at variance with its market value, the issue of under-insurance or over-valuation comes into play. In a case of over-insurance, where the insured amount is greater than the insured value, the portion in excess shall be null and void.[61] Namely, the measure of indemnity is limited to the lower amount set by the

[58] Article 238 of the Chinese Maritime Code.
[59] Article 220 of the Chinese Maritime Code. It should be noted that the fact that the insured amount is agreed between the insurer and the assured does not make the insurance a valued policy. A valued policy in Chinese law is not about fixing the maximum amount recoverable, but rather about fixing the insured value under the Chinese Insurance law, or the insurable value under the Chinese Maritime Code, of the insured subject-matter.
[60] (1995) *Min Jing Zhong Zi* Number *2*.
[61] Article 220 of the Chinese Maritime Code and Article 55 of the Chinese Insurance Law.

insured value. Thus, the ceiling imposed by the insured amount will be ineffective given that the lower ceiling of the insured value will be applied.

However, Chinese law is silent about how to ascertain the insured amount if it was not already agreed upon between the insurer and the assured. In a rare case where the insured amount has not been agreed upon in the policy, the maximum amount recoverable should be subject to the principle of indemnity. English law offers an example in this regard.

In English law, the maximum amount recoverable is essentially the full extent of the value of the insured subject-matter, which varies between valued and unvalued policies. For a valued policy, both the common law and MIA 1906 use the value fixed in the insurance contract.[62] In the case of an unvalued policy, the maximum amount recoverable is the *market value at the date when the insured peril occurred*[63] for general insurance contracts, and *the full extent of the insurable value,*[64] which for marine insurance contracts is actually the *CIF value at or before the inception of the risks,* as discussed above. Such differences in valuation of the goods remain when finding the maximum sum recoverable. Since a similar divergence in valuation also exists between the Chinese Insurance Law and the Chinese Maritime Code, the inconsistency is likely to occur again when determining the maximum amount recoverable in China if following the English approach.

[62] *Westminster* (n 55 above), p 71 and Section 67 (1) of MIA 1906.
[63] *Leppard v Excess Insurance Co Ltd* [1979] 2 Lloyd's Rep 91.
[64] Section 67 (1) of MIA 1906.

4.5.2 Principle of average

The principle of average is applicable to the case of under-insurance, where the sum insured is less than the insurable value. Thus, the assured will only be indemnified for the proportionate part of the loss. In the Chinese insurance market, under-insurance is particularly common in cargo insurance. Pursuant to Article 55 (4) of the Chinese Insurance Law and Article 238 of the Chinese Maritime Code, the assured is only allowed to recover that part of the loss which the sum insured bears to the value of the goods in the case of under-insurance; the remainder is deemed to be self-insured by the assured.

$$Measure\ of\ indemnity = Measure\ of\ loss \times \frac{Sum\ insured}{Insurable\ value}$$

In China, the principle of average is a statutory principle for property insurance and marine insurance. But the principle of average is also subject to an otherwise contractual agreement, such as the value warranty. Again, the "insured value" is used in Article 238 of the Chinese Maritime Code.[65] As discussed in the case of over-valuation, the "insured value" in Article 238 of the Chinese Maritime Code should be replaced with "insurable value" for the sake of consistency.[66]

It should be noted that the principle of average is only applicable in the case of a partial loss under the Chinese Maritime Code. In the official version in Chinese, Article 238 of the Maritime Code explicitly confines the principle of average to be applicable under a partial loss, whereas there is no such confinement in the Chinese Insurance Law. This

[65] Article 238 provides that "where the insured amount is lower than the insured value, the insurer shall indemnify the proportion that the insured amount bears to the insured value".
[66] Please refer to Section 4.3.3 of this chapter.

suggests that when under-insured goods suffer a total loss, the measure of indemnity is immune from the principle of average, so the assured can still recover the full extent of the insurable value under the policy.

Actually, with or without such confinement in Article 238 of the Chinese Maritime Code, the final sum recoverable will always be subject to a deduction triggered by under-insurance. For total loss in an under-insurance situation, the alternative deduction applicable is the policy limit. In an under-insured policy, limiting the insurer's liability to the insured amount has the same effect as the principle of average. In the same case[67] above in section 4.5.1, even without the principle of average, the assured will be indemnified for CNY 1.20 million because of the ceiling set by the insured amount.

The maximum sum recoverable and the principle of average actually achieve the same effect, the only difference between the two deductions being their application. The maximum sum recoverable is more often triggered by a total loss, whereas the effect of the principle of average is explicitly confined to the case of a partial loss for marine insurance contracts.

4.5.3 Insurable interest of the assured:

It is in accordance with the indemnity principle that the assured is indemnified for his pecuniary loss. However, similar damage to the insured subject-matter would constitute different degrees of loss to assureds with different insurable interests, calling for a

[67] *Jie Yang* (n 60 above).

different measure of indemnity.[68] Thus, the measure of indemnity also depends on the insurable interest of the assured in the insured subject-matter.

The bailee's measure of indemnity is perhaps one exception to deduction imposed by the insurable interest. In English law, the bailee of the insured goods is entitled to the full value of the insured subject-matter, which could be more than his potential liability to the shipper for the loss of the insured subject-matter.[69] In doing so, the bailee will hold any part in excess of his liability in trust for the shipper or the bill of lading holder of the insured goods.[70]

However, the insurable interest of the bailee or other equivalent roles under Chinese law is still under debate. There is no equivalent mechanism of bailment as mature as it is in English law. In China, the possessory right is protected under the Chinese Property Law. But this is different from bailment in English law. In China, although property rights are insurable, the current definition of insurable interest is unclear about whether such possession is insurable as a property right.

4.5.4 Deductibles

Unlike the former three deductions, which are statutory, the effect of a deductible clause depends on the contractual agreement. It is up to the contracting parties whether or not to incorporate a deductible clause in the policy. Most cargo policies contain a deductible

[68] *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd* [1940] 2 KB 388, p 405-406.
[69] In *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E&B 870, p 880, Lord Campbell explained that to enable the bailee to insure the goods in his trust would be commercially convenient.
[70] *Ibid*, the court held that the warehouseman is entitled to recover the full value of the goods, even if the owner of the goods gave no orders to insure the goods and was unaware of their insurance. The warehouseman is regarded as a trustee of the remainder for those parties who have the ulterior interest in the property.

clause,[71] where the sum recoverable is actually divided into two layers: firstly, the assured will bear the sum up to the deductible, and secondly, the insurer will indemnify any sum exceeding the deductible.

The deductible clause can serve many purposes. On one hand, it helps to keep the premium down by saving on the insurer's administration costs when handling small claims. On the other hand, it can motivate the assured to be more prudent to avoid loss, by assigning him an unrecoverable sum.

The deductible clause can take various forms. It is normally either in the form of a fixed amount or a percentage of the loss, or even the higher amount of these two. The deductible can also be applicable on an aggregated occurrence basis or a claim basis. Under an aggregated occurrence basis, the Multimodal Transport Operator (MTO) who insured the property carried is entitled to apply one deductible, irrespective of the number of claims made under the policy. Under a claim basis, the same MTO may subtract the deductible from the sum recoverable in every claim against the insurer. This difference will affect the measure of indemnity.

It is a construction of the contract as to how to subtract the deductible,[72] but ambiguity sometimes exists in the absence of a clear deductible clause. It may be unclear as to whether the deductible should be subtracted from the measure of loss (step 3 of the proposed four-step framework) or from the final sum payable under the policy (step 4 of the proposed four-step framework). In cases of under-insurance, where the principle of

[71] There are also cases that preclude the deductible. For instance, the insurer can incorporate a deductible buy-back extension to remove the deductible at the cost of a higher premium.

[72] There are a number of cases on the construction of the deductible clause in English law. For a detailed discussion of these cases, please *see* Merkin *et al* (n 2 above), para 10.153-10.171. The right construction of the deductible clause should always depend on the choice of words in the context. *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1996] 1 Lloyd's Rep 664, [1997] 2 Lloyd's Rep 687 (CA)

average is applicable, the way that the deductible is subtracted would affect the measure of indemnity.

Contemporary judicial practice is a mixture of both. Most reported cases hold the view that the deductible is subtracted from the sum payable (step 4) after having applied the principle of average.[73] This practice is similar to the English approach. In English law, the deductible is usually subtracted from the sum payable under the policy, not from the measure of loss, unless the policy provides otherwise.[74] The reason for such practice is explained in a New Zealand case:

> "[T]he rationale for having a deductible is that it represents a portion of any loss caused by a particular form of risk, for which the insurer does not assume liability. To effect that outcome in the case of a claim by a fully insured property owner, the deductible is the last amount subtracted before the insurer makes payment."[75]

Yet, there exist other cases where the deductible is subtracted from the measure of loss (step 3) before the application of the principle of average. In *Zhejiang Yuanda Import and Export Co Ltd v Ningbo Tianan Insurance Co Ltd*,[76] the deductible clause simply states "deductible: 0.3%". The insured goods suffered a shortage of 648 tons during their multimodal transport. It is a trading custom that there is a leeway of 0.3% shortage of the total cargo delivered. The goods were under-insured by the proportion of 61.07%.

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[73] For example, *Tianjin Zhong Heng Run Cargo Transport Co Ltd v Tianjin China Pingan Property Insurance Co Ltd* (2014) *Nan Min Chong Zi* Number *0014* and *Xiong Jianmin v PICC Yi County (2015) Da Hai Shang Chu Zi* Number 272.
[74] Merkin *et al* (n 2 above), para 10.150.
[75] *QBE Insurance (International) Ltd v Wild South Holdings Ltd and Maxims Fashions Ltd* [2013] NZHC 2781; *Marriott v Vero Insurance* and *Crystal Imports Ltd v Certain Underwriters at Lloyd's of London* [2014] NZCA 447. This is a New Zealand Case on appeal in the joined cases. But the position in English law is expected to be similar.
[76] *Zhejiang Yunda* (n 48 above).

In the measure of loss, the court held that the insurable value of the part lost is the value of the shorted 648 tons after subtracting the value of the 0.3% leeway and the 0.3% deductible of the total cargo carried. After that, the final measure of indemnity is the proportion that the sum insured bears to the deducted insurable value of the part lost.

In this case, the court subtracted both the deductible and the customary leeway together during the measure of loss. However, the customary leeway and deductible are different. The customary leeway is specifically for calculating the volume of the cargo lost in transit and thus is used in the third step of the proposed four-step framework in the measure of loss, whereas the deductible applies to the sum payable and should only be subtracted in the last step.

4.6 Is there a constructive total loss in cargo insurance in multimodal transport?

Normally, constructive total loss exists only in the context of marine insurance.[77] Under Chinese law, there is no statutory ground to apply the constructive total loss principle in non-marine insurance. Constructive total loss is regulated in Chapter 12 of the Chinese Maritime Code. The Chinese Insurance Law for general insurance contracts does not contain such rules. Without a statutory basis in general insurance law, a loss that would have been recognised as a constructive total loss in marine insurance is a partial loss in non-marine insurance.

However, the insurance of goods in multimodal transport may include both marine and non-marine perils. Then the question arises as to whether the insurance of goods in

[77] The English law also limits constructive total loss to marine insurance only.

multimodal transport admits a constructive total loss. The answer to this question is of great importance because of the differing measures of indemnity under constructive total loss and partial loss.

A brief answer is that since contemporary Chinese legislation confines constructive total loss to the area of marine insurance, the application of this principle is actually decided by the nature of the insurance contract. In the context of the insurance of goods in multimodal transport, the insurance of goods in "maritime-plus" is likely to be a contract of marine insurance and the constructive total loss principle is applicable. On the other hand, the insurance of goods in multimodal transport without a sea leg is not a marine insurance contract, which deprives it of the application of the constructive total loss principle.

In view of this, is there a necessity to promote similar rules in non-marine insurance law? Would the laws for non-marine insurance be better off with the constructive total loss principle included? There have already been discussions on this issue both under English insurance law and the laws of other common law countries, and these discussions can offer valuable references for the future development of Chinese insurance law.

4.6.1 A case study on the insurance of buildings

In a recent insurance case decided in New Zealand relating to buildings, the court had to consider whether there was a constructive total loss. In this case, two buildings were seriously destroyed in an earthquake. The court held that the buildings were not totally

lost until they ceased to exist, and the insurers were liable to indemnify the assured for repairing the buildings at whatever cost.[78]

Although the judges in this case refused to deem the buildings as a constructive total loss, it is not easy to generalise their rationale to the insurance of goods. Their judgment was built upon the peculiar feature of the insured subject-matter in this case, namely buildings. One characteristic of a building that distinguishes itself from cargo is its uniqueness. In other words, it is practically impossible to obtain an equivalent building after the insured one is damaged. Therefore, a fair and reasonable measure of indemnity is to repair the damaged building, even though the cost of repair exceeds its value when repaired. In contrast, damaged goods can usually be easily substituted in the open market. It would be economical and practical to deem the loss as total when the cost of repair exceeds the recovered value of the insured goods.

4.6.2 Historical analysis: marine adventure as it was in the old days?

There is a need to analyse why constructive total loss was developed from marine insurance in the first place. The reasons have been well explained by Lord Atkinson in *Moore and Gallop v Evans*, as follows:

> "Those willing to adventure, who had possessed themselves of expensive but money-making chattels like ships for the purpose of their adventures, should, if they insured, be protected as far as possible from having their capital locked up unprofitably in ships whose fate they were unable actually to ascertain and prove. Hence it was that ships which had sailed and had not been heard of for a length of

[78] *Marriott v Vero Insurance New Zealand Ltd* [2013] NZHC 3120.

time were presumed not merely to have been lost, but to have foundered at sea, so that the owner would be at once entitled to recover the full amount under his policy."[79]

Constructive total loss grew out of the necessities of maritime trade and commerce. Historically, the establishment of a constructive total loss was confined to the insured subject-matter exposed to marine perils in marine insurance.[80] But nowadays, risks arising from marine adventure has been largely decreased with the improvement of ship building and communication technologies. Other modes of transport, such as the carriage of goods by railway and air, play an increasingly important role in supporting international trade. Assets devoted to other modes of transport are also substantial, but the risks entailed in marine adventure and other modes of transport has been narrowing down.

The divergence of marine and non-marine insurance has led along varied paths for measuring the indemnity of goods in multimodal transport with or without a sea journey, and differentiation has thus accelerated ambiguity. When the cost of recovering the goods exceeds the recovered value, whether the loss is total or partial depends on whether or not a sea leg is involved — and the answer to this will affect the measure of indemnity.

The fact that constructive total loss is generated from marine insurance does not prevent it from being later useful for other types of insurance. It is a doctrine that operates to achieve the commercial efficiency, expectations of both parties and the principle of

[79] (1918) 117 LT 761, p 764.
[80] *Goss v Withers* (1758) 2 Burr 683, p 694 and *Hamilton v Mendes* (1761) 1 Wm BL 276.

indemnity. There are three main reasons to introduce the constructive total loss principle to other commercial property insurances.

Firstly, constructive total loss is an economic principle that allows the assured to be indemnified under the pending status of the insured subject-matter, and encourages the assured to abandon the damaged insured subject-matter when it is not economical to repair it.

Secondly, it would meet the expectation of both parties by giving the assured the option to release himself from the further losses that may occur by abandoning the insured subject-matter and the insurer the option to accept the abandonment and taking over the rescue process if necessary. The insured subject-matter in distress will only be deemed as a constructive total loss with the consent of both insurer and the assured driven by their reasonable expectations.

Thirdly, constructive total loss is consistent with the principle of indemnity. As Brett L.J. pointed out in *Castellain v Preston* that constructive total loss is

> "…a doctrine introduced by the benefit of the assured; for, as a matter of business, a constructive total loss is equivalent to an actual total loss; and if a constructive total loss could not be treated as an actual total loss, the assured would not recover a full indemnity. But grafted upon the doctrine of constructive total loss came the doctrine of abandonment, which is a doctrine in favour of the insurer or underwriter, in order that the assured may not recover more than a full indemnity. The doctrine of constructive total loss and the doctrine of notice of abandonment engrafted upon it were invented or promulgated for the purpose of making a

policy of marine insurance a contract of indemnity in the fullest sense of the term."[81]

Actually, some practices in the non-marine insurance field have already incorporated rules similar to the constructive total loss. The insurance practice of "writing off" in non-marine insurance achieves the same effect as a constructive total loss. This is particularly common in motor insurance where damaged cars can be written off because it is uneconomical to repair them even if they could be repaired.[82] To avoid the ambiguity caused by the differences in rules of law, it is recommended that the insurance contract for goods in multimodal transport also adopts the "writing off" practice to enable the assured to recover the total loss when the cost of repairing is uneconomical.

4.7 Conclusion:

Chinese law establishes the basic four-step framework in the measure of indemnity. However, ambiguity and inconsistency also exist. Both the Chinese Insurance Law and the Chinese Maritime Code are unclear about how to ascertain the extent of loss and how the deductible is subtracted. In practice, much room is actually left for the individual insurance contract or for judicial discretion in absence of a clear contractual agreement. Interestingly, it is observed that Chinese courts, especially in the area of marine insurance, have developed relative stable practices with the influence of the

[81] (1883) 11 QB 380, 387.
[82] *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24.

English MIA 1906. There is an urgent need to crystallize the judicial experience into the rules of law.

Moreover, the Chinese Insurance Law and the Chinese Maritime Code have adopted varied paths in measuring the loss. There are many notable inconsistencies between the two pieces of legislation in terms of the scope of total loss, and on which time the value of the subject-matter insured should be based. This chapter advocates that constructive total loss and the valuation at the inception in the risks should be applied in the insurance of goods in multimodal transport.

Because of the divergent rules applicable to marine and non-marine insurance, the measure of indemnity of goods in multimodal transport is actually dependent on the classification of the insurance contract as discussed in Chapter 2. Given this ambiguity, and the conflicting measures of indemnity applicable between marine and non-marine insurance, it is extremely important for the assured under the insurance of goods in multimodal transport to incorporate specific provisions within the insurance policy to achieve the effect they wish for. Given the transit nature of the insured subject-matter, considerations should also be given to the commercial convenience.

CHAPTER 5

SUBROGATION IN CARGO INSURANCE UNDER MULTIMODAL TRANSPORT IN CHINA

This chapter tackles the aftermath of the indemnity principle from the perspective of the insurer's right of subrogation. After the insurer has indemnified the entitled assured with the sum recoverable, as identified in the preceding chapters, the insurer's right of subrogation comes into play to prevent any unjust enrichment of the assured. In the context of multimodal transport, there have been many disputes as to whether the carrier and actual carrier are the "third party" whom the insurer can claim against. Furthermore, both the Chinese Insurance Law and Chapter 12 of the Chinese Maritime Code lack sufficient guidance on how to allocate the subrogation recoveries and recoup any ex gratia payment, whereas in English case law comprehensive allocative rules have already been established. This chapter attempts to investigate the position of the carrier and actual carrier in a subrogation claim under the insurance of goods in multimodal transport, as well as pursuing the allocative rules under exceptional circumstances which are consistent with the principle of indemnity, with a reference to the English insurance law. It found that whether or not the carrier and actual carrier are the "third party" under subrogation is dependent on individual insurance arrangement and subcontracting the carriage contract. Also, it finds the existence of a great hurdle for Chinese law to overcome if it is to adopt rules similar to the English approach.

5.1 Introduction

Subrogation is a doctrine that prevents the assured from recovering more than his loss from both the insurer and the liable third party.[1] Payment in excess of the full loss of the assured will constitute unjust enrichment, which contradicts the principle of indemnity to put the assured into the same position in which he would have been had the loss not occurred.[2] To ensure that the assured is not indemnified more than his loss, the doctrine of subrogation allows the insurer who has paid the indemnity to take over the rights of the assured and to enforce any action against the liable third party. Moreover, the insurer is entitled to recoup any extra sum from the assured, including any insurance indemnity overpaid by the insurer and any amount recovered from the third party that has accrued so as to diminish the loss of the assured.[3]

The above two alternatives mirror the two limbs of the insurer's right of subrogation in Chinese law (See Table 5-1 below). The first limb embodies the external relationship of subrogation to claim recoveries against the third party, whether in contract or tort, legal or equitable,[4] whereas the second limb exhibits the internal relationship of the insurer's recoupment from the assured.

[1] *Castellain v Preston* (1883) 11 QB 380, 388.
[2] *Callaghan v Dominion Insurance Co* [1997] 2 Lloyd's Rep 541, 544.
[3] *Burnand v Rodocanachi* (1882) 7 AC 333; *Castellain* (n 1 above).
[4] As determined by the legal basis of subrogation in English law, the insurer should only subrogate the whole loss in the name of the assured, see *Castellain*, *ibid*, p 388.

Table 5-1: Statutory provisions on the two limbs of subrogation under Chinese law

	Statutory Provisions	
The First Limb	Article 60 (1) of the Chinese Insurance Law: "Where an insured event occurs due to the loss of or damage to the insured subject-matter caused by a third party, the insurer may… be subrogated into the insured's right of claim against the third party up to the amount of indemnity payment."	Article 252 of the Chinese Maritime Code: "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 party person shall be subrogated to the insurer…"
The Second Limb	Article 60 (2) of the Chinese Insurance Law: "Where the insured event… occurs and the proposer has obtained indemnity from the third party, the insurer may… deduct therefrom a comparable amount which the insured has received as indemnity from the third party."	Article 254 of the Chinese Maritime Code: "In effecting payment of indemnity to the insured, the insurer may make a corresponding reduction therefrom the amount already paid by a third person to the insured."

Subrogation plays a noticeable role under cargo insurance. Many insurance claims nowadays are actually insurers' subrogation claims against the liable third party. In multimodal transport, the insured goods can be lost due to the negligence of the carrier. Presumably, the assured cargo owner is not only entitled to be indemnified by the insurer based on the cargo policy, but also compensated by the Multimodal Transport Operator (MTO) for the breach of carriage contract. If the assured exercised both remedies, there are high chances that he will be compensated for more than his actual loss. However, two problems would arise in regard to the application of subrogation doctrine under the insurance of goods in multimodal transport, attributed to ambiguity in the scope and legal basis of subrogation in Chinese law.

Firstly, it can be difficult to identify whether the insurer is entitled to subrogate against the carrier and the actual carrier. In multimodal transport, the carrier can either act as an agent to purchase cargo insurance or insure the goods transited as the assured. [5] Subcontracting the carriage contract is also a common practice in multimodal transport. In these cases, the identity of the "third party" in the subrogation claim can be questioned.

Secondly, it is unclear how to allocate the subrogation recoveries between the insurer and the assured when the assured is not fully indemnified through both the insurer and the liable carrier. The MTO or carriers, when being the liable third party in a subrogation claim, are likely to be protected by the limited liability under the contemporary international regime on the carriage of goods. Because of their limited liability, it is more likely that recoveries from the liable third party are insufficient to compensate the indemnity paid out by the insurer. In this case, the assured will not be indemnified more than his loss; but third parties' limited liability does not affect the insurer's right of subrogation. It is unclear in Chinese law how much the insurer is entitled to subrogate against the liable carrier or how much the insurer is entitled to recoup from the indemnity paid to the assured.

Therefore, Chapter 5 aims to clarify the scope of subrogation by tackling whether the insurer is entitled to claim against the carrier and actual carrier and, based on an analytical investigation into the legal basis of subrogation, to discuss the allocation of subrogation recoveries when recoveries from the third party are insufficient to compensate the insurer for the indemnity he has paid out. It will firstly clarify the

[5] One interviewee from the empirical study comments the practice as unsatisfactory when asked about the identity of the assured so as to include the carrier under the cargo policy in Chinese insurance market.

preconditions to exercising the insurer's right of subrogation. The next section of this chapter will analyse the legal basis for subrogation under the Chinese debt law framework. Then, through a comparative analysis of English insurance law, the chapter will address the above two problems in the context of multimodal transport.

5.2 Preconditions for the insurer to exercise the rights of subrogation

Upon the occurrence of an insured event caused by the third party, the insurer does not automatically acquire the rights of subrogation. Instead, there are certain preconditions as summarised below from the law and practice in China.

5.2.1 A contract of indemnity

Both the Chinese Insurance Law and the Chinese Maritime Code acknowledge the insurer's right of subrogation.[6] Subrogation is by nature a restitutory remedy,[7] imposed under the principle of indemnity to prevent the assured from recovering more than his loss from two sources. It is for this reason that the doctrine of subrogation is said to be a corollary to the principle of indemnity.[8]

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[6] Article 60 of the Chinese Insurance Law and Article 252 of the Chinese Maritime Code. Property insurance and marine insurance in China is under the category of indemnity insurance, while personal insurance is not. The Chinese Insurance Law only acknowledges the insurer's rights of subrogation under property insurance, not personal insurance. While Article 60 of the Chinese Insurance Law sets the insurer's right of subrogation under property insurance, Article 46 of the Chinese Insurance Law provides that under personal insurance, where an insured event such as death or disability occurs as a result of a third party's act, the insurer shall have no right of subrogation against the third party after indemnifying the assured; however, the assured or the beneficiary remains entitled to claim against the third party.

[7] John Birds, *Birds' Modern Insurance Law* (London: Sweet & Maxwell, 2016), p 327.

[8] In *Burnard* (n 3 above), Lord Blackburn provides that "[t]he general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay, and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the

Cargo insurance is a contract of indemnity, regardless of whether it is in the context of multimodal transport. The insurer can exercise his right of subrogation under indemnity insurance, including the insurance of goods in multimodal transport, regardless of it being one of a marine or non-marine insurance.

5.2.2 Indemnity payment to the assured

Both the Chinese Insurance Law and Chinese Maritime Code expressly require that the insurer should have actually indemnified the assured in order to be able to subrogate against the third party.[9] To execute this condition, marine insurance practice in China requires the assured to issue a subrogation form which specifies details of the insurer's subrogation rights. The insurer will then present the subrogation form together with the receipt of insurance indemnity to claim against the liable third party.[10]

However, debates arise as to whether the insurer should indemnify *in full* or indemnify only the *insured loss* of the assured's loss.[11] The bone of contention is indemnity of an uninsured loss, especially when the loss, although uninsured, is honestly intended by the insurer to indemnify the assured for the purpose of diminishing the loss under the policy. Such payment for the uninsured loss is also referred as *ex gratia* payment by the insurer, [12] which accrues when there is a limit, an insured deductible or excess imposed by the insurance policy, or when the loss or part of the loss is attributed to the uninsured event.

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person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back".

[9] Article 60 (1) of the Chinese Insurance Law and Article 252 of the Chinese Maritime Code.

[10] Zhu Zuoxian, *Study on Principle of Indemnity under Marine Insurance Law* (Doctoral thesis, Dalian Maritime University, 2008) p. 171.

[11] The indemnification does not need to be made by way of payment. As discussed in Chapter 4, the assured can be indemnified by a sum of money, reparation or reinstitution. Other methods of indemnification also meet the precondition to acquire the rights of subrogation.

[12] *See* e.g. Robert Merkin and Judith P Summer, *Colinvaux's Law of Insurance* (London: Sweet & Maxwell, 10th edn, 2014), para 11.029.

Ex gratia payments can be made either consciously or without the insurer's intention, for the purpose of diminishing the insured loss.

One view is that the insurer obtains the rights of subrogation only after having indemnified the assured's full loss whether insured or uninsured, because it is not until then that the insurer has the complete right to bring and control the proceeding against the third party.[13] But the right to bring and control the proceeding against the third party is an issue relating to the *exercise* of subrogation, which should be distinguished from the threshold for the insurer to obtain the *right* of subrogation. In effect, whether the assured has been indemnified for his full loss should only affect the manner in which the right of subrogation is exercised, not the existence of insurers' subrogation rights.

Another view is that the insurer should indemnify the assured pursuant to his obligations under the insurance contract, namely the *insured loss*, in order to acquire subrogation rights. In this regard, the insurer's right of subrogation is limited, since the assured retains his right to claim against the third party for an uninsured loss.[14] Article 60 (3) of the Chinese Insurance Law further validates this view by admitting that the assured can claim for an un-indemnified portion against the third party.[15]

It is noteworthy that the precondition for the insurer to acquire the rights of subrogation should be distinguished from the insurer's scope of subrogation. The former is the threshold for the insurer to obtain the subrogation rights, whilst the latter is the maximum sum that the insurer is entitled to take actions on.

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[13] Zhu (n 10 above), p. 166-167.

[14] The assured can also authorise the insurer to claim for the uninsured loss in conjunction with the insurer's own subrogation claim against the third party.

[15] But this generates another question as to who, among the insurer and the assured, is in the position to bring and control the proceeding against the third party. In a joint proceeding against the liable third party, both the insurer and the assured should act in good faith and not prejudice the interest of the other party.

Both the general insurance and maritime insurance law in China explicitly provide that the scope of subrogation is the paid indemnity, regardless of whether the insurer's obligations under the insurance policy. Article 60 (1) of the Chinese Insurance Law specifies that after the insurer has indemnified the assured, he can take over the assured's right of claim against the third party *up to the amount of indemnity payment*.[16] Whilst the Chinese Maritime Code did not have such a confinement on the insured loss, Article 93 of the Chinese Maritime Procedure Law supplements that the insurer can only subrogate against the third party up to "*the amount of the indemnity paid"*.[17] Thus, the scope of indemnity payment should include both the insured loss and any payment beyond the insurer's obligations under the insurance contract, namely his *ex gratia* payment.[18]

5.2.3 Third party

Another precondition for the insurer to exercise his right of subrogation is that there must exist a third party causing the insured incident that results in the loss of the insured subject-matter. This precondition suggests that the insurer cannot claim against a party who is not a third party to the insurance contract. Article 62 of the Chinese Insurance Law states as follows:

> "The insurer has no right of subrogation against any family member or member of household of the insured unless the occurrence of the insured event provided in

[16] The insurer is entitled to sue the third party for the paid indemnity in his own name.
[17] Article 96 of the Chinese Maritime Procedure Law further stipulates the procedure that the insurer shall submit his proof of indemnity payment during the subrogation proceeding, to ensure that the insurer only subrogates within the indemnity payment.
[18] The same view is also adopted by the common law countries, *see King v Victoria Insurance Co* [1896] AC 250, *Sydney Turf Club v Crowley* [1971] 1 NSWR 724.

the first paragraph of Article 60 of this Law is caused by the wilful misconduct of such a member."

Clearly, it precludes a family member or member of the household of the assured from being a party whom the insurer can subrogate against, unless the insured event is caused by the wilful misconduct of such a member. There is no equivalent provision in the Chinese Maritime Code. In this regard, Article 62 of the Chinese Insurance Law, as the general law, shall thus also apply to marine insurance contracts.[19]

Nevertheless, regrettably, the meaning of "family member or member of household" in Article 62 of the Chinese Insurance Law is not clear and causes intensive discussions. One view is that the "family member or member of household" should refer to the Chinese Law of Succession.[20] Another opinion is that the interpretation of "family member" should be expansive, whereas the interpretation of "member of household" should be restrictive.[21] Both views agree that the restriction against a "family member" is applicable when the assured is a person, and that "member of the household" refers to the assured as a company or organization.[22] These views may be applicable to household property insurance, yet are inappropriate to fit in with commercial property insurance[23] such as cargo insurance in multimodal transport. Article 62 is applicable to property

[19] Article 182 of the Chinese Insurance Law.
[20] Chen Hu, "A note on the restriction of the party to be claimed against under subrogation: the definition of family member or member of household of the assured," *Zhejiang Sheng 2014 Nian baoxian faxue xueshu nianhui lunwenji* (*Zhejiang Province 2014 Annual scholar papers on insurance law*), (2014), pp. 135.
[21] Wang Leyu, Tong Chunhua, "Restrictions on the party to be claimed against under subrogation: from the perspective of Article 62 of Chinese Insurance Law," *Jingji Luntan (Economic Forum)*, (2010) Vol 8.
[22] *The Business Division of China Continent Property & Casualty Insurance Co Ltd v Shanghai Master An Anto Driving Service Co Ltd and Chen Liangyuan* (2015) *Pu Min Liu Shang Chu Zi* Number 5375.
[23] Commercial insurance or non-consumer insurance stands in contrast to consumer insurance. Consumer insurance is a contract of insurance whose assured is a party who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession. There is no such classification as commercial insurance or non-consumer insurance in Chinese insurance law. The classification is established by the Consumer Insurance (Disclosure and Representations) Act 2012 under English law.

insurance under the Chinese Insurance Law. Moreover, in the absence of specific provisions in the Chinese Maritime Code, the Chinese Insurance Law is also applicable to marine insurance as general law. Yet, in the view of other jurisdictions, it is uncommon to prohibit the insurer from subrogating against family member or members of the assured under marine insurance or any other commercial insurance.[24] The third view is that parties protected under Article 62 of the Chinese Insurance Law are the ones with an insurable interest in the insured subject-matter.[25] This view takes into account the features of both consumer insurance and commercial insurance. However, the insurable interest test offers little protection to the insurer, considering that the insurable interest can be based on a wide range of property rights. The interpretation of "family member or member of household" calls for a more rigid test than simply insurable interest.

The purpose of Article 62 of the Chinese Insurance Law is to ensure full indemnity to the assured by preventing the insurer from subrogating against what is virtually "another pocket" of the assured. Therefore, the "family member or member of household" of the assured should be a party who shares a mutual economic interest with the assured, so that claiming against such a party will be directly financially detrimental to the assured and thus will undermine the effect of indemnity to the assured.[26] Current Chinese judicial practice also inclines to the mutual economic interest test. For an assured that is a company or an organization, the court acknowledges a subsidiary or a parent company

[24] For example, section 79 of the MIA 1906 in English law allows the insurer to be subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured. Yet, there is no equivalent confinement on the insurer's right to subrogate against a family member or member of the assured, neither is it referred to in the ICC (A) 1982.
[25] Li Jihan, Yang Zhigang, "Ways to ascertain the scope of 'third party' in subrogation," *Journal of Law Application*, Vol. 6, (2016), pp. 103.
[26] *The Business Division of China Continent* (n 22 above).

or holding company of the assured as his "family member or member of household",[27] since the subsidiary and the parent company share a mutual economic interest. An employee is another type of "member of household" of the assured. Since the assured as an employer should have vicarious liability for his employee's misconduct during the performance of his duty, the employee's liability towards the insurer will eventually be borne by the assured employer.

5.3 The legal basis of subrogation

The legal basis of subrogation is an issue causing intense discussions, in both Chinese law and English law. Traditionally in English law, it is believed that the right of subrogation originates from equity to prevent the unjust enrichment of the assured.[28] However, another recent view, as established in the House of Lord's decision in *Napier v Hunter*, is that subrogation is essentially an implied obligation of the assured in the insurance contract.[29]

The Chinese legal system does not recognise equity law. While both insurance legislations are unclear about this issue, the Chinese Contract Law provides some insights in defining the insurer's right of subrogation, since under the Chinese Contract

[27] *Sunshine P&C Insurance (Wenzhou) Co. Ltd v Chengdu Lianxiang Logistics Ltd and others* (2016) *Zhe 0302 Min Chu Zi* Number 9267, (2016) *Zhe 03 Min Zhong Zi Number* 6244.
[28] Robert Merkin and Judith P Summer (n 12 above), para 11.004 refers to S R Derham, *Subrogation in Insurance Law* (Sydney: Law Book Co, 1985), Chapter 1. After expert analysis of the old cases, the author supports the equitable theory.
[29] Lord Templeman in *Napier v Hunter* [1993] 1 Lloyd's Rep 10, [1993] 1 All E R 385, [1993] AC 713 pointed out that the four implied obligations of the assured are (a) to take proceedings against the wrongdoing third party in order to diminish his loss; (b) to account to the insurer for proceeds of any such action; (c) to allow the insurer to use the assured's name in order to proceed against the third party in the event that the assured himself failed to do so; (b) to act in good faith in proceeding against the third party.

Law, transfer of the debtee's right allows the successive debtee to exercise the original debtee's right against the debtor in order to secure the debtee's right.[30]

5.3.1 Similarities to contractual transfer of the debtee's rights

There are many similarities between contractual transfer of the debtee's rights and subrogation.

Firstly, they both concern passing of the right of action from one to another. One important effect of the transfer of a debtee's rights under the Chinese Contract law is the transfer of the right of action, which allows the successive debtee to take over the rights of the original debtee to claim against the debtor. This is similar to the first limb of subrogation, where the insurer who has indemnified the assured is entitled to take over the assured's rights to claim against the liable third party.

Secondly, the relationship between the original debtee and the debtor will not be altered by the transfer. Under Chinese contract law, transfer of the debtee's rights is a change of parties, rather than any change of substantial rights and obligations between the original debtee and the debtor. Therefore, the successive debtee (the transferee) would only acquire rights subject to his legal relationship with the original debtee (the transferor).[31] Similarly under subrogation, the relationship between the assured and the third party are regarded as an external relationship, which is independent of the internal relationship

[30] The transfer of the debtee's right is sometimes referred as the "assignment of contractual rights" under the Chinese Contract Law; *see* Bing Ling, *Contract Law in China* (Hong Kong: Sweet & Maxwell Asia, 2002), p 310-322. Article 73 of the Chinese Contract Law provides that "where the obligor is remiss in exercising its due creditor's right, thereby harming the obligee's interest, the obligee may petition the People's Court for subrogation in its own name, except that the creditor's right exclusively belongs to the obligor". Thus, "subrogation" in the English version of the Chinese Contract Law should be understood as the debtee's assignment rather than insurer's right of subrogation.

[31] For instance, Article 73 (2) of the Chinese Contract Law provides that "the extent to which the subrogation rights can be exercised is limited to the obligee's rights".

between the insurer and the assured. Article 14 of the Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes[32] (SPC Interpretations Concerning Marine Insurance Disputes 2006) provides that courts shall only contemplate the external relationship between the assured and the third party in hearing the insurer's subrogation claim, rather than the issues arising from the internal relationship, such as the validity of the insurance contract or indemnifying uninsured loss.[33] Although, as its name suggests, this SPC Interpretations applies to subrogation under marine insurance, its Article 14 has a pervasive impact on Chinese courts by defining the scope of subrogation in the context of cargo policies in non-marine insurance.[34]

Thirdly, the transfer does not give the debtor extra defences against the successive debtee. Under the Chinese Contract Law, since the transfer does not alter the relationship between the original debtor and debtee, the debtor may still invoke against the successive debtee the defences he had against the original debtee.[35] Under subrogation, the third party is not allowed to rely on the issues arising from the internal relationship between the insurer and assured to defend against the insurer's subrogation claim. It is with the benefit of hindsight for the third party to defend the insurer's right of subrogation with issues arising from the internal relationships. If the insurer's scope of subrogation is strictly confined to the obligation of the insurer under the policy, it is possible that the third party would seek every excuse to question the validity of the

[32] Fa Shi 2006 Number 10.
[33] An example in this regard is *Guangxi Fangchenggang Bihai Steamship Co Ltd v Huatai Property and Casualty Insurance (Shanghai) Co Ltd* (2009) *Hu Gao Min Si (Hai) Zhong Zi* Number 56, p 5.
[34] An example is *Shenzhen Branch of PICC Property & Casualty Co. Ltd v Beijing Zhonggongmei International Transport Agency Co Ltd* (2009) *Er Zhong Min Zhong Zi* Number 08922, p 5-6.
[35] Article 82 of the Chinese Insurance Law.

indemnity and use it as a technical defence against the insurer in the subrogation proceeding.

Fourthly, the transfer can be made in whole or in part. Article 79 of the Chinese Contract Law allows the debtee to transfer his rights under a contract in whole or in part to another party. Similarly, the insurer may also be entitled to subrogate against the insured loss, which can be the whole or part of the total loss. The insurer is entitled to sue the third party in his own name and the assured could join the subrogation claim to recover the uninsured loss, either as another plaintiff or via authorizing the insurer to act on his behalf.[36]

5.3.2 Peculiarities with the contractual transfer of the debtee's rights

However, subrogation is different from the contractual transfer of the debtee's rights in many aspects. The two most distinct aspects are as follow:

First and foremost, the transfer under contract law and the subrogation under insurance law arise from different grounds. Under the Chinese Contract Law, the successive debtee can only take over the original debtee's contractual right against the third party; whereas in subrogation the insurer is entitled to any types of right, whether contractual or tort, of the assured against the third party.

[36] Article 60 of the Chinese Insurance Law and Article 94 of Chinese Maritime Procedure Law. In a subrogation claim under English insurance law, the insurer must still subrogate against the third party in the name of the assured. It is for this reason that subrogation under Chinese insurance law actually embodies the features of both subrogation and assignment, another principle that allows the insurer to claim against the third party in his own name. The Chinese approach fits in with Chinese insurance practice, in that the assured is usually reluctant to cooperate with the insurer in the subrogation claim after having been indemnified. It is thus impractical to require the insurer to exercise his rights of subrogation closely with the assured. *See* Xia Yan, "On the nature of the right of subrogation in insurance law," *Chinese Journal of Maritime Law*, Vol. 24, (2013), pp. 43.

Moreover, the effect of the transfer is different. For the contractual transfer of the debtee's right to be bound by the debtor, the debtee transferring his rights needs to notify the debtor,[37] while the preconditions for the insurer to exercise rights of subrogation under insurance law do not include notification to the third party,[38] but the paid indemnity to the assured.[39]

Given the similarities and peculiarities between subrogation under insurance law and the transfer of the debtee's right under contract law, many commenters agree that subrogation is a statutory transfer of the debtee's right in insurance law.[40] The insurer's right of subrogation is a special category of the transfer of the debtee's rights as imposed by the Chinese Insurance Law and Chinese Maritime Code. Clarification on the legal basis of subrogation has implications for many unsettled issues arising from the exercise of insurers' rights of subrogation.

5.4 Problems encountered with the insurance of goods in multimodal transport

Against the background of multimodal transport, there are two prominent problems: (a) whether the insurer is entitled to subrogate against the carrier and actual carriers, which are usually the liable parties; and (b) in light of the limitation of liability enjoyed by a

[37] Article 80 of the Chinese Contract Law.
[38] According to Article 60 (2) of the Chinese Insurance Law, if the assured has already obtained indemnity from the third party, the insurer may deduct a comparable amount from his indemnity payout.
[39] Article 60 (1) of Chinese Insurance Law.
[40] Wang Haibo, Study on the Coordination of Marine Insurance Law and General Insurance Law (Doctoral thesis, Fudan University, 2012), pp.103-108, referring to Wang Jia fu, *Minfa zhaiquan (Law of Debts in Civil Law)* (Beijing: Law Press China, 1991), pp. 71-74; Li Yuquan, *Baoxianfa (Insurance Law)* (Beijing: Law Press China, 2nd edn, 2003), pp. 229; John Dunt (ed), *International Cargo Insurance*, Chapter 12 (London: Informa, 2012), p 462.

third party, how to allocate the subrogation recoveries when the recovery from a third party is insufficient to compensate the indemnity paid by the insurer.

5.4.1 Is the carrier a "third party" whom the insurer can subrogate against?

The previously discussed vague expression of "family member or member of household" allows many disputes to arise in the area of cargo insurance as to whether the insurer can subrogate against the carrier for his negligence in causing cargo loss or damage. Article 62 of the Chinese Insurance Law has been rendered as a technical defence for third parties against the insurer's right of subrogation. On one hand, the various arrangements for insuring goods in multimodal transport muddle the role of the carrier in the insurance contract and subsequent subrogation. On the other hand, subcontracting the carriage contract adds to the difficulty in determining whether the insurer is entitled to subrogate against the actual carriers.

(i) Different insurance arrangements in purchasing cargo insurance

There are different ways to insure goods in multimodal transport. Sometimes, the shipper or the cargo interest instructs the carrier to place insurance for the cargo carried on his behalf. In this case, the cargo interest is clearly the assured. But roles played by the carrier are different between the English and Chinese law. The English court treats the carrier as the agent of the assured. In *The Yasin*, the court held that a carrier who purchased insurance to cover total loss of the cargo carried for the consignee at the expense of the carrier as required by the contract of carriage is not the assured, but the

agent of the assured consignee that enters into the insurance contract.[41] Hence, the carrier in this case is a third party under the subrogation claim.

In Chinese law, however, there is another party as the proposer. The carrier who enters into an insurance contract with the insurer and pays the insurance premium falls into the definition of the proposer under the Chinese Insurance Law.[42] Being the proposer, the carrier is also a contracting party, rather than a third party, of the insurance policy. Theoretically, subrogating against the carrier should conflict with the carrier's role as the proposer of the insurance contract. But surprisingly, Chinese courts tend to treat the proposer as the third party that the insurer is entitled to subrogate against because the proposer is not "any family member or member of household of the assured" under Article 62 of the Chinese Insurance Law.[43] This judicial practice is inconsistent with the proposition that the proposer is one of the contracting parties to the insurance contract. Since this Chinese judicial practice does not treat the proposer as a party immune from a subrogation claim, the carrier, who intends to have himself protected against the risks of cargo loss or damage, needs to ensure that he himself is named as the assured or co-assured in the cargo policy.

Alternatively, the carrier sometimes advises the shipper to place insurance for the goods carried. Under the agent-principal theory, a carrier as the principal is the assured of the cargo policy, whereas a shipper acting as the agent of the carrier in purchasing a cargo policy is actually the proposer. However, in reality, the carrier's position as the assured may not be easily recognised by a court under such a circumstance. The obligation to

[41] [1979] 2 Lloyd's Rep 45, p 56.
[42] Article 10 of the Chinese Insurance Law.
[43] A typical example is the appealed subrogation case of *Wutong Huanqiu Logistics Beijing Limited Co v PICC Beijing* (2016) *Jing 04 Min Zhong Zi* Number 82.

purchase insurance varies depending on the carriage contract, and the following case illustrates how carelessness in purchasing insurance can overlook the intention of the carrier in insuring against the risks in multimodal transport.

In *Ou Yingxue and the others v PICC Chongqing Jiangbei Co*,[44] the carrier Ou Yingxue instructed the shipper Changjun Co to insure the goods on his behalf and paid the shipper Changjun Co CNY 200 for the insurance premium. The receipt from the shipper states that, "received CNY 200 as an insurance premium for cargo insurance as instructed". However, the shipper purchased cargo insurance in his own name. The court decided that since the insurer was not aware that Changjun Co acted as the agent of Ou Yingxue, the internal agreement between Changjun Co and Ou Yingxue in purchasing insurance cannot be used against the insurer. The court recognised that the shipper is the assured as well as the proposer, and that the carrier is the third party of the insurance contract. Hence, when the cargo loaded on a truck was lost due to the negligence of the carrier, the insurer is entitled to enjoy the subrogation right to claim against the carrier. In this case, the carrier, who intended to cover his risks during the inland transport by purchasing cargo insurance, found himself not subsequently insured, due to the negligence of its agent. The remedy for the carrier was to sue the shipper as his agent for negligence in purchasing insurance.

[44] (2016) *Yu 01 Min Zhong Zi* Number 7309.

(ii) Subcontracting the carriage contract

If the carrier subcontracts part of or all of the transport to the actual carrier, it is doubtful whether the insurer could subrogate against the actual carrier. Answers to this question vary according to the different methods of insuring goods in multimodal transport.

First, when the cargo interest is the assured of the cargo policy, the position of the actual carrier would be similar to that of the carrier. Whether or not personally effecting the insurance contract, the actual carrier is still a third party under the subrogation claim. Under current judicial practice, the insurer is entitled to subrogate against both the carrier and the actual carrier under the subrogation claim, even though the insured event is caused by the actual carrier.[45] The channelling of liability between the carrier and actual carrier cannot be used to defend against the insurer's subrogation claim.[46]

Second, the problematic scenario is when the carrier is the assured of the cargo, in which case it is doubtful whether the insurer is entitled to subrogate against the liable actual carrier. In other words, can the actual carrier be regarded as a subsidiary of the carrier, or can the driver of the carrying truck be regarded as an employee of the carrier, so that they are protected from the insurer's subrogation claim according to Article 62 of the Chinese Insurance Law?

Judicial practice is reluctant to impose an institutional relationship between the carrier and the actual carrier or driver based solely on the fact of subcontracting. In a subrogation case for the loss of goods carried by truck, the carrier is the assured of the goods in transit. But it is the actual carrier who performs the whole carriage through

[45] *Ibid*.
[46] The appealed subrogation case of *Wutong Huanqiu* (n 43 above).

subcontracting. For example, during the insured period, a fire started in a truck's tire due to the driver's negligence, which caused the loss of the insured goods. After having indemnified the assured carrier, the insurer subrogated against the actual carrier and the driver. The court found that the truck in question had in fact been bought by the driver and registered under the name of the actual carrier. The Court of Appeal held that the driver was not a "member of household" of the assured under Article 62 of the Chinese Insurance Law, but rather the third party whom the insurer is entitled to subrogate against. This case reinforced the mutual economic test for the "member of household" in Article 62 of the Chinese Insurance Law. Although the carrier subcontracted the delivery of the goods to the actual carrier, the actual carrier's liability is not directly financially detrimental to the carrier.[47]

As for the driver, Chinese law deems the driver of the truck as affiliated under the actual carrier. According to Article 3 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases on Compensation for Damage in Road Traffic Accidents 2012, "where a motor vehicle which engages in any road transport operation activity in the form of affiliation causes any damage in a traffic accident, if the liability of the traffic accident is attributed to the motor vehicle, and the party concerned requests the affiliating party and the affiliated party to assume joint and several liabilities, the people's court shall uphold such request". Therefore, as the affiliated party, the actual carrier has joint and several liabilities for the insurer under the subrogation claim.

[47] *China United Insurance Holding Company (Wenzhou) v Lufu Logistics Co Ltd (Yiyang)* (2016) Zhe 11 Min Zhong Zi Number 1421.

(iii) A tentative solution

Whilst the meaning of "family member or member of household" awaits further clarifications from the SPC, an immediate solution to protect those parties from the misdirected arrow in subrogation is in the insurance policy. The insurance contract can incorporate a waiver of subrogation clause, where the insurer agrees to waive his right of subrogation against certain groups of the party for the insured loss if any. Parties protected by subrogation waiver clauses are usually sub-contractors and their employees. Alternatively, it could be implied from the insurance contract that the insurer waives this right of subrogation against certain groups of the third party by naming them as the co-assured, or through careful construction of the policy.

5.4.2 Allocation of subrogation recoveries in case of a "loophole"

The ideal outcome of subrogation is that the assured would be put back to the position where he was should the insured event not have happened, and the compensation obtained from the third party were sufficient to recover the insurer's indemnity payment. However, there could be a "loophole" where the actual loss of the assured is not fully compensated by either the insurer or the third party.[48] A loophole can exist under the circumstances of the insurance deductions under the measure of indemnity[49] or financial incapability to compensate. A loophole is also likely to occur in the insurance of goods

[48] Furthermore, a "surplus" may also occur where the recovery from the third party is greater than the indemnity from the insurer. It has been well established in English insurance law that the assured is entitled to such a windfall in the case of a surplus. *See Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330. The Chinese insurance law also recognises the same principle, yet in a more subtle manner. Article 254 (2) of the Chinese Maritime Code is clear that the assured is entitled to the windfall by providing that "where the compensation obtained by the insurer from the third person exceeds the amount of indemnity paid by the insurer, the part in excess shall be returned to the insured". Article 60 (1) of the Chinese Insurance Law also confines the maximum amount of the insurer's entitlement of subrogation to the amount of the indemnity payment.

[49] Please refer to Chapter 4.

in multimodal transport where the carrier, although presumed to be the liable third party, is often protected by the limitation of liability or exclusion of liability rules under the carriage law or the contract. The key question then arises as to whether the insurer or the assured shall bear the consequences of losses not being fully recovered in the event of such a loophole?

Pursuant to the principle of indemnity, the allocative rules should not only prevent the assured from recovering more than his loss but also ensure that the assured's entitlement to insurance indemnity is not prejudiced by the insurer's right of subrogation. Built upon the above-discussed two limbs of subrogation, there are two ways to prevent the unjust enrichment of the assured. Firstly, as provided by the first limb, after the insurer has indemnified the assured based on the insurance contract, the insurer steps into the shoes of the assured against the liable third party. Or, secondly, the assured first seeks compensation from the liable third party and then claims the insurance indemnity from the insurer, upon which the insurer deducts a corresponding amount from the insurance indemnity he pays to the assured. Despite these two viable ways, the eventual outcome of each route should be the same but, regrettably, both the Chinese Insurance Law and Chinese Maritime Code are unclear on this question.

(i) The English approach – a comparative study

This problem is not unique to China. The English insurance law has also undergone several developments through several milestone common law cases until it reached a consensus on this matter.

The general approach

The general allocative rule, arising from the principle of indemnity, is that the assured shall firstly be indemnified for his actual loss prior to the insurer's subrogation.[50] Nevertheless, special rules are also applicable for cases where there are both insured and uninsured losses.

The pro rata approach

A typical example of the coexistence of both insured and uninsured losses is under-insurance. In this case, the assured is deemed to be his own insurer for the uninsured balance,[51] namely the assured and insurer are regarded as co-insurers. Accordingly, the subrogation recovery should be allocated in proportion to the insurer's and assured's respective interests in the subject-matter, namely, the proportion that the insured loss and uninsured loss bears to full indemnity for the assured's total loss.[52] This *pro rata* approach was established in *The Commonwealth*,[53] a leading case for allocation of recovery in an under-insurance. The MIA also adopts the *pro rata* approach by stating that the insurer and assured shall bear the loss proportionately according to the insured and uninsured sums in the case of under-insurance.[54] The *pro rata* approach is only

[50] *Napier* (n 29 above), p 16-17 held that the principle of indemnity in *Castellain v Preston* actually implies that the assured should be protected so as to obtain a full indemnity so that the assured shall firstly recover from the third party up to his actual loss, the following which the insurer is entitled to the remainder of the subrogation recovery. Under a valued policy, the value of the insured subject-matter is fixed between the assured and insurer, and the assured is estopped from alleging against the insurer for any other value of the insured subject-matter including during the exercise of the insurer's recoupment; *see Thames & Mersey Marine Insurance Co v British & Chilean Steamship Co* [1915] 2 KB 214, [1916] 1 KB 30 (CA) and *North of English Iron Steamship Insurance Association v Armstrong* (1870) LR 5 QB 224. In fact, this special rule is in accordance with the fundamental principle that the assured shall be entitled to full indemnity of his loss.
[51] Section 81 of MIA 1906.
[52] *The Commonwealth* [1907] P 216 (CA).
[53] *Ibid.*
[54] Section 81 of the MIA 1906.

applicable provided that there is no sequence or layers among the risks borne by the insurer and the assured.

The "top down" approach

For situations where there is a sequence or layers among the risks borne by the insurer and the assured, the "top down" approach established by the revolutionary House of Lords decision in *Napier v Hunter* shall be applicable.[55] This approach was illustrated under hypothetical facts: In a marine insurance case, the assured was insured under a GBP 100,000 policy limit with a GBP 25,000 policy excess. The loss incurred by the assured was GBP 160,000, but was only indemnified GBP 100,000 by the insurer due to the policy limit. The subrogation recovery from the third party was GBP 130,000, also smaller than the assured's total loss.

The court at the first instance adopted the general allocative rule and held that the assured is entitled to recover for his uninsured loss prior to the insurer's right of subrogation. Namely, the subrogation recovery will be firstly allocated to the assured for the remainder of his unindemnified loss of GBP 60,000, and the remaining GBP 70,000 subrogation recovery will be allocated to the insurer. However, the House of Lords found that the rule adopted at the first instance was wrong, because the assured should not "be indemnified against a loss which he has agreed to bear".[56]

Lord Templeman from the House of Lords clarified that, with a policy limit and policy excess, the insurance contract has three layers: in the first layer, the assured shall bear any loss below GBP 25,000 as the policy excess; the second layer obliges the insurer to

[55] *Napier* (n 29 above).
[56] *Ibid*, p 731.

bear a further GBP 100,000 above GBP 25,000 as the policy limit; and the third layer requires the assured to bear any loss exceeding GBP 125,000. The problem of allocating the subrogation recovery can be solved by treating the three layers as three insurance policies.[57] The third insurer shall have the first entitlement, since he agreed to pay when the first two policies are insufficient to cover the loss. For a similar reason, the second insurer shall have the next entitlement, and the first insurer shall have the last entitlement. Faced with a subrogation recovery of GBP 130,000, the third insurer is thus entitled to receive GBP 35,000 for the full indemnity paid first. The second insurer can recover only GBP 95,000 from what is left of the recovery. The first insurer can recover nothing from the third party. In this hypothetical case, the assured can be treated as the third and first "insurer" and the insurer is regarded as the second insurer. Therefore, the assured would recover GBP 35,000 and the insurer would recover GBP 95,000 from the third party. Such allocative rule is a "top down" approach, in that the assured is entitled to recover the insured loss in excess of the policy limit first, whilst the loss below the policy excess will only be covered after the insurer has recovered the full amount of his indemnity payment.

The House of Lords adopted neither the general approach nor the *pro rata* approach. On one hand, the general approach that the assured is entitled to the full amount of his loss first should not be applied in the context of "under-insurance or partial insurance or layers of insurance".[58] On the other hand, although the *pro rata* approach is applicable to under-insurance or partial insurance, where there are no priorities among the different types of uninsured loss, an assured who agrees to bear the first GBP 25,000 of any loss

[57] *Ibid,* p 730-731.
[58] *Ibid,* p 731.

under the policy excess should not be placed in the same position as an assured who makes no such promise. Therefore, the "top down" approach should apply to policies written on a layered basis.[59] The policy excess and the policy limit constitute the layers of the policy as established in *Napier v Hunter*.[60] Similarly, insurance with a deductible is also a policy written on a layered basis.[61] Moreover, this "top down" approach was further extended to the insurance of non-marine property in *Kuwait Airways Corporation v Kuwait Insurance Co SAK*.[62]

(ii) Various views under Chinese law

There are different understandings and views under Chinese law. The prevailing view is that the assured should enjoy the recovery benefit prior to the insurer.[63] According to this view, the subrogation recovery shall be allocated to the assured first for his un-indemnified loss, and the insurer will recover the rest, if any. This view is consistent with the purpose of subrogation. Since the assured had no unjust enrichment in the event of a "loophole", the insurer's right of subrogation shall not prejudice the assured's recovery from the third party.

Moreover, this view matches the legislative interpretations. Under the first limb, where the insurer subrogates against the third party, one can infer from the preconditions of subrogation that the assured shall, in most cases, bear the consequences of insufficient

[59] Francis D Rose, *Marine Insurance: Law and Practice* (London: Informa Law, 2004), p 559; Jonathan Gilman, Robert Merkin, Clair Blanchard and Mark Templeman, *Arnould's law of marine insurance and average* (London: Sweet & Maxwell, 16th edn, 1997), para 1299.
[60] *Napier* (n 29 above).
[61] Gilman *et al* (n 59 above), para 1299 argued that it is not precise to consider deductible analogous to policy excess since loss below deductible is regarded as "first loss" rather than "excess of loss".
[62] [1996] 1 Lloyd's Rep 664, [1997] 2 Lloyd's Rep 687 (CA).
[63] Zhu (n 10 above), p. 191; Wang haibo (n 40 above). p. 191; Liang Huixing (ed.), *Mingshangfa luncong (Civil and Commercial Law Review)* (Beijing: Falv chubanshe, 1997), Vol. 6, pp.208.

compensation from the third party's recovery. As discussed above, the insurer must have already indemnified the assured for the insured loss in order to obtain the subrogation rights, and the insurer will indemnify the assured regardless of the sufficiency of the third party's recovery. If the recovery from the third party turned out to be insufficient to cover the indemnity paid by the insurer, let alone the assured's total loss, the insurer shall bear the unfavourable consequences.

Nevertheless, exceptions have been allowed because of the assured's deliberate action or for gross negligence that prejudices the insurer's subrogation rights. Under the Chinese Insurance Law and Chinese Maritime Code, where the assured waives his rights to claim against the third party without the consent of the insurer, or where the insurer is unable to subrogate against the third party due to the intention or gross negligence of the assured, the insurer can request the return of a corresponding amount.[64]

Under the second limb, where the assured has obtained indemnity from the third party, both the Chinese Insurance Law and Chinese Maritime Code provide that the insurer may deduct a "comparable amount"[65] or make a "corresponding reduction"[66] from the indemnity payment. However, there lacks details as to how to ascertain the "comparable amount" and the amount of the "corresponding reduction". One guideline is to ensure the amount obtained from the third party through the insurer's recoupment is the same as the insurer's subrogation obtained from the third party. According to this guideline, the insurer shall also bear the consequence of a loophole.

[64] Article 61 (2) and (3) of the Chinese Insurance Law, Article 253 of the Chinese Maritime Code.
[65] Article 60 (2) of the Chinese Insurance Law.
[66] Article 254 (1) of the Chinese Maritime Code.

This view appears to be the same as the general rule in English law that the assured shall firstly be indemnified for his actual loss before the insurer's recoupment. However, the general allocative rule in English law is subject to several special rules for uninsured loss. Unlike the Chinese approach, which imposes the risks of insufficient subrogation recovery on the insurer, the English approach differentiates the risks borne by the insurer and the assured, so that the allocation of recovery benefit can *prima facie* mirror the allocation of risk under the insurance contract.[67]

Another view is that where the subrogation recovery is insufficient to cover the actual loss, both the assured and insurer should be entitled to recover a proportionate amount. This view is actually consistent with the legal basis of subrogation, being a statutory transfer of the debtee's right as discussed above. After the insurer's indemnity to the assured, the insurer as the transferee has obtained the right of the assured transferor to subrogate against the third party in his own name. Through this transfer, both the insurer and the assured become the debtees of the third party. The general civil law principle in China is that the rights of all debtees should be equal. Applying this general civil law principle, the insurer and the assured should share the subrogation recovery proportionately. This view is similar to the *pro rata* approach under English law. However, unlike the English law where the *pro rata* approach is an exceptional rule for where there is both an insured and uninsured loss, the advocated proportionate view in Chinese law seems to be a general principle.

The second approach should also not be understood as an example where the insurer's reasonable expectations prevail over the assured's. The insurer's expectations are the

[67] Gilman *et al* (n 59 above), para 1299. Nevertheless, the *prima facie* allocation of risk can be replaced by an express and contrary provision in the insurance contract. *See* Rose (n 59 above), p 560.

receipt of premiums and/or non-liability for particular risks.[68] Subrogation serves none of these two purposes. For an insurer to exercise his right of subrogation, he must have indemnified the assured first. Besides, the assured's expectation of coverage has already been satisfied before the insurer exercises his right of subrogation. Subrogation should be treated as one of many approaches for the benefit of the insurer under the contract by keeping himself solvent or minimising his risks of underwriting particular risk pools.[69]

The allocation of subrogation recovery in the case of a loophole is still a controversial issue under Chinese law. Nevertheless, the insurer and assured always retain the liberty to reach an agreement on allocative rules. In marine hull insurance, for example, the standard policies contain express provisions for allocation of recovery benefit.[70] Thus far, though, there is seldom such express provision in the standard policy for cargo in multimodal transport. Given this ambiguity in both current law and judicial practice, it is recommended that the parties of cargo insurance in multimodal transport incorporate a subrogation clause in the insurance policy to clarify allocative rules that display care and foresight.

5.5 Conclusion:

One of the preconditions of subrogation is that there must exist a liable third party causing the insured incident that results in the loss of the insured subject-matter. Article 62 of the Chinese Insurance Law excludes "family member or member of household" from the parties whom the insurer is entitled to subrogate against. In the event of a cargo

[68] Yong Qiang Han, *Policyholder's Reasonable Expectations* (Oxford and Portland, Oregon: Hart Publishing, 2016), p 182.
[69] *Ibid*, p 186-7.
[70] *See* Clause 12.3 of The Institute Time Clauses 1983 and Clause 49.4 of The International Hull clauses 2003.

damage or loss in multimodal transport, the answer to whether the carrier or actual carrier is the third party under a subrogation claim is decided by the prior arrangement in insuring goods and subcontracting the carriage contract. While interpretation of the "family member or member of household" in Article 62 of the Chinese Insurance Law awaits further interpretation from the SPC, it is recommended that the carrier or actual carrier should incorporate a waiver of subrogation clause, or should be named as the co-assured under the insurance contract, in order to protect themselves from a miss-directed arrow.

Furthermore, the insurer's right of subrogation is essentially a special type of transfer of the debtee's rights aimed at preventing the unjust enrichment of the assured, as imposed by insurance legislations in China. In cases where the liable carrier in multimodal transport is subject to a limitation of liability, a loophole would occur during the insurer's subrogation claim. Among many views on the allocation of subrogation recoveries, the *pro rata* approach is consistent with the legal basis of subrogation in Chinese law.

CHAPTER 6

CONCLUSIONS

The mechanism of insurance provides security to the stakeholders of goods in multimodal transport at the price of the premium. Risks in multimodal transport entail both marine and non-marine risks. Although existing marine cargo polices with warehouse-to-warehouse cover can provide substantive coverage for goods in multimodal transport, typically, for a journey with short overland transit, few transhipments and a short period of storage, they are not always satisfactory in meeting the expectations of the assured for comprehensive coverage against risks during both the pre-transit period and the associated inland transport under multimodal transport. In general, the classification of cargo policies in multimodal transport and its applicable law in China is dependent on the employment of a sea leg. Insurance for goods carried by “maritime plus” transport is a marine insurance, as defined under Article 216 of the Chinese Maritime Code, and maritime law is thus applicable thereto, whereas insurance for goods on a journey without a sea leg is not a contract of marine insurance under Chinese law. However, the English law provides an opportunity for the application of MIA 1906, provided that the adventure is analogous to a marine adventure and that the policy is written in the form of a marine policy.

The principle of indemnity is the fundamental principle on which both English and Chinese insurance law is based. This principle embraces the insurable interest, measure of indemnity and subrogation covering three propositions, namely (a) the object of indemnity, (b) the content of indemnity, and (c) the aftermath of indemnity. Insurable

interest ensures that only stakeholders who suffer a loss will be indemnified. Measure of indemnity is devoted to ensuring that the sum recoverable by the assured will put him in the same position he was in before the occurrence of the insured contingencies. Subrogation prevents "double compensation" of the assured from a liable third party after already having been indemnified by the insurer.

China has established the basic framework governing these three propositions. Firstly, the object of indemnity is the party having an insurable interest in the insured subject matter. This issue is mainly regulated under the Chinese Insurance Law 2015 as the general law, but a specific definition of insurable interest in a marine insurance contract is, however, lacking in Chapter 12 of the Chinese Maritime Code. The SPC has also promulgated "Interpretations on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China" with the aim of addressing practical problems arising from the exercise of the insurable interest doctrine. Secondly, the content of indemnity relates to the measure of indemnity under the insurance contract. For general insurance law, the measure of indemnity is simply regulated by Article 55 of the Chinese Insurance Law. As for marine insurance, though, pertinent provisions are scattered throughout Articles 245 to 247, 219, 220, 238 and 240 of the Chinese Maritime Code. Chinese judicial practice also forms consistent rules about the measure of indemnity for the loss of property. Thirdly, the aftermath of indemnity involves subrogation upon the satisfaction of certain conditions. Provisions relating to the doctrine of subrogation are mainly found in Articles 60 to 64 of the Chinese Insurance Law as the general law for all types of insurance contracts, and Articles 252, 253 and 254 in Chapter 12 of the Chinese Maritime Code as the special law for marine insurance

contracts. There are also supplementary regulations from the SPC Interpretations and the Chinese Maritime Procedure Law.

However, gaps sometimes exist due to unclear or absent statutory provisions. Moreover, in the context of the insurance of goods in multimodal transport, great uncertainty remains due to inconsistencies between the law applicable to general insurance and that of marine insurance, especially regarding the measure of indemnity and subrogation. Firstly, despite efforts made by the SPC, existing Chinese law is not entirely clear in determining who has an insurable interest and whether a specific interest is insurable. As revealed by the legal case study, the lack of clear guidance in this respect has repeatedly caused disputes. Secondly, in multimodal transport, great uncertainties still exist in defining, valuing, measuring, and applying any deductions under the insurance of goods, due to the historical divergence between marine and non-marine insurance. However, even though current Chinese law is silent about the way to determine the extent of loss, the courts have gradually formulated stable practices in this regard, which is found to be similar to English insurance law. Given the divergence of marine and non-marine insurance law, the application of constructive total loss to the insurance of goods in multimodal transport is subject to the classification of such insurance as a marine insurance contract. Thirdly, both the Chinese Insurance Law and Chapter 12 of the Chinese Maritime Code lack sufficient guidance on how to allocate the subrogation recoveries and recoup any *ex gratia* payment in the event of a "loophole". The unidentified legal basis for the right of subrogation leads to ambiguities regarding both the preconditions and scope of subrogation. With respect to the insurance of goods in multimodal transport, the immunity provided under Article 62 of the Chinese Insurance

Law is often rendered as a technical defence by the carrier or actual carrier against the insurer's subrogation claim.

This thesis is devoted to critically examining both the law and practice regarding current application of the indemnity principle to the insurance of goods in multimodal transport in China, through a comparative study with English insurance law and practices. The following sections summarise the main contributions of this work and point out opportunities for further research.

Contributions to the coordination of the Chinese Insurance Law and Chapter 12 of the Chinese Maritime Code.

As the fundamental principle of insurance law, the principle of indemnity has been well discussed by literature on both Chinese and English insurance law. This thesis contributes to the existing literature by not only reviewing the principle of indemnity in Chinese law, but also by examining the effectiveness of existing Chinese legal regulations regarding the operation of the object, content and aftermath of indemnity in complying with the fundamental principle of indemnity and meeting both parties' reasonable expectations. It reveals the ambiguity and lack of practical legal rules in defining the insurable interest, ascertaining the extent of loss, subtracting the deductibles,[1] and allocating the subrogation recoveries where the actual loss of the assured is not fully compensated by either the insurer or the third party. Moreover, this thesis also identifies noticeable differences between the Chinese general insurance law

[1] Yet it is observed that Chinese courts, especially in the area of marine insurance, have developed relatively stable practices under the traditional influence of the English MIA 1906.

and marine insurance law in terms of the scope of total loss, and as to the particular time on which the value of the subject-matter insured should be based.[2]

In practice, sustained development of the insurance of goods calls for unequivocal legal rules and a consistent legal framework. Given the ambiguity and conflicts between the law for general and marine insurance in China, this thesis provides the following suggestions:

(i) In the area of property insurance, the insurable interest can adopt the pecuniary interest approach, which consists of both legally recognised rights and the direct factual expectation of the assured.

(ii) Through a comparative study of the English insurance law and a review of Chinese judicial practice, a coordinated four-step framework can be adopted in China for defining, valuing, measuring and applying any deductions.

(iii) The legal basis of subrogation is the statutory transfer of the debtee's rights in China. In the case of a loophole, the *pro rata* approach to allocating the subrogation recoveries is not only consistent with this feature of the transfer of the debtee's rights in Chinese debt law theory, but also serves the aims of subrogation.

With the recent official review work that is being carried out for amendment of the Chinese Maritime Code, the above suggestions in the context of multimodal transport will provide insights on the road to creating internal coherence between Chinese marine

[2] The Chinese Maritime Code is under the influence of the MIA 1906 in English law, although there is not such sign of this in the Chinese Insurance Law.

insurance and general insurance, as well as to that between market practices and legal rules.

Contributions to the development of the insurance of goods in multimodal transport

The development of multimodal transport is inseparable from the support of legal instruments in the areas of sales, transport and insurance. However, a comprehensive discussion on the insurance sector of multimodal transport is lacking.[3] This thesis is the first dedicated scholarly research on the insurance of goods in multimodal transport. Based upon the current Chinese law and insurance practices in insuring goods in multimodal transport, this thesis is an exploratory work on how these insurance laws and practices meet the expectations of both the insurer and the assured of the goods in multimodal transport. It tackles this question by investigating the object, content and aftermath of the principle of indemnity.

In view of the observed ambiguities in current Chinese insurance law and the possible dilemmas raised when applying such law, this study also raises awareness of the need for tailor-made insurance clauses for multimodal transport concerning the duration of cover, the scope of total losses, the time of ascertaining the value of the insured cargo, and the scope of the third party under a subrogation claim. Well-designed insurance products reallocate the risks of the stakeholders of the goods in multimodal transport to

[3] In the domain of international trade law, the International Chamber of Commerce has already launched new INCOTERMS rules tailor-made for the sale of goods delivered by multimodal transport. In addition, in the domain of the international multimodal transport of goods, UNCITRAL has also made several attempts at introducing a unified liability regime for multimodal transport. However, there is thus far no dedicated research on the insurance of goods in multimodal transport.

the insurance market as they reasonably expected, and this paves the way for the sustained development of multimodal transport. Attention, though, should be paid to the following aspects:

(i) The insurance contract for goods in multimodal transport should clarify the identity of the assured or co-assured. Under the pecuniary interest approach, the seller, buyer, carrier and sometimes the freight forwarder are entitled to insure the goods in multimodal transport. It is important to explicitly name them as the assured or co-assured in the insurance contract.

(ii) It is uncertain as to whether or not the goods in multimodal transport can constitute a constructive total loss. To avoid any uncertainty caused by the differences in rules of law for marine and non-marine insurance, it is recommended that the insurance contract for goods in multimodal transport also adopts the "writing off" practice to enable the assured to recover the total loss when the cost of repair is uneconomical.

(iii) The meaning of the phrase "family member or member of household" of the assured, whom the insurer is not entitled to claim against, is unclear. However, there are various approaches to insuring goods in multimodal transport in Chinese insurance practice, and a waiver of subrogation clause is a recommended practice for both the insurer and the assured to clarify the scope of subrogation.

Further Research

This research focuses on the application of the indemnity principle in the insurance of goods in multimodal transport, from the aspects of the object, content and aftermath of indemnity. However, this study assumes that cargo policies in multimodal transport are on an "All Risks" basis. In practice, successful indemnity from the insurer is also subject to the condition that the loss of the assured is within the insurance coverage. There are two constraints in this respect. Firstly, the type of loss suffered by the assured should be stipulated in the insurance contract. Secondly, the perils that cause the loss insured against should be stipulated in the contract. It is within the freedom of the contract for the assured and insurer to agree on the insurance coverage. The empirical study conducted in this research reveals that there are various ways to insure goods in multimodal transport, as well as their respective levels of comprehensiveness as perceived by the insurers, insurance brokers, and assureds. Given that current insurance practice lacks a widely used insurance policy specifically designed for goods in multimodal transport, it is important to further investigate this through a systematic empirical study of the risks perceived by the stakeholders of goods in multimodal transport. Such an empirical study would contribute to the identification of those risks having serious implications for goods in multimodal transport, and to the design of insurance policies with respect to their insurance coverage and exclusions.

Furthermore, this study investigates the area of cargo insurance, which is within the scope of first-party insurance. Given the rapid development of multimodal transport, challenges faced by multimodal transport operators are more complicated than carriers

in unimodal transport. Multimodal transport operators are also motivated to purchase third-party insurance against their liabilities arising from the delivery of goods in multimodal transport. There have already been many insurers offering a liability insurance package to multimodal transport operators. Among these, the Through Transport (TT) club has provided insurance coverage for 80% of the world's maritime containers.[4] Therefore, it would be interesting to explore application of the indemnity principle in liability insurance with regard to the loss of and damage to cargo against the background of multimodal transport.

[4] Available at https://www.ttclub.com/about-us/ (visited 12 Jul 2018).

APPENDICES

Appendix I

Invitation to Participant in a Survey in a Research Project on Investigating the Contemporary Practice in Insuring Goods in Multimodal Transport

Dear Sir or Madam,

My name is Mingzhao Zhang, and I am a PhD candidate at the Department of Logistics and Maritime Studies, The Hong Kong Polytechnic University.

My PhD research is mainly focused on "The Indemnity Principle in Cargo Insurance in Multimodal Transport: a Comparative Study of English and Chinese Law". The aim of my study is to investigate the application of the indemnity principle under Chinese law against the background of cargo insurance in multimodal transport. By providing a comprehensive analysis on the indemnity principle in cargo insurance in multimodal transport, this study discusses how the goods are insured in practice, pinpoints specific suggestions for drafting insurance contracts for goods; and recommends solutions for a better coordination between the laws relating to marine and non-marine insurance contracts.

I cordially invite you to participate in an interview survey, which should take you approximately twenty to thirty minutes. The interview mainly includes three categories of questions: (1) Available insurance policies to insure goods in multimodal transport; (2) the assureds of goods in multimodal transport; and (3) the possible usage of valued and unvalued cargo policies. Your participation in the survey will certainly contribute to our study from industrial perspectives.

Both your personal and company information will be treated in strict confidence and will not be disclosed in the project or anywhere else. All the collected data will be analysed and reported in aggregate along with other participants, and will be used only for the purpose of this study. If you have any queries regarding the usage of your information, please refer to the website of the University Ethics Committee at https://www.polyu.edu.hk/hsesc.

I am looking forward to receiving your favourable response. If you need any clarification about this survey and/or our study, please contact me at mingzhao-april.zhang@ , or +852 3400 3587.

Yours sincerely,
Mingzhao Zhang
PhD Candidate
Department of Logistics and Maritime Studies
The Hong Kong Polytechnic University

Appendix II

Investigating the Contemporary Practice in Insuring Goods in Multimodal Transport

Multimodal transport refers to the carriage of goods by at least two different modes of transport. There are many ways to insure the risk of loss of or damage to goods in multimodal transport. This survey aims to evaluate your perceptions of industrial practices in insuring goods in multimodal transport. This survey contains three parts of questions: (1) Available insurance policies to insure goods in multimodal transport; (2) the assured of goods in multimodal transport; and (3) usage of valued and unvalued cargo policies. Both your personal and company information will not be disclosed in the thesis or anywhere else, and your response will be used for the purpose of this research only. If you need any clarification about this survey, please contact me at mingzhao-april.zhang@ .

Expert Opinion Survey

Part I: Available insurance policies to insure goods in multimodal transport

1. **Have your company used the following ways to insure or underwrite goods in multimodal transport? (you can tick more than one answers)**
   - ☐ Option 1: Cargo policies mainly for unimodal transport (e.g. the Institute Cargo Clauses 1982 and 2009).
   - ☐ Option 2: A combination of cargo policies for unimodal transport (e.g. goods in 'sea-rail' transport are insured for the sea and rail leg respectively).
   - ☐ Option 3: A collective cargo policy irrespective of the employed modes of transport (e.g. a bespoke police for goods during the transit by sea, air, rail, road and any combination).
   - ☐ Others, please specify here_____.

2. **What do you think about the scope of coverage in insuring goods in multimodal transport?**

	Extremely comprehensive	Very comprehensive	Comprehensive	Not very comprehensive	Not comprehensive at all
Option 1	☐	☐	☐	☐	☐
Option 2	☐	☐	☐	☐	☐
Option 3	☐	☐	☐	☐	☐
Others	☐	☐	☐	☐	☐

3. **Whether do you think the current cargo policies can provide satisfactory coverage for goods in multimodal transport? What are the reasons?**

_____

_____

Part II: The assured of goods in multimodal transport

1. **Who do you think have the insurable interest in the goods in multimodal transport? (you can tick more than one answers)**
   - ☐ The seller.
   - ☐ The buyer.
   - ☐ The carrier (including the multimodal transport operator and the actual carrier).
   - ☐ The freight forwarder.
   - ☐ Others, please specify here_____ .

2. **What do you think are the benefits for the carrier to insure the goods he transported?**

_____

_____

3. **What do you think are the hardships for the carrier to insure the goods he transported?**

_____

_____

Part III: Usage of valued and unvalued policies

1. **How often do you think are the goods in multimodal transport insured on a valued and unvalued basis respectively?**

	Extremely often	Very often	Often	Not very often	Not often at all
Valued policy	☐	☐	☐	☐	☐
Unvalued policy	☐	☐	☐	☐	☐

2. **What do you think are the reasons why the goods in multimodal transport are insured on an unvalued policy?**

_____

_____

End of Questions

For the purpose of research, it will be much appreciated if you could provide the following information, which will not be disclosed in the thesis or anywhere else：

- Name of your Company:_____
- Position in the Company:_____

Appendix III

The Insurance Law of the People's Republic of China 2015

(Adopted at the 14th session of the Standing Committee of the Eighth National People's Congress on June 30, 1995; amended for the first time at the 30th session of the Standing Committee of the Ninth National People's Congress on October 28, 2002, according to the Decision on Amending the Insurance Law of the People's Republic of China; revised at the 7th session of the Standing Committee of the Eleventh National People's Congress on February 28, 2009; amended for the second time at the 10th session of the Standing Committee of the Twelfth National People's Congress on August 31, 2014, according to the Decision of the Standing Committee of the National People's Congress on Amending Five Laws Including the Insurance Law of the People's Republic of China; and amended for the third time in accordance with the Decision on Amending Five Laws Including the Metrology Law of the People's Republic of China adopted at the 14th Session of the Standing Committee of the Twelfth National People's Congress on April 24, 2015)

Chapter II Insurance Contracts

Section 1 General Rules

Article 10 An insurance contract means an agreement under which the insurance applicant and insurer agree upon the insurance rights and obligations.

An insurance applicant means a person who enters into an insurance contract with an insurer and performs the obligation of paying an insurance premium under the insurance contract.

An insurer means an insurance company which enters into an insurance contract with an insurance applicant and is liable for paying indemnity or insurance benefits under the insurance contract.

Article 11 An insurance contract shall be concluded upon agreement between both parties after consultation, and the rights and obligations of both parties shall be determined according to the principle of fairness.

An insurance contract shall be concluded voluntarily, unless the insurance is mandated by a law or administrative regulation.

Article 12 An applicant for personal insurance shall, when entering into an insurance contract, have an insurable interest in the insured.

The insured in property insurance shall have an insurable interest in the subject matter insured when an insured incident occurs.

Personal insurance shall be a type of insurance which takes the life and body of human beings as the subject matter insured.

Property insurance shall be a type of insurance which takes property and interests related thereto as the subject matter insured.

An insured means a person whose property, life or body is covered by an insurance contract and who is entitled to claim the insurance money. An insurance applicant may be the insured.

An insurable interest means a legally recognized interest owned by an insurance applicant or insured in the subject matter insured.

Article 13 An insurance contract shall be formed after the insurance applicant applies for insurance and the insurer agrees to underwrite the insurance. The insurer shall issue an insurance policy or any other insurance certificate to the insurance applicant in a timely manner.

The insurance policy or any other insurance certificate shall expressly state the provisions of the contract reached by both parties. Both parties may agree to state the provisions of the contract between them in any other written form.

A legally formed insurance contract shall become effective upon formation. The insurance applicant and insurer may attach a condition or time limit for the effectiveness of the contract.

Article 14 After an insurance contract is formed, the insurance applicant shall pay an insurance premium as agreed upon, and the insurer shall start to assume the insurance liability from the time as agreed upon.

Article 15 After an insurance contract is formed, the insurance applicant may, but the insurer may not, rescind the contract, except as otherwise provided for by this Law or as otherwise agreed upon in the insurance contract.

Article 16 Where the insurer inquiries about the subject matter insured or about the insured when entering into an insurance contract, the insurance applicant shall tell the truth.

Where the insurance applicant fails to perform the obligation of telling the truth as prescribed in the preceding paragraph intentionally or for gross negligence, affecting the insurer's decision on whether to underwrite the insurance or raise the insurance premium, the insurer shall have the right to rescind the insurance contract.

The right to rescind an insurance contract as prescribed in the preceding paragraph shall be annulled 30 days after the insurer knows the cause of rescission. Two years after an insurance contract is concluded, the insurer may not rescind the contract; and where an insured incident occurs, the insurer shall pay indemnity or insurance benefits.

Where the insurance applicant intentionally fails to perform the obligation of telling the truth, the insurer shall not be liable for paying indemnity or insurance benefits for an insured incident which occurs before the contract is rescinded, and shall not refund the insurance premium.

Where the insurance applicant fails to perform the obligation of telling the truth for gross negligence, materially affecting the occurrence of an insured incident, the insurer

shall not be liable for paying indemnity or insurance benefits for an insured incident which occurs before the contract is rescinded, but shall refund the insurance premium.

Where the insurer knows the truth which the insurance applicant fails to tell when they enter into an insurance contract, the insurer shall not rescind the contract; and if an insured incident occurs, the insurer shall pay indemnity or insurance benefits.

An insured incident means an incident within the insurance coverage as agreed upon in an insurance contract.

Article 17 Where an insurance contract is concluded using the standard clauses of the insurer, the insurer shall provide an insurance policy with the standard clauses attached and explain the contents of the contract to the insurance applicant.

For those clauses exempting the insurer from liability in the insurance contract, the insurer shall sufficiently warn the insurance applicant of those clauses in the insurance application form, the insurance policy or any other insurance certificate, and expressly explain those clauses to the insurance applicant in writing or verbally. If the insurer fails to make a warning or express explanation thereof, those clauses shall not be effective.

Article 18 An insurance contract shall include the following:

(1) The name and domicile of the insurer.

(2) The names and domiciles of the insurance applicant and insured and the name and domicile of the beneficiary in the case of personal insurance.

(3) The subject matter insured.

(4) The insurance liability and liability exemption.

(5) The duration of insurance and the time of commencement of insurance liability.

(6) The insured amount.

(7) The insurance premium and the payment method.

(8) The method for paying indemnity or insurance benefits.

(9) The liabilities for breach of contract and the resolution of disputes.

(10) The year, month and date when the contract is concluded.

The insurance applicant and insurer may agree upon other insurance-related matters in the insurance contract.

A beneficiary means a person designated by the insured or insurance applicant in a personal insurance contract to be entitled to claim the insurance money. An insurance applicant or insured may be a beneficiary.

An insured amount means the upper limit of the indemnity or insurance benefits which the insurer is liable to pay.

Article 19 The following clauses in an insurance contract which is concluded using the standard clauses of the insurer shall be null and void:

(1) A clause exempting the insurer from any legal obligation or aggravating the liability of the insurance applicant or insured.

(2) A clause excluding any legal right of the insurance applicant, insured or beneficiary.

Article 20 The insurance applicant and insurer in an insurance contract may modify the contract upon consultation.

To modify an insurance contract, the insurer shall endorse the insurance policy or any other insurance certificate or attach an approval slip thereto, or the insurance applicant and insurer shall enter into a written agreement on the modification.

Article 21 After knowing the occurrence of an insured incident, the insurance applicant, insured or beneficiary shall notify the insurer in a timely manner. Where the insurance applicant, insured or beneficiary fails to do so intentionally or for gross negligence, which makes it difficult to determine the nature, cause, degree of damage, etc. of the insured incident, the insurer need not pay indemnity or insurance benefits for the undeterminable part, unless the insurer has known or should have known the incident in a timely manner through any other channel.

Article 22 After an insured incident occurs, the insurance applicant, insured or beneficiary claiming indemnity or insurance benefits against the insurer under the insurance contract shall provide the insurer with all available certificates and materials related to the determination of the nature, cause, degree of damage, etc. of the incident.

If the insurer deems that the relevant certificates and materials are incomplete according to the contract, it shall notify, in a timely manner and at one time, the insurance applicant, insured or beneficiary of all additional certificates and materials to be provided.

Article 23 After receiving an insured's or beneficiary's claim for paying indemnity or insurance benefits, the insurer shall adjust the claim in a timely manner. If the circumstances are complex, the insurer shall complete the adjustment within 30 days, unless it is otherwise agreed upon in the insurance contract. The insurer shall notify the insured or beneficiary of the adjustment result. For a claim which falls within the insurance coverage, the insurer shall perform the obligation of paying indemnity or insurance benefits within 10 days after reaching an agreement on payment of indemnity or insurance benefits with the insured or beneficiary. If the insurance contract provides for a time limit for payment of indemnity or insurance benefits, the insurer shall perform the obligation of paying indemnity or insurance benefits as agreed upon.

Where the insurer fails to perform the obligation as prescribed in the preceding paragraph, it shall, in addition to paying the insurance money, compensate the insured or beneficiary for any loss suffered therefrom.

No entity or individual shall illegally intervene in an insurer's performance of the obligation of paying indemnity or insurance benefits or restrict an insured's or beneficiary's right to insurance money.

Article 24 After completing the adjustment under Article 23 of this Law, for a claim which does not fall within the insurance coverage, the insurer shall, within three days after completing the adjustment, send a notice of its refusal to pay indemnity or insurance benefits to the insured or beneficiary, with reasons.

Article 25 Where an insurer cannot determine the amount of indemnity or insurance benefits to be paid within 60 days after receiving a claim for indemnity or insurance benefits and the relevant certificates and materials, it shall first pay the amount which may be determined according to the available certificates or materials, and after it finally determines the amount of indemnity or insurance benefits to be paid, pay the difference.

Article 26 The time limitation for an insured or beneficiary in insurance other than life insurance to claim indemnity or insurance benefits against the insurer shall be two years, which shall be counted from the day when the insured or beneficiary knows or should have known the occurrence of the insured incident.

The time limitation for an insured or beneficiary in life insurance to claim indemnity or insurance benefits against the insurer shall be five years, which shall be counted from the day when the insured or beneficiary knows or should have known the occurrence of the insured incident.

Article 27 Where the insured or beneficiary lies about the occurrence of an insured incident which actually never occurs, and claims indemnity or insurance benefits against the insurer, the insurer shall have the right to rescind the insurance contract and not to return the insurance premium.

Where the insurance applicant or insured intentionally causes an insured incident, the insurer shall have the right to rescind the insurance contract, not to pay indemnity or insurance benefits, and subject to Article 43 of this Law, not to refund the insurance premium.

Where, after the occurrence of an insured incident, the insurance applicant, insured or beneficiary fabricates the cause of incident or exaggerates the degree of damage by forging or altering the relevant certificates or materials or any other evidence, the insurer shall not be liable to pay indemnity or insurance benefits for the false part.

Where the insurance applicant, insured or beneficiary commits any of the conduct as prescribed in the preceding three paragraphs, causing the insurer's payment of insurance money or expenses, the insurance applicant, insured or beneficiary shall refund the insurance money or compensate the insurer for expenses.

Article 28 Reinsurance means that an insurer transfers a portion of its underwritten insurance business to other insurers in the form of cede insurance.

At the request of the reinsurer, the cedant shall provide in writing the reinsurer with information on its own liabilities and the original insurance.

Article 29 No reinsurer shall require the original insurance applicant to pay an insurance premium.

Neither the insured nor the beneficiary in the original insurance may claim indemnity or insurance benefits against the reinsurer.

No cedant shall refuse or delay the performance of its original insurance liability under the pretext that the reinsurer fails to perform the reinsurance liability.

Article 30 Where there is any dispute between the insurer and the insurance applicant, insured or beneficiary over any clause of an insurance contract concluded using the standard clauses of the insurer, the clause shall be interpreted as commonly understood. If there are two or more different interpretations of the clause, the people's court or the arbitral institution shall interpret the clause in favor of the insured and beneficiary.

Section 2 Personal Insurance Contracts

…

Section 3 Property Insurance Contracts

Article 48 The insured which does not have an insurable interest in the subject matter insured when an insured incident occurs shall not claim indemnity against the insurer.

Article 49 Where the subject matter insured is assigned, the assignee shall succeed to the rights and obligations of the insured.

Where the subject matter insured is assigned, the insured or the assignee shall notify the insurer in a timely manner, except for a cargo transportation insurance contract or any contract as otherwise agreed upon.

If the assignment of the subject matter insured greatly raises the degree of peril, the insurer may, within 30 days of receipt of the notice as mentioned in the preceding paragraph, increase the insurance premium or rescind the contract as agreed upon in the contract. If the insurer rescinds the contract, it shall refund the collected insurance premium to the insurance applicant after deducting the receivable part from the day of commencement of insurance liability to the day of contract rescission.

Where the insured or assignee fails to perform the notification obligation prescribed in paragraph 2 of this Article and an insured incident occurs because the assignment greatly raises the degree of peril of the subject matter insured, the insurer shall not be liable to pay indemnity.

Article 50 For a cargo transportation insurance contract or a voyage insurance contract for a means of transport, once the insurance liability commences, neither of the parties to the contract shall rescind the contract.

Article 51 The insured shall abide by the state provisions on fire protection, safety, productive operation, labor protection, etc. to maintain the safety of the subject matter insured.

The insurer may check the safety status of the subject matter insured according to the contract, and offer written recommendations to the insurance applicant or insured on eliminating unsafe factors or hidden dangers in a timely manner.

Where the insurance applicant or insured fails to perform the duty of maintaining the safety of the subject matter insured as agreed upon, the insurer shall have the right to increase the insurance premium or rescind the contract.

To maintain the safety of the subject matter insured, the insurer may take safety precautions upon consent of the insured.

Article 52 Where the degree of peril of the subject matter insured greatly increases during the term of validity of the contract, the insured shall notify the insurer in a timely manner as agreed upon in the contract, and the insurer may increase the insurance premium or rescind the contract as agreed upon in the contract. If the insurer rescinds the contract, it shall refund the insurance premium to the insurance applicant after deducting the receivable part from the day of commencement of insurance liability to the day of contract rescission as agreed upon in the contract.

Where the insured fails to perform the notification obligation prescribed in the preceding paragraph and an insured incident occurs because the degree of peril of the subject matter insured greatly increases, the insurer shall not be liable to pay indemnity.

Article 53 Under either of the following circumstances, except as otherwise provided for by the contract, the insurer shall reduce the insurance premium, and refund the corresponding amount of insurance premium calculate by day to the insurance applicant:

(1) The relevant condition based on which the insurance premium rate is determined changes, and thus the degree of peril of the subject matter insured evidently decreases.

(2) The insurable value of the subject matter insured evidently decreases.

Article 54 Where the insurance applicant requires rescission of the contract before the insurance liability commences, it shall pay a commission charge to the insurer as agreed upon in the contract, and the insurer shall refund the insurance premium. Where the insurance applicant requires rescission of the contract after the insurance liability commences, the insurer shall refund the insurance premium to the insurance applicant after deducting the receivable part from the day of commencement of insurance liability to the day of contract rescission as agreed upon in the contract.

Article 55 Where the insurance applicant and insurer agree upon the insurable value of the subject matter insured and include it in the contract, when the subject matter insured suffers any loss, the insurable value as agreed upon shall be the standard for calculation of indemnity.

Where the insurance applicant and insurer fail to agree upon the insurable value of the subject matter insured, when the subject matter insured suffers any loss, the actual value of the subject matter insured at the time of occurrence of the insured incident shall be the standard for calculation of indemnity.

The insured amount shall not exceed the insurable value. In the case of excess, the excess shall be invalid, and the insurer shall refund the corresponding amount of insurance premium to the insurance applicant.

If the insured amount is less than the insurable value, except as otherwise provided for by the contract, the insurer shall be liable to pay indemnity according to the proportion between the insured amount and the insurable value.

Article 56 The insurance applicant in overlapping insurance shall notify all insurers of the overlapping insurance.

The total indemnity paid by all insurers in overlapping insurance shall not exceed the insurable value. Each insurer shall be liable to pay indemnity according to the proportion between its insured amount and the total insured amount, except as otherwise provided for by the contract.

The insurance applicant in overlapping insurance may require the insurers to refund pro rata the insurance premium for the excess between the total insured amount and the insurable value.

Overlapping insurance means that an insurance applicant enters into insurance contracts with two or more insurers respectively for the same subject matter insured, the same insurance interest or the same insured incident and the total insured amount exceeds the insurable value.

Article 57 When an insured incident occurs, the insured shall endeavor to take necessary measures to prevent or reduce losses.

The necessary and reasonable expenses paid by the insured for preventing or reducing losses to the subject matter insured after the insured incident occurs shall be at the expense of the insurer. The amount of such expenses shall be calculated separately from the indemnity for losses to the subject matter insured, and shall not exceed the insured amount.

Article 58 Where the subject matter insured suffers a partial loss, the insurance applicant may rescind the contract within 30 days after the insurer pays indemnity; and except as otherwise provided for by the contract, the insurer may also rescind the contract but shall notify the insurance applicant 15 days in advance.

If the contract is rescinded, the insurer shall refund the insurance premium for the part of the subject matter insured which has not suffered any loss to the insurance applicant after deducting the receivable part of the premium from the day of commencement of insurance liability to the day of contract rescission.

Article 59 After an insured incident occurs, if the insurer has paid the full insured amount which equals the insurable value, all rights in the subject matter insured which suffers losses shall be ascribed to the insurer; if the insured amount is less than the insurable value, the insurer shall acquire part of the rights in the subject matter insured which suffers losses according to the proportion between the insured amount and the insurable value.

Article 60 Where an insured incident occurs for any damage caused by a third party to the subject matter insured, the insurer shall, after it pays indemnity to the insured, subrogate the insured's claim for indemnity against the third party within the extent of the indemnity amount.

Where the insured has been indemnified by the third party after the insured incident prescribed in the preceding paragraph occurs, the insurer may, when paying indemnity, deduct the corresponding amount of indemnity which the insured has obtained from the third party.

The insurer's right of subrogation to a claim for indemnity as prescribed in paragraph 1 of this Article shall not prejudice the insured's right to claim indemnity against the third party for the part of loss which the insured has not been indemnified for.

Article 61 Where, after an insured incident occurs and before the insurer pays indemnity, the insured waives the right to claim indemnity against the third party, the insurer shall not be liable to pay indemnity.

Where the insured waives the right to claim indemnity against the third party without the consent of the insurer after the insurer pays indemnity to the insured, the waiver shall be null and void.

Where the insured, intentionally or for gross negligence, causes the insurer to be unable to exercise the right of subrogation to a claim for indemnity, the insurer may deduct or require the insured to refund the corresponding amount of indemnity.

Article 62 The insurer shall not exercise the right of subrogation to a claim for indemnity against a family member or a member of the insured, unless the family member or the member of the insured intentionally causes an insured incident prescribed in paragraph 1 of Article 60 of this Law.

Article 63 When the insurer exercises the right of subrogation to a claim for indemnity against a third party, the insured shall provide the insurer with necessary documents and relevant information known by the insured.

Article 64 The necessary and reasonable expenses paid by the insurer and insured for ascertaining and determining the nature and cause of an insured incident or the degree of losses to the subject matter insured shall be at the expense of the insurer.

Article 65 For the damage caused by the insured in liability insurance to a third party, the insurer may directly pay indemnity to the third party according to the law or the insurance contract.

Where the insured in liability insurance causes any damage to a third party and the insured's liability for indemnity to the third party has been determined, at the request of the insured, the insurer shall directly pay insurance money to the third party. If the insured is slow to make a request, the third party shall have the right to directly request the insurer to pay indemnity for the damage for which the third party shall be indemnified.

Where the insured in liability insurance causes any damage to a third party and the insured has not indemnified the third party for the damage, the insurer shall not pay indemnity to the insured.

Liability insurance means a type of insurance which takes the insured's legal liability for indemnity to a third party as the subject matter insured.

Article 66 Where an arbitration or litigation is instituted against the insured in liability insurance for an insured incident which causes damage to a third party, the arbitration or litigation costs and other necessary and reasonable expenses paid by the insured shall be at the expense of the insurer, except as otherwise provided for by the insurance contract.

Source of the English Version: *pkulaw.cn*

Appendix IV

The Maritime Code of the People's Republic of China

(Adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on November 7, 1992 and promulgated by Order No.64 of the President of the People's Republic of China on November 7, 1992)

Chapter XII Contract of Marine Insurance

Section 1 Basic Principles

Article 216 A contract of marine insurance is a contract whereby the insurer undertakes, as agreed, to indemnify the loss to the subject matter insured and the liability of the insured caused by perils covered by the insurance against the payment of an insurance premium by the insured.

The covered perils referred to in the preceding paragraph mean any maritime perils agreed upon between the insurer and the insured, including perils occurring in inland rivers or on land which is related to a maritime adventure.

Article 217 A contract of marine insurance mainly includes:

(1) Name of the insurer;

(2) Name of the insured;

(3) Subject matter insured;

(4) Insured value;

(5) Insured amount;

(6) Perils insured against and perils excepted;

(7) Duration of insurance coverage;

(8) Insurance premium.

Article 218 The following items may come under the subject matter of marine insurance:

(1)Ship;

(2) Cargo;

(3) Income from the operation of the ship including freight, charter hire and passenger's fare;

(4) Expected profit on cargo;

(5) Crew's wages and other remuneration;

(6) Liabilities to a third person;

(7) Other property which may sustain loss from a maritime peril and the liability and expenses arising therefrom.

The insurer may reinsure the insurance of the subject matter enumerated in the preceding paragraph. Unless otherwise agreed in the contract, the original insured shall not be entitled to the benefit of the reinsurance.

Article 219 The insurable value of the subject matter insured shall be agreed upon between the insurer and the insured.

Where no insurable value has been agreed upon between the insurer and the insured, the insurable value shall be calculated as follows:

(1) The insurable value of the ship shall be the value of the ship at the time when the insurance liability commences, being the total value of the ship's hull, machinery, equipment, fuel, stores, gear, provisions and fresh water on board as well as the insurance premium;

(2) The insurable value of the cargo shall be the aggregate of the invoice value of the cargo or the actual value of the non-trade commodity at the place of shipment, plus freight and insurance premium when the insurance liability commences;

(3) The insurable value of the freight shall be the aggregate of the total amount of freight payable to the carrier and the insurance premium when the insurance liability commences;

(4) The insurable value of other subject matter insured shall be the aggregate of the actual value of the subject matter insured and the insurance premium when the insurance liability commences.

Article 220 The insured amount shall be agreed upon between the insurer and the insured. The insured amount shall not exceed the insured value. Where the insured amount exceeds the insured value, the portion in excess shall be null and void.

Section 2 Conclusion, Termination and Assignment of Contract

Article 221 A contract of marine insurance comes into being after the insured puts forth a proposal for insurance and the insurer agrees to accept the proposal and the insurer and the insured agree on the terms and conditions of the insurance. The insurer shall

issue to the insured an insurance policy or other certificate of insurance in time, and the contents of the contract shall be contained therein.

Article 222 Before the contract is concluded, the insured shall truthfully inform the insurer of the material circumstances which the insured has knowledge of or ought to have knowledge of in his ordinary business practice and which may have a bearing on the insurer in deciding the premium or whether be agrees to insure or not.

The insured need not inform the insurer of the facts which the insurer has known of or the insurer ought to have knowledge of in his ordinary business practice if about which the insurer made no inquiry.

Article 223 Upon failure of the insured to truthfully inform the insurer of the material circumstances set forth in paragraph 1 of Article 222 of this Code due to his intentional act, the insurer has the right to terminate the contract without refunding the premium. The insurer shall not be liable for any loss arising from the perils insured against before the contract is terminated.

If, not due to the insured's intentional act, the insured did not truthfully inform the insurer of the material circumstances set out in paragraph 1 of Article 222 of this Code, the insurer has the right to terminate the contract or to demand a corresponding increase in the premium. In case the contract is terminated by the insurer, the insurer shall be liable for the loss arising from the perils insured against which occurred prior to the termination of the contract, except where the material circumstances uninformed or wrongly informed of have an impact on the occurrence of such perils.

Article 224 Where the insured was aware or ought to be aware that the subject matter insured had suffered a loss due to the incidence of a peril insured against when the contract was concluded, the insurer shall not be liable for indemnification but shall have the right to the premium. Where the insurer was aware or ought to be aware that the occurrence of a loss to the subject matter insured due to a peril insured against was impossible, the insured shall have the right to recover the premium paid.

Article 225 Where the insured concludes contracts with several insurers for the same subject matter insured and against the same risk, and the insured amount of the said subject matter insured thereby exceeds the insured value, then, unless otherwise agreed in the contract, the insured may demand indemnification from any of the insurers and the aggregate amount to be indemnified shall not exceed the loss value of the subject matter insured. The liability of each insurer shall be in proportion to that which the amount he insured bears to the total of the amounts insured by all insurers. Any insurer who has paid an indemnification in an amount greater than that for which he is liable, shall have the right of recourse against those who have not paid their indemnification in the amounts for which they are liable.

Article 226 Prior to the commencement of the insurance liability, the insured may demand the termination of the insurance contract but shall pay the handling fees to the insurer, and the insurer shall refund the premium.

Article 227 Unless otherwise agreed in the contract, neither the insurer nor the insured may terminate the contract after the commencement of the insurance liability.

Where the insurance contract provides that the contract may be terminated after the commencement of the liability, and the insured demands the termination of the contract, the insurer shall have the right to the premium payable from the day of the commencement of the insurance liability to the day of termination of the contract and refund the remaining portion. If it is the insurer who demands the termination of the contract, the unexpired premium from the day of the termination of the contract to the day of the expiration of the period of insurance shall be refunded to the insured.

Article 228 Notwithstanding the stipulations in Article 227 of this Code, the insured may not demand termination of the contract for cargo insurance and voyage insurance on ship after the commencement of the insurance liability.

Article 229 A contract of marine insurance for the carriage of goods by sea may be assigned by the insured by endorsement or otherwise, and the rights and obligations under the contract are assigned accordingly. The insured and the assignee shall be jointly and severally liable for the payment of the premium if such premium remains unpaid up to the time of the assignment of the contract.

Article 230 The consent of the insurer shall be obtained where the insurance contract is assigned in consequence of the transfer of the ownership of the ship insured. In the absence of such consent, the contract shall be terminated from the time of the transfer of the ownership of the ship. Where the transfer takes place during the voyage, the contract shall be terminated when the voyage ends.

Upon termination of the contract, the insurer shall refund the unexpired premium to the insured calculated from the day of the termination of the contract to the day of its expiration.

Article 231 The insured may conclude an open cover with the insurer for the goods to be shipped or received in batches within a given period. The open cover shall be evidenced by an open policy to be issued by the insurer.

Article 232 The insurer shall, at the request of the insured, issue insurance certificates separately for the cargo shipped in batches according to the open cover.

Where the contents of the insurance certificates issued by the insurer separately differ from those of the open policy, the insurance certificates issued separately shall prevail.

Article 233 The insured shall notify the insurer immediately on learning that the cargo insured under the open cover has been shipped or has arrived. The items to be notified of shall include the name of the carrying ship, the voyage, the value of the cargo and the insured amount.

Section 3 Obligation of the Insured

Article 234 Unless otherwise agreed in the insurance contract, the insured shall pay the premium immediately upon conclusion of the contract. The insurer may refuse to issue the insurance policy or other insurance certificate before the premium is paid by the insured.

Article 235 The insured shall notify the insurer in writing immediately where the insured has not complied with the warranties under the contract. The insurer may, upon receipt of the notice, terminate the contract or demand an amendment to the terms and conditions of the insurance coverage or an increase in the premium.

Article 236 Upon the occurrence of the peril insured against, the insured shall notify the insurer immediately and shall take necessary and reasonable measures to avoid or minimize the loss. Where special instructions for the adoption of reasonable measures to avoid or minimize the loss are received from the insurer, the insured shall act according to such instructions.

The insurer shall not be liable for the extended loss caused by the insured's breach of the provisions of the preceding paragraph.

Section 4 Liability of the Insurer

Article 237 The insurer shall indemnify the insured promptly after the loss from a peril insured against has occurred.

Article 238 The insurer's indemnification for the loss from the peril insured against shall be limited to the insured amount. Where the insured amount is lower than the insured value, the insurer shall indemnify in the proportion that the insured amount bears to the insured value.

Article 239 The insurer shall be liable for the loss to the subject matter insured arising from several perils insured against during the period of the insurance even though the aggregate of the amounts of loss exceeds the insured amount. However, the insurer shall only be liable for the total loss where the total loss occurs after the partial loss which has not been repaired.

Article 240 The insurer shall pay, in addition to the indemnification to be paid with regard to the subject matter insured, the necessary and reasonable expenses incurred by the insured for avoiding or minimizing the loss recoverable under the contract, the reasonable expenses for survey and assessment of the value for the purpose of ascertaining the nature and extent of the peril insured against and the expenses incurred for acting on the special instructions of the insurer.

The payment by the insurer of the expenses referred to in the preceding paragraph shall be limited to that equivalent to the insured amount.

Where the insured amount is lower than the insured value, the insurer shall be liable for the expenses referred to in this Article in the proportion that the insured amount bears to the insured value, unless the contract provides otherwise.

Article 241 Where the insured amount is lower than the value for contribution under the general average, the insurer shall be liable for the general average contribution in the proportion that the insured amount bears to the value for contribution.

Article 242 The insurer shall not be liable for the loss caused by the intentional act of the insured.

Article 243 Unless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured cargo arising from any of the following causes:

(1) Delay in the voyage or in the delivery of cargo or change of market price;

(2) Fair wear and tear, inherent vice or nature of the cargo; and

(3) Improper packing.

Article 244 Unless otherwise agreed in the insurance contract, the insurer shall not be liable for the loss of or damage to the insured ship arising from any of the following causes:

(1) Unseaworthiness of the ship at the time of the commencement of the voyage, unless where under a time policy the insured has no knowledge thereof;

(2) Wear and tear or corrosion of the ship.

The provisions of this Article shall apply " mutatis mutandis" to the insurance of freight.

Section 5 Loss of or Damage to the Subject Matter Insured and Abandonment

Article 245 Where after the occurrence of a peril insured against the subject matter insured is lost or is so seriously damaged that it is completely deprived of its original structure and usage or the insured is deprived of the possession thereof, it shall constitute an actual total loss.

Article 246 Where a ship's total loss is considered to be unavoidable after the occurrence of a peril insured against or the expenses necessary for avoiding the occurrence of an actual total loss would exceed the insured value, it shall constitute a constructive total loss.

Where an actual total loss is considered to be unavoidable after the cargo has suffered a peril insured against, or the expenses to be incurred for avoiding the total actual loss plus that for forwarding the cargo to its destination would exceed its insured value, it shall constitute a constructive total loss.

Article 247 Any loss other than an actual total loss or a constructive total loss is a partial loss.

Article 248 Where a ship fails to arrive at its destination within a reasonable time from the place where it was last heard of, unless the contract provides otherwise, if it remains unheard of upon the expiry of two months, it shall constitute missing. Such missing shall be deemed to be an actual total loss.

Article 249 Where the subject matter insured has become a constructive total loss and the insured demands indemnification from the insurer on the basis of a total loss, the subject matter insured shall be abandoned to the insurer. The insurer may accept the abandonment or choose not to, but shall inform the insured of his decision whether to accept the abandonment within a reasonable time.

The abandonment shall not be attached with any conditions. Once the abandonment is accepted by the insurer, it shall not be withdrawn.

Article 250 Where the insurer has accepted the abandonment, all rights and obligations relating to the property abandoned are transferred to the insurer.

Section 6 Payment of Indemnity

Article 251 After the occurrence of a peril insured against and before the payment of indemnity, the insurer may demand that the insured submit evidence and materials related to the ascertainment of the nature of the peril and the extent of the loss.

Article 252 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.

Article 253 Where the insured waives his right of claim against the third person without the consent of the insurer or the insurer is unable to exercise the right of recourse due to the fault of the insured, the insurer may make a corresponding reduction from the amount of indemnity.

Article 254 In effecting payment of indemnity to the insured, the insurer may make a corresponding reduction therefrom of the amount already paid by a third person to the insured.

Where the compensation obtained by the insurer from the third person exceeds the amount of indemnity paid by the insurer, the part in excess shall be returned to the insured.

Article 255 After the occurrence of a peril insured against, the insurer is entitled to waive his right to the subject matter insured and pay the insured the amount in full to relieve himself of the obligations under the contract.

In exercising the right prescribed in the preceding paragraph, the insurer shall notify the insured thereof within seven days from the day of the receipt of the notice from the insured regarding the indemnity. The insurer shall remain liable for the necessary and reasonable expenses paid by the insured for avoiding or minimizing the loss prior to his receipt of the said notice.

Article 256 Except as stipulated in Article 255 of this Code, where a total loss occurs to the subject matter insured and the full insured amount is paid, the insurer shall acquire the full right to the subject matter insured. 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.

Source of the English version: *The National People's Congress of the People's Republic of China*

Appendix V

INSTITUTE CARGO CLAUSES (A) 1982

Cl. 252 1/1/82

RISKS COVERED

Risks Clause

1. This insurance covers all risks of loss of or damage to the subject-matter insured except as provided in Clauses 4, 5, 6 and 7 below.

General Average Clause

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6 and 7 or elsewhere in this insurance.

"Both to Blame Collision" Clause

3. This insurance is extended to indemnify the Assured against such proportion of liability under the contract of affreightment "Both to Blame Collision" Clause as is in respect of a loss recoverable hereunder. In the event of any claim by shipowners under the said Clause the Assured agree to notify the Underwriters who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

General Exclusion Clause

4. In no case shall this insurance cover

4.1 loss damage or expense attributable to willful misconduct of the Assured

4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured

4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured (for the purpose of this Clause 4.3 "packing" shall be deemed to include stowage in a container or liftvan but only when such stowage is carried out prior to attachment of this insurance or by the Assured or their servants)

4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured

4.5 loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)

4.6 loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel

4.7 loss damage or expense arising from the use of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

Unseaworthiness and Unfitness Exclusion Clause

5.1. In no case shall this insurance cover loss damage or expense arising from unseaworthiness of vessel or craft,
unfitness of vessel craft conveyance container or liftvan for the safe carriage of the subject-matter insured,
where the Assured or their servants are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.

5.2 The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness.

War Exclusion Clause

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

Strikes Exclusion Clause

7. In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions

7.3 caused by any terrorist or any person acting from a political motive.

DURATION

Transit Clause

8

8.1. This insurance attaches from the time the goods leave the warehouse or place of storage at the place named herein for the commencement of the transit, continues during the ordinary course of transit and terminates either

8.1.1 on delivery to the Consignees' or other final warehouse or place of storage at the destination named herein,

8.1.2 on delivery to any other warehouse or place of storage, whether prior to or at the destination named herein, which the Assured elect to use either

8.1.2.1 for storage other than in the ordinary course of transit or

8.1.2.2 for allocation or distribution, or

8.1.3 on the expiry of 60 days after completion of discharge overside of the goods hereby insured from the oversea vessel at the final port of discharge, whichever shall first occur.

8.2 If, after discharge overside from the oversea vessel at the final port of discharge, but prior to termination of this insurance, the goods are to be forwarded to a destination other than that to which they are insured hereunder, this insurance, whilst remaining subject to termination as provided for above, shall not extend beyond the commencement of transit to such other destination.

8.3 This insurance shall remain in force (subject to termination as provided for above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of the adventure arising from the exercise of a liberty granted to shipowners or charterers under the contract of affreightment.

Termination of Contract of Carriage Clause

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before delivery of the goods as provided for in Clause 8 above, then this insurance shall also terminate unless prompt notice is given to the Underwriters and continuation of cover is requested when the insurance shall remain in force, subject to an additional premium if required by the Underwriters, either

9.1 until the goods are sold and delivered at such port or place, or unless otherwise specially agreed, until the expiry of 60 days after arrival of the goods hereby insured at such port or place, whichever shall first occur, or

9.2 if the goods are forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named herein or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage Clause

10. Where, after attachment of this insurance, the destination is changed by the Assured, held covered at a premium and on conditions to be arranged subject to prompt notice being given to the Underwriters.

CLAIMS

11.

Insurable Interest Clause

11

11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

11.2 Subject to 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Underwriters were not.

Forwarding Charges Clause

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter is covered under this insurance, the Underwriters will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter to the destination to which it is insured hereunder. This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their servants.

Constructive Total Loss Clause

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter to the destination to which it is insured would exceed its value on arrival.

Increased Value Clause

14

14.1 If any Increased Value insurance is effected by the Assured on the cargo insured herein the agreed value of the cargo shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured herein bears to such total amount insured. In the event of claim the Assured shall provide the Underwriters with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value the following clause shall apply: The agreed value of the cargo shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the cargo by the Assured, and liability under this insurance shall be in such proportion as the sum insured herein bears to such total amount insured. In the event of claim the Assured shall provide the Underwriters with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

Not to Inure Clause

15. This insurance shall not inure to the benefit of the carrier or other bailee.

MINIMISING LOSSES

Duty of Assured Clause

16. It is the duty of the Assured and their servants and agents in respect of loss recoverable hereunder

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

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

Waiver Clause

17. 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.

AVOIDANCE OF DELAY

Reasonable Despatch Clause

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

Appendix VI

INSTITUTE CARGO CLAUSES (A) 2009

1/1/09

RISKS COVERED

Risks

1. This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below.

General Average

2. This insurance covers general average and salvage charges, adjusted or determined according to the contract of carriage and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4**,** 5, 6 and 7 below.

"Both to Blame Collision Clause"

3. This insurance indemnifies the Assured, in respect of any risk insured herein, against liability incurred under any Both to Blame Collision Clause in the contract of carriage. In the event of any claim by carriers under the said Clause, the Assured agree to notify the Insurers who shall have the right, at their own cost and expense, to defend the Assured against such claim.

EXCLUSIONS

4. In no case shall this insurance cover
   - 4.1 loss damage or expense attributable to wilful misconduct of the Assured
   - 4.2 ordinary leakage, ordinary loss in weight or volume, or ordinary wear and tear of the subject-matter insured
   - 4.3 loss damage or expense caused by insufficiency or unsuitability of packing or preparation of the subject-matter insured to withstand the ordinary incidents of the insured transit where such packing or preparation is carried out by the Assured or their employees or prior to the attachment of this insurance (for the purpose of these Clauses "packing" shall be deemed to include stowage in a container and "employees" shall not include independent contractors)
   - 4.4 loss damage or expense caused by inherent vice or nature of the subject-matter insured
   - 4.5 loss damage or expense caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)
   - 4.6 loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage

     This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract

4.7 loss damage or expense directly or indirectly caused by or arising from the use of any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter.

5. 5.1 In no case shall this insurance cover loss damage or expense arising from

5.1.1 unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the Assured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein

5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out
prior to attachment of this insurance or
by the Assured or their employees and they are privy to such unfitness at the time of loading.

5.2 Exclusion 5.1.1 above shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract.

5.3 The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination.

6. In no case shall this insurance cover loss damage or expense caused by

6.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power

6.2 capture seizure arrest restraint or detainment (piracy excepted), and the consequences thereof or any attempt thereat

6.3 derelict mines torpedoes bombs or other derelict weapons of war.

7. In no case shall this insurance cover loss damage or expense

7.1 caused by strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

7.2 resulting from strikes, lock-outs, labour disturbances, riots or civil commotions

7.3 caused by any act of terrorism being an act of any person acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of any government whether or not legally constituted

7.4 caused by any person acting from a political, ideological or religious motive.

DURATION

Transit Clause

8. 8.1 Subject to Clause 11 below, this insurance attaches from the time the subject-matter insured is first moved in the warehouse or at the place of storage (at the place named in the contract of insurance) for the purpose of immediate loading into or onto the carrying vehicle or other conveyance for the commencement of transit,

continues during the ordinary course of transit

and terminates either

8.1.1 on completion of unloading from the carrying vehicle or other conveyance in or at the final warehouse or place of storage at the destination named in the contract of insurance,

8.1.2 on completion of unloading from the carrying vehicle or other conveyance in or at any other warehouse or place of storage, whether prior to or at the destination named in the contract of insurance, which the Assured or their employees elect to use either for storage other than in the ordinary course of transit or for allocation or distribution, or

8.1.3 when the Assured or their employees elect to use any carrying vehicle or other conveyance or any container for storage other than in the ordinary course of transit or

8.1.4 on the expiry of 60 days after completion of discharge overside of the subject-matter insured
from the oversea vessel at the final port of
discharge,
whichever shall first occur.

8.2 If, after discharge overside from the oversea vessel at the final port of discharge, but prior to termination of this insurance, the subject-matter insured is to be forwarded to a destination other than that to which it is insured, this insurance, whilst remaining subject to termination as provided in Clauses 8.1.1 to 8.1.4, shall not extend beyond the time the subject-matter insured is first moved for the purpose of the commencement of transit to such other destination.

8.3 This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transhipment and during any variation of the adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.

Termination of Contract of Carriage

9. If owing to circumstances beyond the control of the Assured either the contract of carriage is terminated at a port or place other than the destination named therein or the transit is otherwise terminated before unloading of the subject-matter insured as provided for in Clause 8 above, then this insurance shall also terminate *unless prompt notice is given to the Insurers and continuation of cover is requested when this insurance shall remain in force, subject to an additional premium if required by the Insurers*, either

9.1 until the subject-matter insured is sold and delivered at such port or place, or, unless otherwise specially agreed, until the expiry of 60 days after arrival of the subject-matter insured at such port or place, whichever shall first occur,
or

9.2 if the subject-matter insured is forwarded within the said period of 60 days (or any agreed extension thereof) to the destination named in the contract of insurance or to any other destination, until terminated in accordance with the provisions of Clause 8 above.

Change of Voyage

10. 10.1 Where, after attachment of this insurance, the destination is changed by the Assured, *this must be notified promptly to Insurers for rates and terms to be agreed. Should a loss occur prior to such agreement being obtained cover may be provided but only if cover would have been available at a reasonable commercial market rate on reasonable market terms.*

10.2 Where the subject-matter insured commences the transit contemplated by this insurance (in accordance with Clause 8.1), but, without the knowledge of the Assured or their employees the ship sails for another destination, this insurance will nevertheless be deemed to have attached at commencement of such transit.

CLAIMS

Insurable Interest

11. 11.1 In order to recover under this insurance the Assured must have an insurable interest in the subject-matter insured at the time of the loss.

11.2 Subject to Clause 11.1 above, the Assured shall be entitled to recover for insured loss occurring during the period covered by this insurance, notwithstanding that the loss occurred before the contract of insurance was concluded, unless the Assured were aware of the loss and the Insurers were not.

Forwarding Charges

12. Where, as a result of the operation of a risk covered by this insurance, the insured transit is terminated at a port or place other than that to which the subject-matter insured is covered under this insurance, the Insurers will reimburse the Assured for any extra charges properly and reasonably incurred in unloading storing and forwarding the subject-matter insured to the destination to which it is insured.

This Clause 12, which does not apply to general average or salvage charges, shall be subject to the exclusions contained in Clauses 4, 5, 6 and 7 above, and shall not include charges arising from the fault negligence insolvency or financial default of the Assured or their employees.

Constructive Total Loss

13. No claim for Constructive Total Loss shall be recoverable hereunder unless the subject-matter insured is reasonably abandoned either on account of its actual total loss appearing to be unavoidable or because the cost of recovering, reconditioning and forwarding the subject-matter insured to the destination to which it is insured would exceed its value on arrival.

Increased Value

14. 14.1 If any Increased Value insurance is effected by the Assured on the subject-matter insured under this insurance the agreed value of the subject-matter insured shall be deemed to be increased to the total amount insured under this insurance and all Increased Value insurances covering the loss, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

14.2 Where this insurance is on Increased Value the following clause shall apply:
The agreed value of the subject-matter insured shall be deemed to be equal to the total amount insured under the primary insurance and all Increased Value insurances covering the loss and effected on the subject-matter insured by the Assured, and liability under this insurance shall be in such proportion as the sum insured under this insurance bears to such total amount insured.

In the event of claim the Assured shall provide the Insurers with evidence of the amounts insured under all other insurances.

BENEFIT OF INSURANCE

15. This insurance

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.

MINIMISING LOSSES

Duty of Assured

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

16.1 to take such measures as may be reasonable for the purpose of averting or minimising such loss, and

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.

Waiver

17. Measures taken by the Assured or the Insurers 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.

AVOIDANCE OF DELAY

18. It is a condition of this insurance that the Assured shall act with reasonable despatch in all circumstances within their control.

LAW AND PRACTICE

19. This insurance is subject to English law and practice.

NOTE: Where a continuation of cover is requested under Clause 9, or a change of destination is notified under Clause 10, there is an obligation to give prompt notice to the Insurers and the right to such cover is dependent upon compliance with this obligation.

Appendix VII

Ocean Marine Cargo Clauses 2009

I. Scope of Cover:

This insurance is classified into the following three Conditions- Free From Particular Average (F.P.A.), With Average (W.A.) and All Risks. Where the goods insured hereunder sustain loss or damage, the Company shall undertake to indemnify therefor according to the insured Condition specified in the Policy and the Provisions of these Clauses:

1. Free From Particular Average (F.P.A.) This insurance covers:

1) Total or Constructive Total Loss of the whole consignment hereby insured caused in the course of transit by natural calamities: heavy weather, lightning, tsunami, earthquake and flood. In case a constructive total loss is claimed for, the Insured shall abandon to the Company the damaged goods and all his rights and title pertaining thereto. The goods on each lighter to or from the seagoing vessel shall be deemed a separate risk.

   "Constructive Total Loss" refers to the loss where an actual total loss appears to be unavoidable or the cost to be incurred in recovering or reconditioning the goods together with the forwarding cost to the destination named in the Policy would exceed their value on arrival.

2) Total or Partial Loss caused by accidents the carrying conveyance being grounded, stranded, sunk or in collision with floating ice or other objects as fire or explosion.
3) Partial loss of the insured goods attributable to heavy weather, lightning and/or tsunami, where the conveyance has been grounded, stranded, sunk or burnt, irrespective of whether the event or events took place or after such accidents.
4) Partial of total loss consequent on falling of entire package or packages into sea during loading, transshipment or discharge.
5) Reasonable cost incurred by the Insured on salvaging the goods or averting or minimizing a loss recoverable under the Policy, provided that such cost shall not exceed the sum insured of the consignment so saved.
6) Losses attributable to discharge of the insured goods at a port of distress following a sea peril as well as special charges arising from loading, warehousing and forwarding of the goods at an intermediate port of call or refuge.
7) Sacrifice in and Contribution to General Average and Salvage Charges.
8) Such proportion of losses sustained by the shipowners as is to be reimbursed by the Cargo Owner under the Contract of Affreightment Both to Blame Collision clause.

2. With Average (W.A.)

Aside from the risks covered under F.P.A. condition as above, this insurance also covers partial losses of the insured goods caused by heavy weather, lightning, tsunami, earthquake and/or flood.

3. All Risks

Aside from the risks covered under the F.P.A. and W.A. conditions as above, this insurance also cover all risks of loss of or damage to the insured goods whether partial or total, arising from external causes in the cause of transit.

II. Exclusions:

This insurance does not cover:

1. Loss or damage caused by the intentional act or fault of the Insured.

2. Loss or damage falling under the liability of the consignor.

3. Loss or damage arising from the inferior quality or shortage of the insured goods prior to the attachment of this insurance.

4. Loss or damage arising from normal loss, inherent vice or nature of the insured goods, loss of market and/or delay in transit and any expenses arising there from…

5. Risks and liabilities covered and excluded by the ocean marine (cargo) war risks clauses and strike, riot and civil commotion clauses of this Company.

III. Commencement to Termination of cover:

1. Warehouse to warehouses Clause:

This insurance attaches from the time the goods hereby insured leave the ware-house or place of storage named in the Policy for the commencement of the transit and continues in force in the ordinary course of transit including sea, land and inland waterway transits and transit in lighter until the insured goods are delivered to the consignee s final warehouse or place of storage at the destination named in the Policy or to any other place used by the Insured for allocation or distribution of the goods or for stories other than in the ordinary course of transit. This insurance shall, however, be limited to sixty (60) days after completion of discharge of the insured goods from the seagoing vessel at the final port of discharge before they reach the above mentioned warehouse or place of stories. If prior to the expire of the above mentioned sixty (60) days, the insured goods are to be forwarded to a destination other than that named in the Policy, this insurance shall terminate at the commencement of such transit.

2. If, owing to delay, deviation, forced discharge, reshipment or transshipment beyond the control of the Insured or any change or termination of the voyage arising from the exercise of a liberty granted to the shipowners under the contract of affreightment, the insured goods arrive at a port or place other than that named in the Policy, subject to immediate notice being given to the Company by the Insured and an additional premium being paid, if repaired, this insurance shall remain in force and shall terminate as hereunder:

1) If the insured goods are sold at port or place not named in the Policy, this insurance shall terminate on delivery of the goods sold, but in no event shall this insurance extend beyond sixty (60) days after completion of discharge of the insured goods from the carrying vessel at such port or place.
2) If the insured goods are to be forwarded to the final destination named in the Policy or any other destination, this insurance shall terminate in accordance with Section 1 above.

IV. Duty of the Insured:

It is the duty of the Insured to attend to all matters as specified hereunder:

1. The Insured shall take delivery of the insured goods in good time upon their arrival at the port of destination named in the Policy. In the event of any damage to the goods, the Insured shall immediately apply for survey to the Survey and/or settling assent stipulated in the Policy. If the insured goods are found short in entire package or packages or to show apparent traces of damage, the Insured shall obtain from the Carrier, bailed or other relevant authorities (Customs and Port Authorities etc.) certificate of loss or damage and/or short landed memo. Should the carrier, bailed or the other relevant authorities be responsible for such shortage, the Insured shall lodge a claim with them in writing and, if necessary, obtain their confirmation of an extension of them the time limit of validity of such claim.

2. The Insured shall, and the Company also, take reasonable measures immediately in salvaging the goods or preventing or minimizing a loss or damage thereto. The measures so taken by the Insured or by the Company shall not be considered respectively, as a waiver of abandonment hereunder, or as an acceptance thereof.

The Company shall not be liable for the indemnity to the increased loss or damage attributable to the Insured's failure to fulfil the aforesaid obligations.

3. In case of a change of voyage or any omission or error in the description of the interest, the name of the vessel or voyage, this insurance shall remain in force only upon prompt notice to this Company when the Insured becomes aware of the same and payment of an additional premium if required.

4. The following documents should accompany any claim hereunder made against this Company:

Original Policy, Bill of Lading, Invoice, Packing List, Tally Sheet, Weight Memo, Certificate of Loss or Damage and/or Shorthand Memo, Survey Report, statement of Claim.

If any third party is involved, documents relative to pursuing of recovery from such party should also be included.

5. Immediate notice should be given to the company when the Cargo Owners actual responsibility under the Contract of Affreightment and Both to Blame Collision Clause becomes known…

V. Claims Handling

The Company shall upon receipt of a claim from the Insured, check and ascertain without delay whether this insurance covers the loss or damage, then notify the Insured of the result. Where in the circumstances of complicated claim the Company fails to ascertain the facts within thirty days after receiving the claim and the relevant documents from the Insured, the Company shall discuss and agree on a reasonable claim handling period with the Insured according to the actual situation. Then the Company shall ascertain the facts and notify the Insured of the result within this period. Where the loss or damage is covered by the insurance, the Company shall fulfil the obligation of indemnity to settle the claim within ten days from reaching an agreement on the amount of indemnity with the Insured.

VI The Time of Validity of a Claim:

The time of validity of a claim under this insurance shall not exceed a period of two years counting from the day on which the peril insured against occurred.

English translation is for reference only. For any disputes from policy interpretation, Chinese policy will prevail.

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