Restrictions on the Insurer's Rights of Subrogation in Chinese Law

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Introduction

For indemnity insurance contracts, where an insured event is caused by a third party, after the insurer has indemnified the insured's loss, he is entitled to step in the insured's shoes and enforce the insured's right to sue the third party wrongdoer. In certain situations, the insurer's rights of subrogation against the third party wrongdoer may be restricted by the relationship between the insured and a third party, by virtue of a contract between them, or by operation of law. In China, restrictions on subrogation are provided in articles 46, 60, 62 of the Insurance Law 2009. These rules were first formulated in the Insurance Law 1995[1] and amended in 2002[2] and 2009.[3] The rules restrict the scope of the application of insurer's subrogation right and the amount of subrogation recoveries, and preclude the insurer's subrogation rights against certain persons. This paper critically discusses these rules in the Insurance Law 2009, and considers the manner in which these rules of law are interpreted and applied by Chinese courts. Meanwhile, English and Australian laws are referred to in an attempt to work out appropriate solutions to deficiencies in respect of restrictions on the insurer's rights of subrogation in the Insurance Law.

Restriction on the application of subrogation

It is well known that the doctrine of the subrogation applies only to indemnity insurance (such as property, fire, liability, motor vehicle insurance and marine insurance), and does not apply to life insurance.[4] In China, the Insurance Law 2009 expressly prohibits application of

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[1] The Insurance Law of the People's Republic of China was enacted by the National People's Congress in 1995 which was the first comprehensive legislation on insurance in China which consists of insurance contract law and insurance regulation. It includes 8 chapters such as (1) General Provisions, (2) Insurance Contracts, (3) Insurance Company, (4) Rules governing insurance business, (5) Supervision and Control of insurance industry, (6) Insurance Agents and insurance brokers, (7) Legal liability, and (8) Supplementary provisions.

[2] To meet the commitment to the WTO, the Insurance Law 1995 was amended in 2002 mainly on insurance regulation, and insurance contract law was essentially not changed in 2002 version.

[3] The Insurance Law was significantly amended in 2009 in both insurance contract law and insurance regulation.

[4] *Solicitors & General Life Assurance Society v Lamb* (1864) 2 De G. J. & S. 251. In England, in the days when life insurance was still believed to be indemnity insurance prior to the decision in *Dalby v India & London Life Assurance Co* (1854)15 C.B 365, the principle of subrogation was applied to a contract of life insurance. See

subrogation to life insurance,[5] but it is not very clear whether it is prohibited in medical insurance. According to the Insurance Law, life insurance is one of the types of personal insurance which consists of life insurance, health insurance and accident insurance.[6] Art. 46 of the Insurance Law provides: "Where an insured event, such as death, disability, or illness, etc. occurs in respect of the insured as a result of a third party's act, the insurer shall, after paying insurance benefits to the insured or the beneficiary, have no right of subrogation against the third party, and the insured or the beneficiary remains entitled to claim compensation from the third party." "Illness" mentioned in this article should be covered by medical policies. If this is correct, by virtue of art. 46 there is no room for doctrine of subrogation in medical insurance. However, other legal materials indicate that whether or not subrogation applies to medical policies depends on the type of medical policy. In 2006, the China Insurance Regulatory Commission (CIRC)[7] published a document on the "Health Insurance Management Methods", in which medical insurance is divided into indemnity medical insurance (for actual medical expenses) and non-indemnity insurance (for fixed sum agreed in the policy).[8] If the policy is the former subrogation applies. On the basis of the CIRC "Health Insurance Management Methods", some guiding rules are provided by Shanghai High People's Court (SHPC) on the disputes of whether subrogation applies to medical insurance. In its Notification concerning "Questions and answers on how to deal with insurance cases relating to subrogation" 2010,[9] the Court points out that according to Rules 2 and 4 of the "Health Insurance Management Methods", medical expenses policies are divided into indemnity medical policy and non-indemnity medical policy. The doctrine of subrogation applies to indemnity medical policies and not to non-indemnity medical policies.[10] In academic circle, there are two different views as to the issue whether or not

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Burnand v Rodocanachi (1882) 7 App. Cas. 333 and *Godsall v Boldero* (1807) 9 East 72. This position is explained in *MacGillivary on Insurance Law*, para.23-025.

[5] Art.46 of the Insurance law 2009.

[6] Art. 95 of the Insurance Law 2009 stipulates: "The scope of business of an insurance company shall be as follows: (1) Personal insurance business, consisting of life, health and accident insurances; (2) Property insurance, consisting of property loss, liability, credit and surety bond insurances; and (3) Other insurance – related business approved by the insurance supervision and administration authority of the State Council …."

[7] The China Insurance Regulatory Commission, established on November 18, 1998, is authorized by the State Council to conduct administration, supervision and regulation of the Chinese insurance market, and to ensure that the insurance industry operates stably in compliance with law.

[8] Art. 4 of the CIRC "Health Insurance Management Methods" 2006.

[9] Shanghai High People's Court, No.2 [2010], Notification concerning "Questions and answers on how to deal with insurance cases relating to subrogation". See Question 1 of the Notification. The Notification is to guide the lower courts rather than to bind them. The rules have no legal force.

[10] Answer to Question 1 of the Shanghai High People's Court , No. 2 [2010]. To decide whether a policy is indemnity medical policy, courts will refer to the terms of the contract. If on the construction of the contract, the insurer promises to indemnify the insured according to his actual expenses for medical treatment, the policy

subrogation should be applied to life and medical insurance.[11] Some take the view that human life and body cannot be valued in terms of money. When the insured suffers injury and medical expenses for treatment of the injury, he cannot be said to be unjustly enriched if he is paid twice by his insurer and the third party for the same injury and medical costs, so subrogation should be prohibited in medical insurance.[12] Some others argue that many forms of life policy have indemnity components. For instance, an accident policy usually has a section of medical expenses. There can be no doubt that these policies are for indemnity purpose and therefore should attract the rights of subrogation.[13]

In judicial practice, however, courts usually hold that the insurers are liable to pay the insured under accident insurance and medical insurance policies, even if the latter has been indemnified by the third party wrongdoer; and the insurers are restricted to be subrogated to the right of the insured to claim against the third party wrongdoer. This can be illustrated in the case of *China Life Property Insurance Company Ltd, Henan Province Puyang Branch v Mr Guan Yinghui*,[14] Mr Guan (a school boy) was insured by a group policy of accident and medical expenses which was effected by his school with the insurer. On 3 April 2010, Guan was injured by a car and was taken to hospital. He stayed in the hospital for 141 days for treatment with the total medical costs of ¥21,245. His right arm and hand were in the end disabled to some extent. The third party's insurer paid him ¥139,000 for the injury and medical costs. Guan then claimed for insurance payment on disability (¥20,000) and medical costs (¥5000) under the group policy. The insurer refused his claim on the ground that Guan had already been indemnified for the medical costs by the third party's insurer, so he should not be entitled to another payment for the same medical costs, otherwise he would be unjustly enriched. The trial court held that according to art. 46 of the Insurance Law 2009, after been paid by the third party's insurer, Guan remained entitled to claim compensation from the insurer. The insurer was thus liable to pay Guan ¥25,000 for his disability and medical costs, and also not entitled to be subrogated to the insured's right to recoup from the third party.

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is indemnity medical policy, subrogation applies. If the insurer promises to pay a certain sum of money on the happening of an event insured against such as medical treatment, no subrogation will arise.

[11] Zhou Xin, "Medical expenses and principle of indemnity", in the book edited by Xie Xian, *A Hundered Insurance Cases* (Law Press China, 2012), pp155-159.

[12] Lunwenwang, "An analysis of application of subrogation in life insurance", published on the website *http://www.lunwenwang.com*, visited on 14 Aug 2013.

[13] Ibid.

[14] Henan Province Fuyang City Intermediate People's Court, judgement on 19 Sept 2010. (*http://www.110.com/panli/panli_13085630.html*, visited on 12 Aug. 2013).

The insurer appealed, but the Puyang City Intermediate People's Court upheld the trial court's decision.

Under English law, insurance policies other than life or accident policies are usually held to be indemnity policies to which subrogation apply.[15] However, there are disputes on whether subrogation applies to health and medical policies. Although these polices fall into the category of life insurance, they have indemnity intentions. As Birds comments, there can be no real doubt these policies are indemnity policies and therefore should attract the right of subrogation.[16] The current position of English law is that if, on a proper construction of the contract of insurance, the insurer has promised to pay a certain sum of money on the happening of a certain event (*e.g*. on accident or death) regardless of the actual loss suffered by the assured, there is no room for the doctrine of subrogation.[17]

Restriction on the amount of recovery from the third party

Para. 1 of art. 60 of the Insurance Law 2009 stipulates "Where a third party damages the subject matter of the insurance, thereby leading to the occurrence of an event insured against, the insurer shall, from the date of payment of insurance moneys to the insured, be subrogated to the insured's right to claim indemnity from a third party *within the amount of the payment*." This article expressly provides that the insurer is restricted to suing the third party for the amount no more than his payment to the insured.[18] This can be explained by a Chinese case.[19] In February 1999, the insured truck was crashed by a lorry due to the fault of the lorry driver (the third party). The insured suffered a loss of ¥100,000. His insurer paid him ¥80,000 under the policy and was subrogated to his right against the third party for the amount paid. The insurer recovered ¥70,000 from the third party. The insured also claimed against the third party for the uninsured loss ¥20,000 but was turned down. The third party argued that the insurer had agreed to receive ¥70,000 as a final settlement of the event. The court held that the insured still had the right to claim from the third party for the uninsured loss (¥20,000) and he only transferred to the insurer the right to claim from the third party for the amount of ¥80,000. So the third party was liable to pay the insured ¥20,000. Further, according to para. 3 of art. 60 of the Insurance Law, "the insurer's

[15] *E.g. Blascheck v Bussell* (1916) 33 T.L.R. 74.
[16] J. Birds, *Birds' Modern Insurance Law,* (8th edn., Sweet & Maxwell, 2010), p.321.
[17] *MacGillivary on Insurance Law*, (12th edn., 2012), para. 23-05.
[18] Para. 1 of art. 60 of the Insurance Law 2009.
[19] This case is cited in the book, *Insurance Law Principles and Cases*, edited by Lin Baoqing, Qinghua University Press, 2006, pp166-168.

exercise of subrogation right to claim against the third party shall have no impact on the insured's right to claim indemnity from the third party for the portion which has not been indemnified."

It is obvious that para. 3 of art. 60 of the Insurance Law refers to the situation where the insured is not fully covered under the policy, such as where the policy contains an excess or there is under-insurance. Under this circumstance, the insurer's right of subrogation against third party and the insured's right of demanding damages from the third party co-exists,[20] a difficult question may arise, this is, who should have priority to recover from the third party? It is suggested by the SHPC that the insured should have the priority to receive money from the third party for the uninsured amount to the limit of his total loss, in other words, the insured's total loss should be fully compensated by the insurance payment plus the damages from the third party.[21] The difficulty may still exist where the insurer takes the action before the insured does to claim against the third party for the amount he paid to the insured, but the third party cannot afford the amounts claimed by the insurer and the insured. For example, if the third party has caused a loss of £10,000, the insured amount under the policy is £6000. The insurer has paid the insured £6000 and then takes a subrogation action against the third party for £6000. The third party can only afford to pay the insurer £6000. Later the insured claims for £4000 (the uninsured loss) from the third party but receives nothing because of the financial difficulty of the third party. The question then arises, is the insurer entitled to keep the full recovery (£6000) without regard to the insured's uninsured loss (£4000)? According to art. 60 of the Insurance Law, the answer would be "yes". This is unfair to the insured, the insurer has received premium but suffered no loss, while the insured's is left with a loss of £4000. This is not in agreement with the fundamental principle of subrogation which is to prevent unjust enrichment of the insured. It is suggested by the SHPC[22] that where the insurer takes action against the third party, the court which deals with the case should check whether or not the policy in question is an under-insurance policy. In order to prevent the

[20] In the Insurance Law, the concept of subrogation is a mixture of subrogation and assignment. While the insurer can use his own name in exercising right of subrogation to sue the third party for the amount he paid under the policy, the insured can use his own name to claim from the third party for the un-insured loss. For more, see Zhen Jing, "The Confusion between Subrogation and Assignment in the Insurance Law of the People's Republic of China 1995 – A Critical Analysis on Article 44 of the Insurance Law", [2002] J.B.L., pp.608-625.

[21] Shanghai High People's Court, No.3 [2010], Question 5: For the under insurance contracts, where the insurer's right of subrogation against third party and the insured's right of demanding damages from the third party co-exists, how to decide the amount of indemnity from the third party? Answer to Q5: … the insured has the priority to seek damages from the third party for the uninsured amount to the limit of full indemnity…

[22] See Question 6, Shanghai High People's Court, No.3 [2010].

insurer from prejudicing the insured's right to claim against the third party for un-insured loss, the court should notify the insured to participate the litigation as a third person according to para. 2 of art. 56 of the Civil Procedure Law.[23] In this situation, the court should make the judgment that the insured should have priority to be paid by the third party up to the amount of his uninsured loss.[24]

In contrast to the Chinese position that the insurer and the insured may sue the third party for their respective interests, English position is that the insurer must sue the third party for the whole loss for his own benefit as well as the insured's un-insured loss.[25] It is suggested that the Insurance Law should vest in the insurer the right to claim the whole loss for his and the insured's benefits. Any recovery should then be allocated between the insured and the insurer and the insured should have priority to the recovery so as to be fully compensated for the total loss (insured and uninsured). This can not only avoid the dilemma that the third party would face two claimers but also reduce administrative or/and legal costs to recover from the third party.

Restrictions of insurer's rights of subrogation against the insured's family members and staff members

The insured's family members

Art. 62 of the Insurance Law 2009 provides "The insurer may not exercise his right to claim indemnity by subrogation against the insured's family members or *other persons comprising such a family of the insured,*[26] unless the insured's family members or other persons

[23] Art. 56 of the Civil Procedure Law of the People's Republic of China 1991 provides:
" If a third party considers that he has an independent claim to the object of action of both parties, he shall have the right to bring an action.
Where the outcome of the case will affect a third party's legal interest, such party, though having no independent claim to the object of action of both parties, may file a request to participate in the proceedings or the people's court shall notify the third party to participate. A third party that is to bear civil liability in accordance with the judgment of the people's court shall be entitled to the rights and obligations of a party in litigation".
[24] See Question 7, Shanghai High People's Court, No.3 [2010].
[25] See A. McGee, *The Modern Law of Insurance*, (3rd edn, 2011), para 22.13. It is common practice for insurers in these circumstances to seek in the claim to recover any uninsured loss (e.g. the policy excess) on behalf of insured. However, there is no authority on the nature of the insurer's duties when exercising subrogation right.
[26] The meaning of the Chinese version of the phrase "*bei bao xian ren de zu cheng ren yuan"* is not very clear. There are two different translations for this phrase: one being "other persons comprising such family of the insured", and the other being "staff members of the insured". This will be discussed later.

comprising such a family of the insured cause an event insured against to occur intentionally as mentioned in para.1 of art. 60 hereof."

This article prevents an insurer from exercising his subrogation right against members of the insured's family or other persons comprising such a family of the insured, where such persons cause the insured event to occur negligently rather than intentionally. The purpose of this provision is to protect the interest of the insured and his family. However, there are no definitions of the two phrases of "family members" (*jia ting cheng yuan*) and "other persons comprising such family of the insured" (*bei bao xian ren de zu cheng ren yuan*). This ambiguity gives rise to different interpretations of the two phrases. For example, one interpretation holds that the phrase of "family members" consisting of husband and wife, their parents, and children; and the phrase of "other persons comprising such family of the insured" including grandparents, grandchildren, brothers, sisters and persons who are supporters of the insured or persons who are supported by the insured.[27] Another interpretation gives different meaning to the two phrases:[28] In a broad meaning, the "family members" of the insured (*bei bao xian ren de jia ting cheng yuan*) refers to persons who live with the insured in the same household, such as spouses or relatives with a blood relationship or marital relationship, or persons who do not live with the insured, but are financially interdependent. The phrase "*Bei bao xian ren de zu cheng ren yuan"* refers to persons who act for the insured or as the insured's trustee or have a special relationship with the insured, such as the insured's employees or business partners or his agents. In another version of English translation for the Insurance Law 2009, the phrase "*bei bao xian ren de zu cheng ren yuan"* is translated as "staff members of the insured".[29] The SHPC interprets the phrase "family members" of the insured broadly, including (i) his spouse, parents, children, brothers and sisters, grandparents and grandchildren; and (ii) other persons bearing foster or support or maintenance relationship with the insured.[30] But the SHPC does not interpret the phase "*bei bao xian ren de zu cheng ren yuan".*

[27] See Yu Xinnian and Gao Shengping, "The Most Recent Interpretation on the Articles of the Insurance Law" (People's Court Press, 1995), p118.
[28] HanYanchun, "The restriction for the exercise of insurance subrogation right*"* in the handbook for insurance law, p.346, China Procuratorial Press, 1996.
[29] See the English translation for the Insurance Law of the People's Republic of China, China Legal Publishing House, 2000.
[30] Answer to Question 11, Shanghai High People's Court, No.2 [2010].

In China, husband and wife have a duty to maintain each other,[31] parents have a duty to bring up and educate their children, and children have a duty to support and assist their parents;[32] they are economically interdependent. In this situation, to allow an insurer to exercise his subrogation right against a member of the insured's family would constitute a case of giving with one hand and taking with the other. For instance, a person insured his house against fire, and his mother who lived with him and was financially dependent on him caused a fire negligently when she was cooking, and damaged the house. If after paying the insured, the insurer exercised his subrogation right to claim against the insured's mother, it is, in fact, an action against the insured in a financial sense, because he was her financial supporter and he had to satisfy the claim himself. It is obviously unfair to permit an insurer to exercise his subrogation right where the insured paid the premium but finally has to bear the loss himself. It is also unreasonable in a moral sense to allow an insurer to sue the insured's mother by way of subrogation even if the insurer uses his own name. The same reasoning applies to the other family relationships.[33] However, if the loss is caused by wilful misconduct of the insured's family members or other related persons, they cannot enjoy the immunity from the insurer's subrogation action.

In a Chinese case,[34] the insured's son (15 years old) drove his father's car and had an accident in Oct 2003. The car was damaged with a loss of ¥170,000. The insured claimed but was refused by the insurer who argued that the loss was caused by the insured's son, even if the insurer had paid the insured, he had the subrogation right to claim the money back from his son. Because the son was not over 18 and without legal capacity, his father had to face the subrogation action and pay the money back to the insurer. According to art. 45 of the

[31] Art.20 of the Marriage Law 2001.
[32] Art.21 of the Marriage Law 2001.
[33] It is submitted that in China, the restriction of the insurer's subrogation right is not based on the procedural rule that the plaintiff cannot sue his own family member. Rather it is based on the financial relationship and moral sense, because in China it is not necessary that the insurer sues a third party by using the insured's name, usually the insurer acts in his own name. However in England, as a subrogated insurer has to take action by using the insured's name, he is therefore only entitled to the benefit of any right of action that the insured himself possesses. It follows that any defence that the third party could raise in an action brought against him by the insured personally should also be an effective defence to a subrogation action. Thus the insurer has no right to sue his own insured by way of subrogation simply because the insured has no right of action to sue himself for the damage. See *Simpson v. Thomson* (1877) 3 App. Cas. 279. Also the insurer was not entitled to exercise his subrogation right against the insured's wife because the insured himself had no right of action to sue his own wife until the English Law Reform (Husband and Wife) Act 1962 by which interspousal immunity was abolished. See *Midland Insurance Co. v. Smith and Wife* (1881) 6 Q.B.D. 561.
[34] This case is cited in the book, *Insurance Disputes and Cases*, by Li Ke and Song Caifa, (People's Court Press, 2004), p147.

Insurance Law 2002,[35] the insurer may not exercise his right to claim indemnity by subrogation against the insured's family members, so the insurer was liable to pay the insured for the loss caused by the insured's son.

In Australia, section 65 of the Insurance Contracts Act 1984 (ICA) [36] limits an insurer's right of subrogation against an uninsured third party when the insured himself has not exercised or might reasonably be expected not to exercise those rights because of (i) a family or other personal relationship between the insured and the third party;[37] or (ii) the insured having expressly or impliedly consented to the use, by the third party, of a road motor vehicle that is the subject-matter of the contract.[38] Where the third party is not insured in respect of the third party's liability to the insured, the insurer does not have the right to be subrogated to the rights of the insured against the third party in respect of the loss.[39] By this section, the insurer' rights of subrogation are effectively limited to the extent that the third party has insurance in respect to his liability to the insured.[40]

The insured's staff members

If the phrase "*bei bao xian ren de zu cheng ren yuan"* in art. 62 of the Insurance Law is interpreted as "staff members of the insured" who act for the insured or as the insured's trustee, employees, business partners or his agents, such persons should be covered in art.62. If the phrase is interpreted as "other persons comprising such a family of the insured", such persons would not be covered in art.62. It is unclear which interpretation is correct. If the insurer's right of subrogation is allowed in this situation, good industrial relationships between the insured and his employee or his partners would be prejudiced. It is suggested that the Supreme People's Court of China should provide a clear interpretation to this phrase to cover such persons in art. 62.

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[35] This article is exactly the same as art. 62 of the Insurance Law 2009.

[36] Part 8 of ICA is concerned with subrogation. The new Insurance Contracts Amendment Act 2013 provides " in this part, a reference to an insured includes a reference to a third party beneficiary".

[37] Similarly, article 10:101(3) of the Principles of European Insurance Contract Law provides "The insurer shall not be entitled to exercise rights of subrogation against a member of the household of the policyholder or insured, a person in an equivalent social relationship to the policyholder or insured, or an employee of the policyholder or insured, except when it proves that the loss was caused by such a person intentionally or recklessly and with knowledge that the loss would probably result."

[38] S.65 of the ICA 1984 does not apply where the conduct of the third party giving rise to the loss was serious or wilful misconduct, or occurred in the course of or arose out of the third party's employment by the insured.

[39] S.65 (3) of the ICA 1984.

[40] See M. Skinner and J. Coss, *"Subrogation"* published on the website on 7 Aug 2006 (*http:/www.allens.com.au/pubs/pdf/insur/pap7jun06.pdf*).

In *China Pingan Property Insurance Company, Foushan City Nanhai Branch v Mr Gue Behua,*[41] the court dealt with a dispute on whether or not the insured's employee is immune from subrogation action. The insured's driver went to Lianxing Motor Repair Centre (LMRC) to negotiate business in Nov. 2003. Mr Chen Yanan (an employee of LMRC) met the driver and helped, with the consent of the driver, to park the mini-bus as a courtesy. While parking the mini-bus, an accident occurred due to the faulty of Mr Chen. The mini-bus was damaged with a loss of ¥295,000. The insured made a claim for the loss against the Mr Guo Behua (the owner of LMRC) and Mr Chen Yanan. The court held that Mr Chen's action to help parking the mini-bus was in the course of his employment by Mr Guo Behua. The accident was caused by the fault of Mr Chen, so Mr Guo and Mr Chen were liable for the loss. Because the insured was unable to show sufficient evidence for the loss, his claim for the loss was turned down by the court. The insured then turned to his insurer and was paid by the insurer for ¥295,000. The insurer was then subrogated to the right of the insured to claim against Mr Guo and Mr Chen for the loss. The trial court held that the insurer's cause of action against Guo and Chen came from the insured whose action to claim against Guo and Chen had already been rejected by the court, so the insurer would not have a better position than the insured. The High Court on appeal held that (i) Guo and Chen was liable to the loss, the failure of the insured's previous action to claim against them was due to lack of evidence for the loss; (ii) According to art. 47 of the Insurance Law 2002,[42] the insurer was restricted to exercise subrogation right against the insured's staff member. This restriction on subrogation applied to the employees of the insured, not to the employee of the third party (Mr Guo). Mr Chen's help to park the insured's mini-bus was in the course of employment by Mr Guo not by the insured, so the insurer's subrogation right against Guo and Chen was allowed. Because Chen was Guo's employee, so Guo was liable to pay the insurer ¥295,000 for the loss. It is suggested that in this case, the insurer should be prohibited to exercise right of subrogation against the third party by the reason that the insured had expressly consented to Mr Chen's help in parking the vehicle, Mr Chen should be treated as the insured himself in respect of the restriction on the insurer's subrogation right.[43]

[41] Guangdong Province Foushan City Intermediate People's Court (2006), civil case final judgement report No. 53.
[42] It was the same as art. 62 of the Insurance Law 2009.
[43] This is the approach in section 65 of the ICA 1984.

The English authorities in respect of the relationship between an employer and his employee are *Lister v. Romford Ice and Cold Storage Ltd.* [44] and *Morris v. Ford Motor Co.*[45] The facts were similar in these two cases, but the decisions different. In *Lister*, it was held that the employee was liable to his employer for loss suffered as the result of the employee's negligence in the performance of his work. The insurance industry subsequently accepted that it was not appropriate to pursue recoveries against negligent fellow-employee and entered into a voluntary agreement – known as the "gentlemen's agreement" or "Lister v Romford Ice Agreement" – not to enforce its right in such circumstances.[46] In *Morris*, Lord Denning stated that it was not just and equitable that Ford should be compelled to lend its name to Cameron to be used to sue its servant or alternatively, there was no implied term that Cameron should be entitled to use Ford's name to do so.[47] The decision of *Morris* has effectively stymied the application of subrogation in the employer's liability field as a matter of practice in England. The decision of *Morris* was obviously influenced by the "gentleman's agreement". However, the "gentlemen's agreement" lacks legal force, so the British National Consumer Council recommends law reform to restrict the insurer's subrogation rights against an employee by the employer's insurer.[48] In the Joint Scoping Paper, the Law Commission and the Scottish Law Commission raised a question on subrogation, asking "Do you agree we should consider the law of subrogation?" But in the end, the Law Commissions decided that the law of subrogation causes problems, but it is not necessarily a priority for reform. This will only be looked at as a separate topic if time allows after other work has been concluded.[49] It is suggested that the gentlemen's agreement should be codified to restrict the application of subrogation in the employer's liability field in the future reform.

Australian law does not allow the insurer to be subrogated to the rights of the insured against the employee. Section 66 of the ICA 1984 provides that the insurer does not have the right to be subrogated to the rights of the insured against the employee, where (a) the rights of an insured under a contract of general insurance in respect of a loss are exercisable against a

[44] [1957] A.C. 555.
[45] [1973] Q.B. 793.
[46] The Law Commission and the Scottish Law Commission, *Insurance Contract Law, A joint Scoping Paper*, December 2005, para.2.22.
[47] [1973] Q.B. 793, at 801-802.
[48] See J. Birds, *Insurance Law Reform, the Consumer Case for a Review of Insurance Law*, p.76, published by British National Council, 1997.
[49] The Law Commission and the Scottish Law Commission , *Insurance Contract Law, Analysis of Responses and Decisions on Scope*, August 2006, para 3.27.

person who is the insured's employee; and (b) the conduct of the employee that gave rise to the loss occurred in the course of or arose out of the employment and was not serious or wilful misconduct.[50] Accordingly, section 66 of the ICA may defeat any purported subrogated action by an insurer against a co-insured who was also an employee. This provision represents a great progress in view of protection of the industrial relationship between the employer and employee.

The co-insured

The nature of co-insurance is that, under one policy, two (or more) persons insure property in which each (or all) of them has an interest. Lots of examples can be given for co-insurance situations, such as contractor and subcontractor, mortgagor and mortgagee, landlord and tenant, bailor and bailee and other business partnership, etc. The question here is that if the property is damaged by the fault of one of the co-insureds, and the insurer indemnifies the other against his loss, is the insurer then entitled to exercise the right of subrogation, suing the person at fault in the name of his co-insured? [51]

Since 1980, when the economic reform started in China, lots of private partnership businesses have emerged, and they usually insure their property jointly under a single policy, that is the case of co-insurance. If the insurer is entitled to sue a negligent partner after paying the victim partner, not only would their partnership be harmed, but also their business would be affected. In practice, the insurer is not allowed to exercise his subrogation right against a co-insured. For example, there is an extra Third Party Liability insurance attached to the Contractor All Risks Policy, the main content of this extra insurance is that "…… for the loss caused by a co-insured due to his fault or negligence, after the payment by the insurer to the insured who suffered the loss, the co-insured who caused the loss is immune from the insurer's subrogation action."[52] It is suggested that this good practice should be adopted in the Insurance Law.

[50] This provision is quite similar to the English "gentleman's agreement". While the "gentleman's agreement" has no legal force, s.66 puts the "gentleman's agreement" into statutory form, omitting the reference to "collusion". See Ray Hodgin, *Insurance Law Text and Materials*, p.565.

[51] For more on co-insurance, see R. Merkin, *Colinvaux's Law of Insurance* (9th edn., 2010), para. 11-024 to 11-033.

[52] See the Contractor's All Risk policy and the Extra Third Party Liability Insurance of the People's Insurance Company of China.

The Insurance Law does not cover the co-insurance cases, it is beneficial here to see how English law deals with co-insurance matter. In theory, the rights of subrogation do exist between co-insureds but will usually in practice be defeated by circuity of action,[53] or by an implied term in the policy that the insurer will not exercise its rights of subrogation against a co-insured. [54] The question of circuity was first addressed by Lloyd J in *The Yasin.*[55] In this case both the plaintiff and the defendant took out insurance for the plaintiff's cargoes loaded on the vessel.[56] The vessel became a total loss, and the plaintiff was paid under the policy. One of the issues was whether the plaintiff was entitled to make any claim against the defendant for the account of subrogated underwriters. The learned judge rejected the argument that there was any general principle which prevented an insurer from exercising subrogation rights against a co-insured. He held that any subrogation immunity rested on the principle of circuity. He also held that the rule of subrogation immunity applies only under the situation where A is insured against damage to goods, and B is insured against his liability for damage to the goods under the same policy. If the damage of A's property is caused by B's negligence, after he has indemnified A, the insurer plainly cannot exercise subrogation rights in A's name against B, because B himself is entitled to claim under the policy which covers his liability for A's property. Thus the subrogation action would give rise to circuity in claims. If A and B were both insured against damage to property, and B negligently damaged A's property, B would not be immune from a subrogation action merely because he was a co-insured under the policy, as his interest under the policy was not the same as that of A.[57] However, in his later judgement in *Petrofina Ltd v. Magnaload Ltd*,[58] the learned judge somewhat modified the view he had in *The Yasin.* He insisted in the latter case that the principle of circuity applies to both types of policy described above. So the insurer was not allowed to exercise his subrogation right in the latter case. A similar view

[53] See *MacGillivray on Insurance Law*, (12th edn. 2012) para. 23-098. For more on circuity and co-insurance in English and Australian positions, see P. Mead, "Of Subrogation, Circuity and Co-insurance: Recent Development in Contract Works and Contractor's All Risk Policies" [1998] 9, ILJ, pp.1-33.
[54] *MacGillivray on Insurance Law* (12th edn., 2012), paras.23-099 and 23-100.
[55] *The Yasin* [1979] 2 Lloyd's Rep. 45.
[56] In this case, the charterparty provided that if any vessel chartered was more than 15 years old (the vessel in question was), the owner of the vessel were to procure insurance from Lloyd's in respect of the cargo.
[57] Lloyd J stated: "It is said to be a fundamental rule in the case of joint insurance, that the insurer cannot exercise a right of subrogation against one of the co-insureds in the name of the other. I am not satisfied that there is any such fundamental rule. In my judgement, the reason why an insurer cannot normally exercise a right of subrogation against a co-insured rests not on any fundamental principle relating to insurance, but on ordinary rules about circuity. In the present case, a claim in the name of the plaintiffs might well have been defeated by circuity if the insurance had purported to protect the defendants against third party liability. But that was not argued by Mr. Philips (Counsel for the defendants). As I have already mentioned, his submission was that the insurance protected the defendants' proprietary interest as bailees. That being so, I do not see how circuity can help the defendants in this case." [1979] 2 Lloyd's Rep. 45 at 54-55.
[58] [1984] 1 Q.B. 127.

was taken in the subsequent decision in *National Oilwell (U.K.) Ltd v. Davy Offshore Ltd.*[59] However, if a co-insured has been guilty of wilful misconduct which disqualifies him from claim under the policy, English law does not protect him from the insurer's exercising of subrogation rights against him.[60] An alternative to the circuity analysis found favour based upon an implied term of the insurance policy. A term was to be implied in a joint names policy that where two or more insureds were insured in respect of the same loss or damage which has occurred the insurer would not seek to exercise rights of subrogation to recoup from a second insured the cost of an indemnity which has paid to a first insured.[61] Accordingly, a co-insured made defendant to a subrogated action can raise the breach of the implied term as a defence.[62]

Suggestions on amendment of art.62

Art.62 of the Insurance Law 2009 restricts the application of an insurer's subrogation right against the family members of the insured, but there is no explicit provision in respect of the insurer's subrogation right on an insured's employee or co-insured. It is suggested that Australian and English models about the restriction on the insurer's subrogation right against the insured's employee, co-insured, or a third party without insurance for his liability to the insured could be referred to in the reform of art. 62 of the Insurance Law in the future as follows:

(a) The insurer shall not exercise his right to claim indemnity by subrogation against the family members of the insured or the other members comprising such family of the insured unless the occurrence of the insured event referred to in the first paragraph of art. 60 has resulted from the wilful misconduct of such a third party. 'Family members of the insured' refers to husband and wife, their parents, and children. 'Other persons comprising such family of the insured' refers to persons, such as grandparents, grandchildren, brothers, sisters and other persons bearing foster or support or maintenance relationship with the insured.[63]

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[59] [1993] 2 Lloyd's Rep. 582.
[60] See *National Oilwell v. Davy Offshore*, in which Colman J took the view that, if wilful misconduct were proven, the subcontractor would lose subrogation immunity.
[61] *National Oilwell v Davy Offshore* [1993] 2 Lloyd's Rep. 582, 613-614*; Tate Gallery v Duffy* [2007] 1 All E.R. (Comm) 1004, 1025-1026.
[62] *MacGillivray on Insurance Law* (12th edn., 2012), paras.23-099 and 23-100.
[63] The interpretation of the two phrases is according to Yu Xinnian. See Yu Xinnian and Gao Shengping, "The Most Recent Interpretation on the Articles of the Insurance Law" (People's Court Press, 1995) p118., and Shanghai High People's Court, No.2 [2010].

(b) The insurer shall not exercise the subrogation right against his insured's employee if the loss is caused by the employee in the course of or arise out of the employment and is not due to the employee's wilful misconduct.[64]

(c) Where the insured has expressly or impliedly consented to the use, by a person, of a road motor vehicle that is the subject-matter of the contract, the insurer shall not exercise the subrogation right against the person unless the loss is caused by the person's wilful misconduct.[65]

(d) Where a person is not insured in respect of the third party's liability to the insured, the insurer does not have the right to be subrogated to the rights of the insured against the person in respect of the loss. Where the person is so insured, the insurer may not, in the exercise of the insurer's rights of subrogation, recover from the person an amount that exceeds the amount that the person may recover under the person's contract of insurance in respect of the loss.[66]

(e) The insurer shall not exercise his subrogation right against his insured's partners or co-insureds where the loss is caused by such partners or co-insureds negligently rather than by wilful misconduct. [67]

Restriction by the agreements between the insured and the third party

The insurer's rights of subrogation depend on the insured having a right of action against the third party wrongdoer. In the absence of such an action, the insurer has no recourse to the third party. The insurer's right of subrogation may be restricted by the agreements between the insured and the third party. If the insured abandons his right to claim against the third party by an agreement with a third party, whether the abandonment will bind the insurer depends on when the abandonment was made. Four different situations are briefly considered here: abandonment before the insurance contract is entered into; abandonment after the contract is entered into but before the loss occurs; abandonment after the loss occurs but prior to the insurance payment; and abandonment after the insurance payment.

[64] With reference to the English "gentleman's agreement" and the decision in *Morris v. Ford Motor Co.* ; s.66 of the ICA 1984; and art. 10:101(3) of the Principles of European Insurance Contracts Law.
[65] This is the approach in section 65 of the ICA 1984.
[66] Ibid.
[67] With reference to the English approach on restriction of an insurer's subrogation right against a negligent co-insured.

Abandonment before the insurance contract is entered into. Before the insured has entered into a policy with the insurer, insurer's subrogation rights do not exist, so there is no question as to the restriction of the insurer's subrogation. The question to be considered is whether or not the insured is under a duty to disclose the fact to the insurer, at the time of the contract, that he has made a contract with a third party which excludes or limits the right of the insured to recover from the third party. There is no answer to this question in the Insurance Law 2009. It is obvious that if the insured abandoned or limited his right against the third party before the insurance contract was entered into, the insurer will have no right of subrogation to recover from the third party, once the insured event occurs. It is suggested that if the insurer wishes to know this fact he should raise a question in the proposal form to ask the insured whether or not he has entered into an agreement with a third party which excludes or limits the insured's right to claim against the third party. The insured should truthfully answer the question. If the insurer does not ask such a question, the insured has no duty to voluntarily disclose the fact to the insurer.[68]

In Australia, the duty of disclosure does not require the insured to disclose to the insurer the existence of a contract that the insured is a party to an agreement that excludes or limits a right of the insured to recover damages from a person other than the insurer in respect of the loss.[69] However, the insurer may include a provision in the insurance policy to exclude or limit his liability if the insured enters into an agreement with a third party which restricts the insured's right to recover damages from the third party in respect of a loss covered by the insurance. But this provision is not effective if the insurer did not clearly inform the insured in writing of the effect of the provision, before the insurance contract was entered into.[70]

Abandonment after the insurance contract is entered into but before the loss occurs. If insured enters into a contract with a third party during the insurance period in which the insured abandons his right, by an exclusion or limitation clause, to claim against the third

[68] For pre-contract disclosure, the Insurance Law 2009 adopts the way of inquiring disclosure (not voluntary disclosure). The proposer is only obliged to disclose the information asked in questions by the insurer in the proposal form, and the insurer may not avoid a policy on the ground that the proposer did not disclose something material which is beyond the questions raised in the proposal form. For more, see Zhen Jing, "Insured's duty of disclosure and test of materiality in marine and non-marine insurance laws in China" [2006] J.B.L., pp.681-704.
[69] Section 68(2), ICA 1984.
[70] Section 68(1), ICA 1984.

party in respect of a loss covered by the insurance policy,[71] the insurer's right of subrogation will then be limited by the insured's abandonment. How does a court handle the situation in which the insurer refuses to pay the insured for the loss on the ground that the insured has abandoned his right to sue the third party? The Insurance Law does not give an answer to this question. It is suggested by the SHPC that the court which handles such a dispute should first check the validity of the exclusion clause which excludes the third party's liability to the insured in the contract between the insured and the third party according to art.58 of the Civil Code 1986,[72] and articles.40, 52 and 53 of the Contract Law 1999.[73] If the exclusion clause is valid, the court will not support insurer's subrogation action to recover from the third party. If the exclusion clause is invalid, the court will not support the third party's defence to insurer's subrogation action. If the insured has entered into a contract with a third party in which the insured' right to claim against the third party is excluded or limited, the insured should notify the insurer of such a material change of circumstances which significantly increases risk of loss according to art. 52 of the Insurance Law 2009. [74] The insurer may demand more

[71] For example, in the transport contracts, the shipper of goods often gives up his right to claim against the carrier when the loss of goods occurs in return for lower freight.

[72] The General Principles of the Civil Law of the People's Republic of China was promulgated in 1986. Article 58: Civil acts in the following categories shall be null and void:
(1) those performed by a person without capacity for civil conduct;
(2) those that according to law may not be independently performed by a person with limited capacity for civil conduct;
(3) those performed by a person against his true intentions as a result of cheating, coercion or exploitation of his unfavourable position by the other party;
(4) those that performed through malicious collusion are detrimental to the interest of the state, a collective or a third party;
(5) those that violate the law or the public interest;
(6) economic contracts that violate the state's mandatory plans; and
(7) those that performed under the guise of legitimate acts conceal illegitimate purposes.
Civil acts that are null and void shall not be legally binding from the very beginning.

[73] Contract Law of the People's Republic of China was enacted on 15 March 1999.
Article 40: A standard term is void if it involves any of the circumstances provided for in arts. 52 and 53 of this Law, or if it excludes the liability of the party supplying the standard term, increases the liability of the other party or deprives the other party of a major right.
Articel52: A contract is void in one of the following situations:
(1) Where a party uses fraud or duress to conclude the contract, thereby harming the interests of the state;
(2) Where it involves malicious collusion to harm the interests of the state, a collective organisation or a third person;
(3) Where it conceals an illegal purpose in a lawful form;
(4) Where it violates the public interest;
(5) Where it violates mandatory provisions of laws or administrative regulations.

Article 53: The following exception clauses in a contract are void:
(1) One that exempts liability for personal injury caused to the other party;
(2) One that exempts liability for property loss caused to the other party either intentionally or as a result of gross negligence.

[74] Art. 52 of the Insurance Law 2009 provides "Where there is a material increase of risk of the subject matter of insurance during the term of a contract, the insured shall notify the insurer in a timely manner in accordance with the contract and the insurer shall have the right to demand an increase in the premium or terminate the contract.

premiums or terminate the policy in response to the material increase in risk.[75] If the insured fails to notify the insurer of such an increase in risk, the insurer shall not be liable for indemnity for the loss caused by the material increase in risk.[76]

Under English law, in the absence of any warranty concerning subrogation recoveries in the policy, the insurer cannot avoid the policy where the insured has entered into an agreement with a third party during the insurance period, exempting the latter from liability to the insured.[77]

Abandonment after the loss occurs but before payment by the insurer. Para.1 of art. 61 of the Insurance Law provides "Where the insured waives his right to claim indemnity from a third party following the occurrence of an event insured against and prior to the insurer's payment of insurance moneys, the insurer shall not be liable for the payment of insurance moneys." If the insured has abandoned his right of claim against the third party before the payment by the insurer, he will have no right to transfer to the insurer. The insurer will have no subrogation right to sue the third party and is then entitled to refuse the insured's claim.

Abandonment after the insurance payment. After the insured has been paid by the insurer, the former's right is transferred to the latter, so any settlement or compromising agreement between the insured and the third party after the insurer's payment to the insured is invalid and will not restrict the insurer's right of subrogation.[78]

Restriction on the time of action for subrogation

Where the insured fails to perform his obligation of notification specified in the preceding paragraph, the insurer shall not be liable for indemnity in the case of the occurrence of an event insured against which is caused by the material increase in risk".

For a detailed discussion of the insured's duty of notification of increase of risk, see Zhen Jing, "The Insured's Post-contract Duty of Notification of Increase of Risk: A Comparative Perspective" (forthcoming) J.B.L.

[75] Para. 1 of art. 52 of the Insurance Law 2009 imposes a duty on the insured to notify the insurer of a material increase of risk in accordance with the contract.

[76] Para. 2 of art. 52 of the Insurance Law 2009.

[77] *Boag v Standard Marine Insurance Co Ltd* [1937] 2 K.B. 113. For more, see R. Merkin, *Colinvaux's Law of Insurance* (9th edn., 2010), para. 11-041.

[78] Para. 2 of art. 61 of the Insurance Law 2009 provides "Where the insured, without the consent of the insurer, waives his right to claim indemnity from a third party after the insurer has paid insurance moneys to him, the waiver shall be invalid."

Where the insured loss is caused by a third party, after indemnifying the insured for the loss under the policy, the insurer acquires the rights of subrogation. However, the insurer may have the risk of being time barred for exercising the right to sue the third party. Though the Insurance Law 2009 clearly provides that the limitation period for insurance claims is two years for indemnity policies, and five years for life policies, starting from the date when the insured or the beneficiary knows or ought to know the occurrence of the insured event,[79] but does not give any stipulation as to the limitation period for the insurer's exercise of subrogation right against the third party. Because the insurer's right of subrogation to sue the third party comes from the insured, the SHPC provides that the limitation period for the insurer's exercise of subrogation rights should be the same as that for the insured's right to sue the third party.[80] The limitation period for the insured to sue the third party varies according to relevant laws which govern the legal relation between the insured and the third party.[81] According to Chinese Civil Code, except as otherwise stipulated by other law, the limitation of action for protection of civil rights shall be two years which begins when the entitled person knows or should know that his rights have been infringed upon.[82] Accordingly, if the time bar for the insured to sue the third party is two years, the insurer's subrogation action to sue the third party is also two years.

The issue here is when the limitation period for the insurer's subrogation action starts. Again the Insurance Law does not cover this point. The Supreme People's Court (SPC)[83] has recently answered the question. Art. 16 of the SPC Interpretations provides "… the limitation period for exercising the rights of subrogation starts to run from the date when the insurer

[79] Art. 26 of the Insurance Law 2009.
[80] Answer to Question11, Shanghai High People's Court, No.3 [2010].
[81] For example, if the legal relation between the insured and the third party is governed by Contract Law (art. 129), the limitation period is four years for the international sale of goods; if by Civil Code (art. 126), the limitation is one year for injury of human body; and if by Maritime Code (art. 257), the limitation period is one year for carriage of goods by sea.
[82] Articles 135 and 137 of the General Principles of the Civil Law of the People's Republic of China which was promulgated in 1986.
Article 135: Except as otherwise stipulated by law, the limitation of action regarding applications to a people's court for protection of civil rights shall be two years.
Article 137: A limitation of action shall begin when the entitled person knows or should know that his rights have been infringed upon. However, the people's court shall not protect his rights if 20 years have passed since the infringement. Under special circumstances, the people's court may extend the limitation of action.
[83] According to articles 5 and 6 of the Stipulations of the Supreme People's Court on the Judicial Explanations (2007 No 12), the Supreme People's Court stipulations, judicial explanations or decisions have legal effect. This means that the Supreme People's Court stipulations, judicial explanations or decisions are legal sources in China.

acquired the rights of subrogation".[84] However, art.16 does not stipulate when the limitation period should end, this may cause confusion as shown below.

Let us make a hypothetical case to see how art. 16 of the SPC Interpretations would work. The insured's goods were damaged by a road accident due to the fault of the transporter on 1 Feb. 2010. The limitation period for the insured to claim against the transporter is two years from 1 Feb. 2010 to 31 Jan. 2012.[85] Instead of making a claim against the transporter, the insured claimed against his insurer on 1 Mar. 2010. The insurer paid the insured for the loss on 1 May 2010. The right of the insured to claim compensation from the transporter was then subrogated to the insurer from 1 May 2010. [86] The question here is when the limitation period will end. There are two possible answers:

(1) The limitation period for the insurer's exercising his subrogation right to sue the third party starts from the time the insurer has obtained the subrogation right and ends at the same time as for the insured's limitation period, that is the period from 1 May 2010 to 31 Jan. 2012; and

(2) The limitation period for the insurer's exercising his subrogation right to sue the third party is two years, beginning from the time the insurer has obtained subrogation right, that is the period from 1 May 2010 to 30 Apr. 2012.

It seems that the first answer does not make sense, if the limitation period for the insurer's exercise of subrogation right ends at the same time as for the insured's limitation period, it would be pointless to stipulate when it starts. It is submitted that art.16 refers to the second situation which is two years from the date when the insurer obtained the subrogation right. If this is the case, the third party transporter was put in a position (the limitation period was for two year and three months) which he would otherwise not have been in if the insured himself had made a claim against him (the limitation period was for two years). The law is certainly unfair to the transporter. Art. 16 of the SPC Interpretations aims to protect the insurer from being time barred for exercising subrogation rights but at the expense of the third party's interest. It is submitted that the SPC Interpretations in respect of the starting point of the

[84] The Supreme People's Court has recently published its Interpretations on Questions to the Insurance Law 2009. The Interpretations were enacted by the Judgement Committee of the Supreme People's Court on 6 May 2013 and became effective on 8 June 2013.

[85] Articles 135 and 137 of the General Principles of the Civil Law of China.

[86] In marine insurance, Article 252 of Maritime Code 1993 provides "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".

limitation period does not make the situation clearer but rather the reverse. The rule that the insurer has no better position than the insured should apply to the limitation period, as it does to any other aspects of subrogation. So the limitation period for the insurer to exercise right of subrogation should be exactly the same as that for the insured to sue the third party. In contrast to the SPC's approach, the SHPC suggests that the limitation period for the insurer's exercise of subrogation right to sue the third party should start from the time when the insured knows or ought to know that his rights have been infringed upon.[87] Accordingly the correct answer to the hypothetical situation is that the limitation period for the insurer's exercise of his subrogation right should be two years from 1 Feb. 2010 to 31 Jan. 2012 which is exactly the same as the limitation period for the insured to sue the transporter (1 Feb. 2010 to 31 Jan. 2012).

A more difficult situation about the limitation period for the insurer's exercise of subrogation right is found in marine insurance. In marine cargo insurance, the limitation period for subrogation is 90 days, starting from the day on which the insurer paid the insured under the policy or was served with a copy of the process by the court handling the claim against him. [88] This 90-day limitation period for subrogation is arbitrary which is independent on the one-year limitation period for the insured to sue the carrier which starts from the day on which the goods were delivered or shall have been delivered by the carrier.[89] The insurer cannot demand an extension of this 90-day period on the ground that his subrogation action is still within the one-year limitation period for the insured to sue the carrier. On the other hand, the carrier cannot defend himself to the insurer's subrogation action on the ground that the insurer's subrogation action is beyond the one-year limitation period.[90] According to art. 264 of the Maritime Code 1993, the limitation period for the insured to claim against the insurer is two years (from the day on which the insured peril occurred).[91] The insured can claim against the insurer even in the last day of the 2-year period, so the insurer's subrogation

[87] See the Answer to Question 12, Shanghai High People's Court, No.3 [2010].
[88] Art. 257 of the Maritime Code of the People's Republic of China 1993 provides "The limitation period for claims against the carrier with regard to the carriage of goods by sea is one year, counting from the day on which the goods were delivered or should have been delivered by the carrier. Within the limitation period or after the expiration thereof, if the person allegedly liable has brought up a claim of recourse against a third person, that claim is time-barred at the expiration of 90 days, counting from the day on which the person claiming for the recourse settled the claim, or was served with a copy of the process by the court handling the claim against him".
[89] Ibid.
[90] For more, see the book, *Insurance Law and Cases*, edited by the Law Department, China Ping An Insurance Company Ltd (Qinghua University Press, 2005), p364.
[91] Art. 264 of the Maritime Law 1993 provides " The limitation period for claims with regard to contracts of marine insurance is two years, counting from the day on which the peril insured against occurred."

period may start from a day which is well beyond the 2-year period. Moreover, the difference in the length of the limitation period for the insurer to sue the third party by subrogation (90 days), for the insured to sue the carrier (one year), and for the insured to sue the insurer (two years) is very confusing and can cause problems. It is suggested that the arbitrary 90-day limitation period should be eliminated, and that the limitation period for the insured to sue the carrier or to sue the insurer, and for the insurer to exercise subrogation right to sue the third party should be the same, say, two years from the day on which the goods were delivered or shall have been delivered by the carrier.

In order to protect the insurer's subrogation right to recover damages from the third party against any relevant legal or arbitration time bar, it is suggest that the insurer may put a clause in the policy to request the insured to take necessary steps to reserve the right against the third party. [92] According to art. 19 of the SPC "Interpretations on Questions Concerning Civil Cases in respect of Limitation Period", after having acquired rights of subrogation, the insurer or the insured may notify the third party that the insured's right to claim against him has been transferred to the insurer. The limitation period will stop to run when the third party has received the notification.[93]

Conclusions

Insurance Law 2009 provides rules in respect of restrictions on subrogation, but some of the provisions are ambiguous and very confusing. The restrictions by the relevant rules are still insufficient in terms of protection of interests of the insured's and other persons in a social or financial interdependent relationship with the insured. It is suggested that an insurer should not be permitted to exercise subrogation rights against employees of an insured employer and against a co-insured in Chinese law, and that reform on subrogation in the future could move toward the direction of permitting the insurers to exercise subrogation rights only against a third party wrongdoer who intentionally brought about the occurrence of the insured event.[94]

[92] For example, in the property insurance policy, a clause states that "where a third party is held responsible for the loss or damage covered under this policy, the insured shall, whether being indemnified by the company or not, take all necessary measures to enforce or reserve the right of recovery against the third party, and upon being indemnified by the company, subrogate to the company the right of claim against the third party, transfer all necessary documents to and assist the company in pursuing recovery from the responsible party. See the policy for property all risks insurance of the Ping An Insurance Company of China. Same clauses are also provided in the policy for public liability insurance and policy for erection all risks and third party liability insurance of the Ping An Insurance Company of China.

[93] See the Answer to Question 14, Shanghai High People's Court, No.3 [2010].

[94] See J. Birds, *Birds' Modern Insurance Law* (8th edn, 2010), p350.