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School of Law

Research on Insurable Interest in English and Chinese Law of Marine Insurance

by

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ABSTRACT

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REASEARCH ON INSURABLE INTEREST IN ENGLISH AND CHINESE LAW OF MARINE INSURANCE

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Being one of the oldest forms of commercial protection, marine insurance was flourished in Britain since seventeenth century through the Lloyd's market. With great influence on many nations including China, the law of marine insurance was simultaneously developed in the Courts with special characteristics including the doctrine of insurable interest. Controversy and complexity over this doctrine have long been discussed in courts and among academic scholars, especially the nature of insurable interest, *i.e.*, what kind of relationship between the assured and the subject matter insured constituted a valid insurable interest has been discussed by the learned lawyers within 200 years time.

This thesis examines the doctrine of insurable interest within marine insurance contracts. The legal problems related to the doctrine, in theory and in practice, are discussed and evaluated through the citation and critical analysis of the relevant case law in the United Kingdom. The relevant codes and cases in Chinese law are compared to find the defects, together with an analysis comprising thoughts and proposals on possible extensions, further research options, and a possible future law reform.

This thesis comprises of two parts, twelve chapters: Part I is on insurable interest in English law of marine insurance. Chapter I discusses the requirement of insurable interest and the history. Chapter II is the meaning of insurable interest. Chapter III discusses the general consideration of insurable interest. Chapter IV discusses insurable interest in ship insurance. Chapter V discusses insurable interest in cargo insurance. Insurable interest in freight and future earning insurance is discusses in Chapter VI. Chapter VII discusses insurable interest in marine liability insurance. In Chapter VIII, insurable interest in co-insurance is discussed. Insurable interest in marine reinsurance is discussed in Chapter IX. Insurable interest in Chinese law of marine insurance is discussed in Part II. The general description like the history, definition, the parties who have the insurable interest, when it must be attached and the consequence of lack of insurable interest is discussed in Chapter X. The illustration of specific interests is discussed in Chapter XI. In the final Chapter, the conclusion is summarised and the future of insurable interest in Chinese law is discussed.

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PREFACE

I. The Reasons of the Motive to Study the Principle of Insurable Interest

An assured has to have an insurable interest in the subject matter insured before he is to be allowed to claim under a marine policy, otherwise, the contract is deemed to be a gaming or wagering contract and void in consequence, as stated by section 4 of Marine Insurance Act 1906.[1] Why? There are two reasons: first, the requirement of insurable interest emanates from the cardinal principle of marine insurance law that a contract of marine insurance is a contact of indemnity.[2] Thus, before an assured can seek an indemnity under any policy, it has first to be shown that he has in fact suffered a loss. To prove this, he has to show that he is interested in a marine adventure as defined by s.5 (1) MIA 1906, that is, he has to verify that he has relationship with the subject matter insured against. Second, a contract of insurance without insurable interest may itself be invalidated or unenforceable on the ground of contrary to public policy, that is to say, a wager by insurance. In history, serious practitioners in the insurance market of the eighteenth and nineteenth centuries were much disturbed by the numbers of claims made on policies under which the claimant held no insurable interest. These were circumstances in which the claimants had affected insurance as a gambling exercise with no more than the premium to lose in the event of loss or damage to the ship or cargo that was the subject of the insurance.

There are altogether 12 sections relating to insurable interest in MIA 1906, including the definition of the insurable interest, the timing of insurable interest attached, the consequences of lack of insurable interest, illustrations of insurable interest and assignment of interest. In the Marine Insurance (Gambling Policies) Act 1909,[3] a criminal sanction is imposed when the assured effects contract of marine insurance without insurable interest in the subject matter. Together with relevant decided cases since the eighteenth century, a complete legal framework relating to insurable interest has been enacted and has played an important role in the law of marine insurance until the present time. However, continuous comments and different opinions on insurable

[1] Herein after MIA 1906.
[2] S.1, MIA 1906.
[3] Herein after MIA 1909.

interest especially on its definition and application in specific circumstances under hull policy, cargo policy, freight insurance, liability insurance, co-insurance and reinsurance have been raised by the learned judges and scholars.

From the Nineteenth century, the English law of marine insurance (especially the MIA 1906) has greatly influenced many nations in the world, including China. Since the Maritime Code of the People's Republic of China[4] and the Insurance Law of the People's Republic of China[5] entered into force, a marine insurance law system has been established. The requirement that the assured must possess an insurable interest in the subject matter of a marine insurance in English law has been stated in the Insurance law of China. Before that, maritime practice has accepted the concept of insurable interest. Actually, the Chinese practice on insurable interest is in some ways compatible with the common law practice, especially English law of marine insurance. Nevertheless, compared with the devotion of the 12 sections to the subject of insurable interest in the MIA 1906, MIA 1909 and related *ratio decidenti,* the relevant Article 12[6] regulating the insurable interest in general in Insurance Law of China is far less perfect. The defects include unclear definitions causing misunderstanding, lack of statements in details as the timing of insurable interest attached and illustrations of insurable interest, the difference between common law and civil law causing hindrance in legal method, urge us to make further improvement in the insurable interest in the Chinese law of marine insurance.

II. The Objectives and Aims

1) To make a thorough research of insurable interest in English law of marine insurance from history to find the exact and complete reason for introducing the requirement of insurable interest in the law of marine insurance.

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[4] This code was adopted at the 28th Meeting of the Standing Committee of the Seventh National People's Congress on November 7, 1992, and effective as of July 1, 1993, herein after CMC.

[5] This law was adopted at the 14th Meeting of the Standing Committee of the Eighth National People's Congress on June 30, 1995, and effective as of October 1, 1995. There was not any amendment in the revised version in 2002, herein after CIL 2002.

[6] ' An applicant shall have an insurable interest in the subject matter of the insurance.
An insurance contract is null and void if the applicant has no insurable interest in the subject matter of the insurance.
Insurable interest is meant the legally recognised interest which the applicant has in the subject matter of the insurance.'
--Art. 12, CIL 2002 (free translation).

2) By study and analysis the relevant statues, cases and books, to try to have a full idea on insurable interest in English law of marine insurance as its definition; nature; when must attach; effect of no expectation of interest; illustration of specific insurable interest of assured in vessels, ships, profits, liabilities; insurable interest of shareholders, Mortgagors and Mortgages; insurable interest in reinsurance.

3) To research into the relevant statues and cases regarding insurable interest in Chinese law of marine insurance and find the defects after making comparison with the counterpart in English law of marine insurance.

4) To render suggestions or advice on the amendment or comprehensive interpretation of present vague and ambiguous enactments on insurable interest in Chinese law of marine insurance, so that the courts do not encourage a harsh attitude towards the doctrine.

III. Methodological Issues

During the research, sources and material in relation to the concept of insurable interest in marine insurance contracts have been selected to secure the objective of comprehensiveness and similarity in the pattern. Whilst the relevant provisions in English statues and cases together with Chinese statues and cases have been the major and leading point for the present study and discussion, reference has also been made to legal resources from other common law countries.

An analysis of the historical evolution on the attitudes towards insurable interest has been attempted, as well as an evaluation of the legislative framework and the reasoning behind it in English law regimes examined. Then its meaning, allocation, timing, consequence and its application in specific insurance lines in English law are deeply analysed and discussed, following with the relevant parts in Chinese law of marine insurance. The aim for all that is to enhance the better understanding of this concept within English marine insurance and to examine the present comprehension in Chinese law. To fulfil this aim, legal issues and their justification together with views of academics on certain issues have been evaluated wherever needed, hence also the

literature review attempted. Furthermore, reference has been made to case law regarding non-marine insurance wherever needed or wherever there is none available marine insurance case law to evaluate the discussion. In addition, commercial practice trends have been examined and compared to the theoretical aspects already discussed in an effort to better approach the topic in terms of the everyday practice.

Through the study and comparative analysis of legislation and judicial decision in these two legal systems, the author will strive to improve the understanding of the potentially 'problematic' areas in Chinese law and to propose legal amendments on the amendments in relevant statues and advices on judicial practices.

IV Structure of the Thesis

This work comprises of two parts, twelve chapters: Part I is on insurable interest in English law of marine insurance. Chapter I discusses the requirement of insurable interest and the history. Chapter II is the meaning of insurable interest. Chapter III discusses the general consideration of insurable interest. Chapter IV discusses insurable interest in ship insurance. Chapter V discusses insurable interest in cargo insurance. Insurable interest in freight and future earning insurance is discusses in Chapter VI. Chapter VII discusses insurable interest in marine liability insurance. In Chapter VIII, insurable interest in co-insurance is discussed. Insurable interest in marine reinsurance is discussed in Chapter IX. Insurable interest in Chinese law of marine insurance is discussed in Part II. The general description like the history, definition, the parties who have the insurable interest, when it must be attached and the consequence of lack of insurable interest is discussed in Chapter X. The illustration of specific interests is discussed in Chapter XI. In the final Chapter, the conclusion is summarised and the future of insurable interest in Chinese is discussed.

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PART ONE:
INSURABLE INTEREST IN ENGLISH LAW OF MARINE INSURANCE

CHAPTER I:
THE LEGAL REQUIREMENT AND HISTORY OF INSURABLE INTEREST IN MARINE INSURANCE

1.1. Marine Insurance is a Contract of Indemnity

The requirement of insurable interest originates from the cardinal principle of marine insurance law that a contract of marine insurance is a contract of indemnity which is 'the great principle of the law of insurance'[1]. As a separate and independent contract, the modern marine insurance dated from the early years of the 14th century, and was the last term in the evolution of various legal devices invented to provide against the risks of the sea. The contract of insurance first appeared as an independent contract, modelled on the maritime loan which developed into the contract of bottomry or respondentia, in which the insurer plays the part of debtor, states that he has received the amount for which the ship or goods not arriving safely and it was inevitable that those who drew up the earliest contracts of insurance should be the same persons as those who were in the habit of drawing up contracts of loan on bottomry or respondentia.[2]

But later in the 14th century the form of insurance contract changed. It came to be modelled on a sale, and the analogy of a sale was used to explain its incidents. The contract of sale was adapted to the purposes of insurance by regarding the property insured as sold to the insurer, subject to a resolute condition in the event of its safe arrival. It was for this reason that the goods were at the insurer's risk during the whole of the voyage, and that he could sue for their recovery during this period. The principle of insurable interest in insurance law flowed from this conception. The insured must be

[1] Lord Ellenborough in *Brotherston v Barber* (1816), 5 M&S 418 at 425. Also see *Castellain v Preston* (1883) 11 QBD 380; *Richards v Forestal Land, Timber and Railways Co.* [1941] 3 All ER 62, at 76.
[2] See W.S. Holdsworth, A History of English Law, vol. VIII, Methuen, 1937, at p.277, herein after Holdsworth.

the owner, or at least have some interest in the property insured. A man can not transfer risk to what another which he does not own. Therefore from the first the contract was a true contract of indemnity, and not a mere wager on the safe arrival of ship or merchandise.[3] From a judgment it is clearly shown that in 1377 in the City of Bruges 'the insurance was a true one, *i.e.* a contract to indemnify the insured against the loss of certain specified articles and, therefore, not a wager'.[4] This explicitly proved that until the 14th century, people started to define that marine insurance is a contract of indemnity. By the middle of the sixteenth century, in the court of Admiralty it is assumed in several cases that the contract of insurance is a contract of indemnity.[5] In 18th century, Lord Mansfield also emphasised that 'the insurer, by the marine law, ought never to pay less, upon a contract of indemnity, than the value of the loss; and the insured ought never to gain more.' [6] The above words clearly showed that the contract of insurance is a contract of indemnity and 'lest the temptation of gain should occasion and wilful losses.'[7]

In s.1, Marine Insurance Act 1906, it is defined 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.'

The key words in the above paragraph are 'indemnify'[8] and 'losses'[9] which clearly verify that a contract of marine insurance is a contract of indemnity. The sole and exclusive object of marine insurance contract is for the insurer to reimburse the assured in case of an anticipated damage upon him. In the strict sense of that word, for any losses he may sustain through the agency of those sea risks against the effect of which the underwriter by the terms of his policy stands pledged to protect him. To prevent the assured from suffering loss by means of any of the perils insured against is the object of

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[3] P.278-279, *ibid.*
[4] See Trenerry, The Origin and Early History of Insurance, P.S. King & Son, Ltd, 1926, at p.264.
[5] See Holdsworth, vol. VIII, at p.290.
[6] *Hamilton v Mendes* (1761) 2 Burr. 1214.
[7] *Godwin v London Assurance Co.* (1758) 1 Burr.492.
[8] Indemnify means' to restore the victim of a loss, in whole or in part, by payment, repair, or replacement'--Black's Law Dictionary, West Publishing Co. 1990, 6 ed. at p.769.
[9]The word 'loss' in insurance policy in its common usage means a state of fact of being lost or destroyed, ruin or destruction. -- Black's Law Dictionary, West Publishing Co. 1990, 6 ed. at p.945. *Rickards v Forestal Land, timber and Railways Co.* [1941] 3 All ER 62, HL.

marine insurance, and its whole spirit would be violated if he could make the occurrence of any such casualties a means of gain, for this would be to give him an interest in procuring sea losses, which would be opposed to every principle of commercial policy. Hence an insurable interest in the subject matter insured is of very essence of the right to recover upon the contract. In the absence of such an interest the plaintiff is not indemnified, although there may have been a total loss of the subject matter insured because the assured can not show evidence to prove his damage.

From the above illustration, we can find that marine insurance is a contract of indemnity was fixed in the marine insurance usage and law from the very beginning. In order to fulfil this principle the assured must have insurable interest in the subject matter. Although marine insurance is not a perfect contract of indemnity because of the existence of valued policy,[10] the requirement of insurable interest is also necessary because the valued policy only changes the measure of indemnity on the valuation of subject matter's value on agreement instead of on its actual value at the time of loss or at the time of formation of the contract or inception of the risk. To keep the insurer's obligation to reimburse the insured for the actual loss from the covered risk and to entitle an assured to be restored, subject to the terms and conditions of the policy, to the financial position enjoyed immediately before the loss, the assured has to prove his insurable interest in the insured subject matter to clarify his loss. Furthermore, the principle of indemnity becomes important only where a loss has occurred, for indemnity is concerned with the qualification of loss. By contrast, the rules of insurable interest are mainly concerned with ensuring that a person who has no prospect of suffering a loss is prevented from insuring in the first place. Where an assured is unable to satisfy the indemnity requirement by proving any loss, the position is quite simple that he can not recover under the policy. Thus, in case of contractual interest, subject to the express

[10] Under a valued policy the value of the insured subject matter is agreed between the parties at the outset and, on the happening of an insured event, the agreed sum is payable between the parties at the outset and, on the happening of an insured event, the agreed sum is payable without the need for the assured to quantify his actual loss. In valued policy, agreed value is conclusive which was stated in the s 27(3)MIA 1906 and relevant cases: *Irving v Manning*(1847) 1 HL Cas 287; *Woodside v Globe marine Insurance Co. Ltd* [1896] 1 QB 105; *Barker v Janson* [1868] LR 3 CP 303; *Lidgett v Secretan* (1871) LR 6 CP 626. That is to say, the binding nature of the valuation was said to apply regardless of any change in the actual value of the subject-matter insured. Thus, the final and exact figure of reimbursement has already been fixed when the policy is drawn instead of the real value at the time of loss. And the assured sometimes will be not fully indemnified or even over indemnified. See Mustill, Sir Michael J., Gilman, Jonathan C.B., Arnould's The Law of Marine Insurance and Average, 16th ed, Stevens, 1981, para.3, footnote 14. Herein after--Arnould 16th ed.

terms of the contract, it is the time of the loss that is all important, for unless the assured can prove interest at that time he can not recover, then he has suffered no loss for which an indemnity is payable. Failure to demonstrate insurable interest is potentially more serious: where a marine policy without interest amounts to a gambling policy, the MIA 1909 imposes criminal sanctions.

1.2. Avoid Wager Policy in Marine Insurance

Wager policy is 'one where the assured has no insurable interest, and his contract is entered into without expectation of acquiring such an interest or which contains words implying that the contract it embodies is not really an insurance, but a wager; *i.e.*, a pretended insurance, founded on a fictitious risk, where the assured has no interest in any thing insured, and can, therefore, sustain no loss by the happening of any of the casualties against which the supposed insurance professes to protect him.'[11] In this definition, the most important word is wager. In the case of *Thacker v Hardy*,[12] Cotton, L.J., says: 'The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature -- that is to say, if the event turns out one way, A will lose, but if it turns out the other way he will win.' The typical definition of wagering contract was given by Mr. Justice Hawkins in *Carlill v Carbolic Smoke Ball Co.*,[13] 'a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract.' In this case, the learned Justice also emphasised that the

[11] Arnould 16th ed, para.9.
[12] (1878-79) L.R. 4 Q.B.D. 685, 695.
[13] [1892] 2 QB 484 at p. 90-491; approved by the Court of Appeal in *Ellesmere v Wallace* [1929] 2 Ch 1 at 24,36,48-9.

mutuality in the wager contract is also essential. If one party's intention in the contract is not to make wager, this contract can not be treated as wagering contract, and 'neither has any interest except in the money he may win or lose by it'

In the case *Gedge and Others v Royal Exchange Assurance Corporation*,[14] we can find the vivid description of how people used insurance for gambling. A Mr. Rouse, an employee of a Japanese insurance company London office called Nippon, on sometime before November 14, 1898, knew that the government of Japan would change higher tax on goods imported after December 31st, 1898 and read from Lloyd's Shipping Gazette that a *M.V. Radnorshire* was on the way to Japan. He then obtained a policy from the defendant against loss in respect of the non-arrival of *M.V. Radnorshire* in Japanese ports before December 31st, 1898. Mr. Rouse's intention is to make wager upon the vessel by using the method of insurance, however, he got nothing except paid the premium because this insurance was declared to be void by the Court.

The above definition and example clearly disclose the nature of wager: Firstly, the two parties in the wagering contract will not suffer any mental or pecuniary loss on the subject which they bet whether it will be damaged or disappeared. Secondly, their intentions in the contract are in the same--to make a bet. If one party's intention is not, like in the case of *Thacker v Hardy*,[15] the defendant's intention was to earn money through the plaintiff, a broker, in the stock market instead of make gambling, it can not be called wager policy. Thirdly, there must be loss and gain for either party in a wagering contract, while it usually brings benefit for both parties in a non-wagering contract as an insurance policy.

Why insurance is often used as wager? It is because 'contract of insurance, like wagering contracts, are aleatory contracts.'[16] 'Insurance is a contract upon speculation.'[17] Insurance 'must be a contract whereby for some consideration, usually but not necessarily in periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event. Then the next thing that is necessary is that the event should

[14] [1900] 2 QB 214.
[15] (1878-79) L.R. 4 Q.B.D. 685.
[16] See Rob Merkin, Colinvaux's Law of Insurance, 7th ed, S&M, 1997, at p.1.
[17] Per Lord Mansfield in *Carter v Boehm* (1766) 3 Burr. 1905

be one which involves some amount of uncertainty. There must be either uncertainty whether the event will ever happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen'.[18] When we compared these two kinds of contracts, we can find they are in great similarity except insurable interest to be required in insurance. 'A contract which would otherwise be a mere wager may become an insurance by reason of the assured having an interest in the subject-matter—that is to say, the uncertain event which is necessary to make the contract amount to an insurance must be an event which is prima facie adverse to the interest of the assured. The insurance is to provide for the payment of a sum of money to meet the loss or detriment which will or may be suffered upon the happening of the event.'[19] 'The genuine expectation of an interest in the future will, therefore, be sufficient to make a contract one of insurance.'[20]

Why it is prohibited to make wager policy in marine insurance? Among the economic objections are that gambling adds nothing to the wealth of the community. On the contrary, it diverts resources, according to a theory of diminishing marginal utility.[21] There is also an element of waste, it is said, for a significant part of the insurer's costs are made up of administration which, in the case of a wager, serves no useful social purpose. The reply that man should play as well as work and that gambling is a legitimate recreation is countered by social and ethical objections. More importantly, making gambling under the guise of marine insurance will increase the risk instead of diminishing the risk of loss on the insured property. If the relation between the assured and the subject matter was only the policy itself, the assured would destroy the subject matter to get payment from the insurer without any extra loss. Although the insurer will refuse to pay on reason of fraud, great loss is occurred to the party who has real interest on the subject matter. This leaves far away from the real meaning of the insurance to transfer an existing risk to an insurer but to create a new and more dangerous risk conversely.[22]

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[18] Per Channell J. in *Prudential Insurance v I.R.C.*[1904] 2 K.B. 658, at p.663.
[19] *Ibid.*at p.663.
[20] See Rob Merkin, Colinvaux's Law of Insurance 7th ed, S&M, 1997, at p.1.
[21] See Harnett and Thornton, Insurable Interest in Property: A Socio-Economic Re-evaluation of a Legal Concept, 48 Colum. L. Rev, (1948) 1162, at p.1179.
[22] See the Preamble, MIA 1745. '...it hath been found by experience, that the making of insurances, interest or not interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have...been fraudulently lost or destroyed.'

The most usual form of wager policy is p.p.i. (policy proof of interest) policy. It is such a kind of policy inserted with such kind sentences like 'interest or no interest', or 'without further proof or interest than the policy itself,' or 'policy to be deemed sufficient proof', or 'without benefit or salvage to the insurer',[23] or, 'full interest admitted' etc. With this kind of policy between the assured and the insurer, the assured does not have to provide further proof to show that he has insurable interest upon the subject matter because the policy itself is the enough evidence. The p.p.i. policy has another 'much-abused' name called honour policy because 'the honour of the insurer is engaged to pay such losses as may occur within the ambit of the policy, though they could not be recovered by action at law'.[24] Why p.p.i. policy is used in marine insurance? Firstly, with this policy, the assured can avoid his obligation to prove the insurable interest upon the subject matter, thus he can make wager; secondly, sometimes it is not easy for the assured to provide enough proof on his interest when loss happened; thirdly, the insurer issued the p.p.i. policy only for convenience, thus the assured does not need to prove his interest in the policy although he actually has interest, like some freight policies and Tonners Policies in reinsurance practice.[25] No matter the p.p.i. policy is issued under what kind of the situations as the above mentioned, it is a gaming or wagering policy and is null and void,[26] even though the assured may actually have an interest[27] and the p.p.i. clause may have been detached by the assured at the time of claim,[28] and the insurer has not the right of subrogation[29] if he has paid the loss to the assured, and the person effects it shall be guilty of an offence and shall be liable to imprisonment.[30] However, an insurance effected 'without benefit of salvage to the insurer' when there is no possibility of salvage is valid.[31]

The prohibition of wager under the insurance policy without interest or in the form of p.p.i. policy in MIA 1745 was extended to life insurance and other non-indemnity

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[23] *Allkins v Jupe* (1877)2 C.P.D.384.
[24] See Arnould, 16th ed, para. 20. Also see Lord Robson's remark in *Thames and Mersey marine Insurance co. Ltd v 'Gunford' ship Co* [1911] AC 529 at p550, HL.
[25] See Robert H. Brown and Peter B. Reed, Marine Reinsurance, Witherby &Co. Ltd 1981, at p.53.
[26] S.4 (2) (b), MIA 1906.
[27] *Cheshire & Co v Vaughan Bros & Co.* (1919) 25 Com Cas 242; [1920] 3 KB240, CA.
[28] *Re London County Commercial Reinsurance office Ltd* [1922] 2 Ch 67.
[29] *Edwards &Co., Ltd. v Motor Union Insurance Co.* [1922] 2 K.B. 249.
[30] S.1(1) (b), Marine Insurance (Gambling Policies) Act 1909.
[31] S.4, final paragraph, MIA 1906.

policies like accident policies by the Life Assurance Act 1774 which requires the assured to possess insurable interest at the inception of the policy.[32] MIA 1906 which repealed MIA 1745 subsequently introduced s.4 to declare that marine insurance policy without insurable interest or in p.p.i. form is void wager policy, and the MIA 1909 imposes criminal liability to marine policy for gambling or in p.p.i. form. Pursuant to s.18 Gaming Act 1845[33] which renders null and void all contracts made by way of gaming or wagering mutually agreed by the both parties involved,[34] other forms of insurance, like non-marine goods, land, liability, are also not allowed to be made by way of gaming or wagering. Insurable interest is required in all these forms of insurance to exclude wager and on the principle of indemnity in indemnity insurance policies.

However, with the new Gaming Act 2005 received Royal Assent on April 7th 2005 and is targeted to be full implementation on Septmeber 1st, 2007,[35] the Gaming Act 1845, including s.18 has been repealed by s.334 and is replaced by s.335 which enacted:

(1) The fact that a contract relates to gambling shall not prevent its enforcement.
(2) Subsection (1) is without prejudice to any rule of law preventing the enforcement of a contract on the grounds of unlawfulness (other than a rule relating specifically to gambling).

As s.335 (1) Gaming Act 2005 declares that a contract with the fact involving in gambling is enforceable, with a *proviso* in subsection (2) to prevent its enforcement on any rule of law saying that a contract is unenforceable because of unlawfulness, except those rules relating specifically to gambling and rendering the contract unlawful are of no effect. From the literal interpretation on the impact of this section on the rules

[32] s.1, Life Assurance Act 1774, herein after LAA 1774. For a completion introduction and evaluation of insurable interest in life insurance, please *cf* R. Merkin, 'Gambling by Insurance—A Study of the Life Assurance Act 1774' 9 Anglo-Am. L. Rev. (1980), p.331-363.
[33] 'All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager...' s.18, Gaming Act 1845.
[34] '...it is not necessarily a gambling transaction so far as the broker is concerned; and in order to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it'. *Universal Stock Exchange v Strachan* [1896] A.C. 166 at 168, per Cave J. Based on this point, it is regarded that s.18 Gaming Act 1845 has no independent effect on marine insurance because the marine policy can sufficiently be a wager policy if the assured himself intends to gamble without the requirement of mutuality.
[35] http://www.culture.gov.uk/gambling_and_racing/

relating to insurable interest in marine insurance and other kinds of insurance,[36] we can find that s (4)(1) MIA 1906 will be superseded by s.335 Gaming Act 2005 when it comes into force because the enactment in s.4 (1) MIA 1906 which states marine wagering policy void is not saved by s.335(2) which does not apply to any rule of law which relates specifically to gambling as the MIA 1906, s.4 does. Thus a marine policy 'by way of gaming or wagering'—*i.e.* one in which the assured has no interest and no expectation of interest or in p.p.i. form--is enforceable in statue law. The requirement of insurable interest to 'provide a means of distinguishing the insured sheep from the wagering goats'[37] will become meaningless.[38] Nevertheless, in the consideration of that gambling is regarded as a popular leisure activity[39] and one of the objectives of the Gaming Act 2005 is to prevent gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime;[40] and the cases in the early time that a wager against sound public policy[41] and affecting a third party in any way[42] was illegal;[43] also if we recall the numerous common law cases decided after the MIA 1745 and MIA 1906 in which many learned judges condemned wager policies as they caused great danger to the property and life at sea,[44] a further solution are

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[36] As insurable interest is clearly required at the date of the policy under s.1 LAA 1774 and the policy without insurable interest is held illegal in the subsequent cases: *Howard v Refuge Friendly Society* (1886) 54 L.T. 644, *British Workmans Assoc v Cunlifee* (1902) 18 T.L.R. 425, *Harse v Pearl Assurance* [1904] 1 K.B.558, s.335 Gaming Act 2005 has no impact on life insurance. In other kinds of indemnity insurance, abided by the indemnity principle, the insured has also to prove his insurable interest at the time of loss. He is not required to prove insurable interest at the inception pursuant to s.335(2) Gaming Act 2005 but further confirmation is needed by studying the complicated numerous cases before Gaming Act 1845. *cf* Merkin, Colinvaux and Merkin's Insurance Contract Law, S&M. (loose leaf), para A-0393. Hereinafter, Merkin's Insurance.

[37]Nicholas Legh-Jones QC ,'The elements on Insurable Interest in Marine Insurance law' in D Rhidian Thomas (editor), Modern Marine Insurance law Vol. 2, LLP 2000, at 4B.1 p.136.

[38] There is a proposal to abolish the doctrine of insurable interest to 'ensure consistency'. See James Davey, 'The Reform of Gambling and the Future of Insurance Law', Legal Studies Vol.24 No.4 December 2004, p507-515.

[39] 'Gambling Bill—Regulatory Impact Assessment' Prepared by the Department for Culture, Media and sports at p.3. http://www.culture.gov.uk/global/publications/archive_2004/gamblingbill_ria.htm

[40] See s.1(a) Gaming Act 2005.

[41] *Jones v Randall* (1774) 1 Cowp. ; *Hartley v Rice* (1808) 10 East 37; *Gilbert v Sykes* (1812) 16 East; *Burn v Taylor* (1823) R.& M. 28.

[42] *March v Pigot* (1771) 5 Burr. 2802; *Da Costa v Jones* (1778) 2 Cowp. 729; *Eltham v Kingsman* (1818) 1 B & Ald. 683; *Ditchburn v Goldsmith* (1815) 4 Camp. 152. *Cf* R. Merkin, 'Gambling by Insurance—A Study of the Life Assurance Act 1774' 9 Anglo-Am. L. Rev. (1980), p.333-337.

[43] For further discussion on the consequence of lack of insurable interest in marine policy, please see below Section 3.3.,Chapter III.

[44] As Lord Shaw said 'the shipping and insuring world is aware that such things (policies without insurable interest) go on; and that every insurer of ship or hull takes his risk that the scales may be weighted in favour of the destruction of the vessel by that kind of underwriting.' 'When a gamble has been made by one of the parties for gain upon the event of loss of ship, although the subject of the particular gamble be not the ship itself, the interest of that party is that the ship shall be destroyed'. *Thames and Mersey Marine Insurance Co Ltd v Gunford Ship Co Ltd* [1911] AC 529 at p 543. See also

expected from their interpretations. Furthermore, even if marine policy by way of gaming or wagering is enforceable, considering the principle of indemnity, insurable interest is still required at the date of the loss. The only exclusion is that he needs not to possess an expectation of an insurable interest at the inception of the marine policy.

1.3 The History of Insurable Interest in the Law of Marine Insurance

Ever since the earliest form of insurance business came into being in ancient Roman time during the period from 300B.C. to A.D. 1000,[45] it was recognised that the assured must have some relationship with the subject matter insured had been required in the contract. There are two examples in the ancient Roman period: As early as *c* 215 B.C., in two contracts whereby the government of the Romans Republic insures merchants, the merchants' ownerships of the cargo are shown in the contract to make the insurance.[46] In A.D. 58, the contract whereby Emperor Claudius undertook to indemnify shippers against risk of loss from storms in winter to take imported food for the starving people is equivalent to that of modern marine insurance because 'the essentials of insurance, namely, (a) ownership of insured property, (b) risk and (c) premium are all present'.[47]

At the same time, insurance by wager was also in constant use in the leading seaport towns as early as the later Roman Empire and early Middle Ages.[48] Towards the end of 14th century and the beginning of 15th century, in the insurance business centre of Florence and Genoa, in order to make more profit on insurance, some insurers tried to insert clauses which bound the insurers to pay whether or not the insured had any interest. This soon gave rise to the serious evil of facilitating, by means of insurance, mere wagering contracts on the safety of ships or other property. In the end of the fifteenth century, the great freedom allowed the parties in the contract to make what terms they pleased, led to an increase in the practice of making insurance contracts solely for the purpose of wagering, and the legislations at Genoa made attempts to

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Kent v Bird (1777) 2 Cowp 583; *Gedge v Royal Exchange Assurance Corporation* [1900] 2 QB 214; *Coker v Bolton* [1912] 3 KB 315.

[45] Trenerry, The Origin and Early History of Insurance P.S. King & Son, Ltd, 1926. at p108.

[46] *Ibid.* at p112-114.

[47] *Ibid.* at p.119.

[48] *Cf*, Trenerry, The Origin and Early History of Insurance, P.S. King & Son, Ltd , 1926, at p.128.

prohibit them, which were not very successful.[49] In the 1484 statue of Barcelona, rules were made to suppress the practice of insuring non-existent cargoes.[50] To prevent the issue of mere wager policies, the underwriters 'likewise must declare on oath that the insurance are real and fictitious;' and for the same reason they are specially forbidden to use the words, 'value more or less, or, done or done' in the policy.[51]

Since the passing of the Act of the forty-third of Elizabeth in 1601, 'the oldest law in the English statue-book bearing upon marine insurance',[52] the rules relating to marine insurance were set up gradually in the relevant cases and acts,[53] originated and grew from Italian cities, Barcelona and other continental countries.

However, the custom in the city of London of not requiring insurable interest in subject matter of making insurances is very popular. One reason is because gambling and wagering contracts were not prohibited by English law at that time if this wager was not contrary to public interest.[54] Another reason is that the attitudes of court of Admiralty, the 'Chamber of Assurance', the courts of Common law and the court of Chancery towards the wager policy especially the p.p.i. policy are ambiguous and in great difference before the statue of MIA 1745. They exercised a competing jurisdiction on marine insurance cases, and 'neither the Admiralty nor the Common Law Courts had knowledge of the custom of merchants or the practice of insurance',[55] which afforded many opportunities to the dishonest and litigious. The natural result was that during the sixteenth and seventeenth centuries, the law of insurance was in a very backward state. Neither in the court of Admiralty in the earlier part of this period, nor in the courts of common law and equity in the latter parts was any very general or certain rules evolved. At neither period, had there been any legislation, comparable to that of continental state, directed against the practice of cloaking mere wager under policies of insurance.

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[49] Holdsworth, Vol.8, at p.279-281.
[50] Holdsworth, Vol.8, at p.282.
[51] Frederick Martin, the History of Lloyd's and of the Marine Insurance in Great Britain, Macmillan and Co. 1876, at p.24.
[52] P.33, *ibid.*
[53] 6 Geo.1.c.18; 7 Geo.1.c.27; 8 Geo.1.c.15;
[54] Nicholas Legh-Jones QC, MacGillivrary on Insurance Law: Relating to All Risks other than Marine, 9th ed, S&M, 1997.para. 1-15.
[55] P.29, Harold E. Raynes, A History of British Insurance, London, Sir Isaac Pitman & Sons, Ltd. 1948.

We can find an example in the earliest mention of a policy of insurance in England among the records of the court of Admiralty in the pleadings of case of *Ridolphye c. Nunez* (1562). In this case, the defendants of other underwriters except Robert Ridolphye & Co. refused to pay when a loss occurred on the grounds that the insurance was not in the plaintiff's name and that he had no interest in the ship insured. The defending underwriters were ordered to pay by the Court.[56]

In the Courts of common laws, claims for a total loss under wager policies written 'on interest or no interest', 'free from average', and 'without benefit of salvage' are allowed in these courts.[57] Although the reason in the cases is 'when insurance is interest or no interest, the plaintiff has no occasion to prove his interest for the defendant can not controvert that,' [58] actually what Lord Hardwicke said in the case of *Sadlers Co. v Badock*[59] that 'the common law learnt strongly against these policies [interest or no interest] for some time, but being found beneficial to merchants, they winked at it' is the real excuse. '*Modus et conventio vincunt legem*' (Custom and agreement overrule law).

The Court of Chancery, differing from the courts of common law, held that if the insured had no interest, the policy was void.[60] The reason is clearly expressed by the judge in *Goddart v Garratt*:[61] 'Take it that the law is settled, that if a man has no interest, and insures, the insurance is void, although it be expressed in the policy interested or not interested, and the reason the law goes upon, is that these insurances are made for the encouragement of trade, and not that persons unconcerned in trade, nor interested in the ship, should profit by it; and where one would have benefit of the insurance, he must renounce all interest in the ship.'

However beneficial the wager policy might happen to be to merchants, Parliament took a different view. In 1745 an Act[62] was passed to prohibit the making of insurances on British ships—'interest or no interest, or without further proof of interest than the

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[56] B.G. Marsden, Select Pleas of the Admiralty(s.s.) ii 52,53, from Harold E. Raynes, A History of British Insurance, London, Sir Isaac Pitman & Sons, Ltd. 1948 at p.45.
[57] *Depaba v Ludlow* 1 Com. Rep. 360; *Assievedo v Cambridge* (1710) 10 Mod.Rep.77.
[58] *Depaba v Ludlow* 1 com. Rep. 360
[59] (1743) 2 Atk 555, at p.556.
[60] *Goddart v Garratt* (1692) 2 Vern. 269; *Harman v Vanhatton*(1716) 2 Vern. 716; *Le Pypre v Farr* (1716) 2 Vem, 716.
[61] (1692) 2 Vern. 269.
[62] MIA 1745.

policy, or by way of gaming and wagering, or without benefit of salvage to the assurer; and that every such insurance shall be null and void to all intents and purposes.'[63] Since then, wager upon insurance is deemed to be void in marine insurance. However, wager policies on foreign ships and cargoes were still permitted by s.3, MIA 1745.

In the following 100 years, the definition, scope and other important aspects rules of insurable interest in marine insurance was built up by the learned judges in some important cases and finally were codified in MIA 1906 by Chalmers. The current law governing insurable interest is contained from s.4 to s. 15 of the MIA 1906, supplemented by the MIA 1909. From the MIA 1906 and 1909 till today, another 100 years have passed, the rules regarding insurable interest are in progress, important cases being reported. Articles and books being published, not only make reform on English law of marine insurance, but also greatly influence many nations' insurance law, no matter in common law system or in civil law system, including China.

[63] S.1, MIA 1745.

CHAPTER II:
THE MEANING OF INSURABLE INTEREST

2.1. The Classic Definition of Insurable Interest

In English law, to confirm the existence of insurable interest, the Courts must find whether the assured is interested in the subject matter instead of whether the contract is one of gaming or wagering[1] in three steps: first the subject matter of the insurance should be ascertained from the terms of the policy; then the nature of the assured's insurable interest be discovered from all the surrounding circumstances, lastly the court should construct whether the policy 'embraces'[2] the insurable interest.[3] In particular, the question of the nature or definition or meaning of insurable interest, in other word, what kind of relationship between the assured and the subject matter insured is deemed to be valid insurable interest, or what is the standard for the courts to recognize an insurable interest, has been discussed and explained in many important cases since the 18th century and was enacted in relevant sections in MIA 1906.

2.1.1. Moral Certainty

2.1.1.1. *Le Cras v Hughes*

In MIA 1745, there was no definition of insurable interest. Before that, in *Sadlers Co. v Badock*,[4] Lord Hardwicke said 'Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there interest or no interest is almost constantly inserted, and if not inserted, you can not recover unless you prove a property.' This showed that in marine insurance, the property right or

[1] *Feasey v Sun Life Assurance Company of Canada* [2003] Lloyd's Rep. I.R. 637, at para. 58, also see Lord Buckmaster in *Macaura v Northern Assurance Company Ltd and others*[1925] AC 619 at p.631 and Lord Mansfield in *Lowry v Bourdieu* (1780) 1 Dougl 468 at p. 470. However, in some cases, the absence of intention to gamble by the assured in the policy is regarded as one reason to uphold the existence of insurable interest. See Lawrence J in *Boehm* v. *Bell* (1799) 8 Term Rep. 154,162; Lord Ellenborough C.J. in *Robertson v Hamilton*(1811) 14 East 522,532-533; Lord Pearce in *Hepburn v A. Tomlinson* [1966] A.C.451.

[2] See Blackburn J in *Anderson v Morice* (1875) 10 C.P. 609 at 622.

[3] See Waller LJ's summary in *Feasey v Sun Life Assurance Company of Canada* [2003] Lloyd's Rep. I.R. 637, at para 97.

[4] (1743) 2 Atk, 555, at p.556.

ownership upon the subject matter insured by assured[5] was already regarded to be firmly established as the valid insurable interest in the early time.

With the development of marine insurance business, anticipated profits and commissions such as the earning of freight and captured ships were added into the subject matter insured. Obviously, their relationship with the assured can not be regarded as a kind of property right or ownership. Thus in *Le Cras v Hughes*,[6] Lord Mansfield held that sea officers had an insurable interest in the captured ships because: firstly, they did not intend to effect a gaming policy; secondly, their interest was based on a right vested on a relevant Act[7] which is the 'strongest ground'; thirdly, an existing reasonable expectation of benefit was already enough to entitle the assured to insure the safe arrival of ship or cargo whether or not he had a title or right to it. The authority of this case, especially the third reason, was affirmed in *Wolff v Horncastle*,[8] and was also recognised by the *dictum* of seven of the Judges in *Lucena v Craufurd*,[9] but at the same time the judges had doubts as to this authority and described it as 'a case of mere expectation'. It was heavily questioned by individual judges of great authority in many cases.[10] In *Camden v Anderson*,[11] Lord Kenyon commented that 'the right to freight

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[5] See Arnould 16th ed.,at para 333.

[6] (1772) 3 Dougl 91.

[7] French Prize Act, 19 G.3, c.67.

[8] (1798) 1 Bos & Pul. 323. The court held that the plaintiff who, as the general agent of a vendor, accepted the B/L and bills and made insurance on the cargo which the consignee refused, had an insurable interest. Buller J commented: 'I agree that a debt which has no reference to the article insured, and which can not make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest.' p.323. Heath J said: 'the plaintiff had a contingent and reasonable expectation of interest. It was sufficient to entitle them to insure'.p.324.

[9] 'the case of *Le Cras v Hughes* was a case of mere expectation, and the circumstances were not near so strong in favour of the assured as the circumstances of this case. The doctrine there laid down by that expositor of marine law, Lord Mansfield, twenty-four years ago, has been recognised as law in subsequent cases; and if it were now to be decided that the interest of these commissioners was not insurable, it would render unintelligible that doctrine upon which merchants and underwriters have acted for years, and paid and received many thousand pounds. The interest of the captain, in *Le Cras v. Hughes*, was not certain, yet it was all but certain that the property would be given according to the custom of the Crown in such cases. Captain Luttrell had an interest for which he should not be allowed to insure that interest against the perils of the sea. There is a decision of a foreign court of prize very nearly corresponding with *Le Cras v Hughes*, in 2 Valin, article 15, fo. 57. By the French ordinance, future profits were prohibited to be insured. The author, in commenting on the article, says, 'It is not a future profit to insure a prize already taken, although the prize be not acquired with certainty until it be brought within the ports of the realm,' and then cites an adjudication by the Parliament of Aix. At common law a possibility may be transferred, and devised; and of so, why may it not be insured.' (1806) 2 Bos & Pul 269, at 294, 295; per Graham B, Leblanc J, Rooke J, Grose J, Heath J, Macadonald Ch B and Sir James Mansfield Ch.J.

[10] In *Routh v Thompson* (1809) 11 East 428, Lord Ellenborough made the following observations upon the principle case. ' In *Le Cras v. Hughes* which was cited in argument, part of the captors at least, viz.

results from the right of ownership; and if the plaintiffs have no title to the ship they have no interest in the freight'. Lord Eldon also rejected it *Lucena v Craufurd.*[12] Although the authority in *Le Cras v Hughes*[13] had never been overruled by the judgement of any courts, Tindal CJ commented in *Stirling v Vaughan*[14] that 'the doctrine laid down in *Le Cras v Hughes*, if still to be treated as a binding authority, must be considered incapable of being extended, and as confined to cases falling strictly within the same circumstances'.

2.1.1.2. Lawrence J's 'Moral Certainty' in *Lucena v Craufurd*

This case which had lasted in five courts over a period of around eight years is the most important case regarding the topic of insurable interest. Not only establishing the traditional principle on insurable interest in property which required a legal relationship between the assured and the property, the learned judges' opinions on the definition of insurable interest especially the dictum of Lawrence J in answering the fifth question proposed by Lord Eldon on whether the assureds interested in the said ships and goods insured in this case, is still discussed even today.

Lawrence J's definition was based on the learned judge's full analysis of insurance business. In his opinion, the nature of the contract of insurance is that the insurer should secure the assured against suffering 'loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them' 'in consideration of a

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the seamen, were considered as having a vested right in the ship and cargo, as prize, to a certain extent; and the Court decided, that the capture was within the Prize Act, and the captors had therefore a right vested by that Act. It is true that another question (which Lord Mansfield considered as by no means the strongest) was raised—whether possession and the expectation of future benefit, founded on the contingency of a future grant from the Crown, but warranted by universal practice, amounted to an insurable interest? And the Court of K.B. gave a decided opinion that it did. But what fell from Lord Eldon in *Lucena v Craufurd*, 2 New Rep. 323, is materially at variance with the decision of the Court of K.B. on that point. However, if the authority of that case were unquestionable upon both the points decided, yet what was held by the Court of K.B., in respect to a contingency of the nearly certain kind which was then under consideration, would afford no rule to govern a case circumstanced like the present.'

[11] (1794) 5 T.R. 711.

[12] 'That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favour of the expectation'. (1806) 2 Bos & Pul 269, 323.

[13] (1772) 3 Dougl 91.

[14] (1809) 11 East 619.

price paid to him adequate to the risk'[15], thus 'it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who in consequence of such events they would acquire according to the ordinary and probable course of things'[16] and 'that a man must somehow or other be interested in the preservation of the subject-matter exposed to perils, follows from the nature of this contract, when not used as a mode of wager, but as applicable to the purposes for which it was originally introduced; but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature.'[17] He then made the definition on insurable interest:

' A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; and whom it importeth that its condition as to safety or other quality should continue. Interest does not necessarily imply a right to the whole or a part of the thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected as to produce a damage, detriment or prejudice to the person insuring. And where a man is so circumstance with respect to advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have the benefit from its existence, prejudice from destruction'.[18]

The above definition included his interpretation on 'to be interested in a thing', 'interest' 'to be interested in the safety of the thing' and 'to be interested in the preservation of a thing'. He did not agree that 'to be interested in a thing' or 'have insurable interest' was inconsistent with 'to have property right'.[19] In his opinion, the

[15] 'insurance is a contract by which the one party in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. (1806) 2 Bos & Pul 269, 301.
[16] *Ibid*, at p.301.
[17] *Ibid,* at p.302.
[18] *Ibid,* at p.302, 303.
[19] Following the definitions, the learned judges distinguished the difference of property right to the subject matter insured and be interested in it 'The property of a thing and the interest derivable from it may be very different. Of the first the price is generally the measure, but by interest in a thing, every

main reason why insurers refused to pay the loss of the insured subject matter which the assureds did not have property right was not mainly because of the proposed non-existence of insurable interest, but because insurers thought it was difficult to decide whether to pay the loss because the great possibility of the subject matter to cause damage or bring no benefit to the assured without happening of the insured perils, which would make the insurer easily to declare the signed insurance contract to be void. To protect the assured's legitimate interest, Lawrence J commented that marine insurance contract should protect such interest because this was not in breach of the marine insurance law as it had been upheld in relevant cases and concurrent statues and he finally concluded that 'the contract of marine assurance is not from its nature confined to protect the interest arising from the ownership of the subject exposed to the risk insured against'.[20]

Lawrence J's definition 'has enjoyed but uncertain recognition by the courts even to this modern day',[21] and is continuously discussed from the day it was delivered. There are also disagreement and different views on this famous dictum.

In Lord Eldon's speech in the same case, he firstly said that 'the commissioners did not and could have made a good title, even if they had been brought into an English port'.[22] They are only the agents of the King. Then he opposed the opinion that the factual expectation of benefit constituted valid insurable interest with the comments as following:

'Since the 19 Geo.2, it is clear that the insured must have an interest, whatever we understood by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured however to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract

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benefit and advantage arising out of or depending on such a thing may be considered as being comprehended'. *Ibid,* at p.303.

[20] *Ibid,* at p.304.

[21] *Ibid.*

[22] (1806) 2 Bos & Pul 269, 320.

about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party'.[23]

In this dictum, Lord Eldon clearly expressed his definition of insurable interest as relating to assured's ownership of, or right to possess, the insured subject matter. He further commented 'I do not wish that certain decisions which have taken place since the 19 Geo.2 should be now disturbed, but considering the caution with which the Legislature has provided against gambling by insurances upon fanciful property, one should not wish to see the doctrines of those cases carried further, unless they can be shown to be bottomed in principles less exceptionable than they would be found upon closer investigation.'[24] Lord Eldon believed that 'If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure',[25] which would be difficult to avoid a policy being a wager and in breach of the MIA 1745. The learned Lord's opinions can be generalised into following two points: firstly it is difficult to give a clear definition on 'moral certainty' which would cause uncertainty and gambling on insurance, secondly it would bring various insurances on one subject matter and would increase the insurer's liability. Furthermore, it is also thought by scholars that the principle of indemnity in marine insurance prevented the acceptance of expectation of benefit.[26]

Nevertheless, Lawrence J's definition which was expressed earlier in *Barclay* v. *Cousins*[27] meets the nature of insurance and is sometimes regarded as authority in later cases.[28] It is thought to be 'broad enough to occupy the entire field of juridical inquiry into the existence of insurable interest', 'is the simplest expressed, yet most all-inclusive of the insurable interest concepts',[29] and is 'an extremely wide one'.[30] In a Canadian

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[23] (1806) 2 Bos & Pul 269, 321.
[24] (1806) 2 Bos & Pul 269.
[25] *ibid.* 324.
[26] For further comments on moral certainty, please see 4C.2, 4C.4'The elements on Insurable Interest in Marine Insurance law' by Nicholas Legh-Jones QC in Rhidian Thomas, editor, Modern Law of Marine Insurance Vol. 2 LLP 2000.
[27] (1802) 2 East 544.
[28] *Wilson v Jones* (1867) L.R. 2 Ex.139; *The 'Moonacre'* [1992] 2 Lloyd's Rep.503, *Mark Rowlands v Berni Inns Ltd. and others* [1986] 1. K.B. 211; *Glengate-KG Properties v Norwich Union Fire Insurance Society* [1996] 1 Lloyd's Rep. 614; *Constitution Insurance Co. of Canada v Kosmopoulos* (1987) 34 DLR (4th) 208, 216.
[29] Hartnett & Thornton, Insurable Interest in Property, 48 Col. Law Rev 1162 (1948), p1171
[30] Rob Merkin, Colinvaux & Merkin's insurance contract law (loose leaf), S&M, at para A-0397, herein after Merkin's Insurance.

case *Constitution Insurance Co. of Canada v Kosmopoulos*,[31] Wilson J praised Lawrence J's definition as 'provides a readily ascertainable standard.'[32] However, there are different views which focus on the meaning of 'moral certainty'. As in the final part of Lawrence J's opinion, the learned judge disagreed the commissioners had an insurable interest because they did not have benefit on the insured ships and suffer no prejudice by the loss as the assured had no power to control them in pursuance of 35 Geo.3, c.80 before arrival in England and they only acted rather as agents than as trustees or consignees of the ships and cargo insured in the final part of his judgement, which is interpreted as 'the touchstone of moral certainty of benefit is the assured's possession of a legal right to, or power over, the insured property. No other criterion of moral certainty is offered.'[33] This is regarded as 'classic legal theory'[34] and commented as 'the search for a definition with doctrinal integrity has led English law to equate the concept of moral certainty with the existence of a legal or equitable right or obligation'.[35] Walton J discussed this point in *Moran, Galloway & Co. v Uzielli*,[36] and said that 'although an interest to be insurable is not necessarily a right, legal or equitable, in or charge upon or arising out of the ownership of the thing exposed to the risks insured against, and any interest may be insured which is dependent on the safety of the thing exposed to such risks, still it must in all cases at the time of the loss be an interest legal or equitable, and not merely an expectation, however probable'.[37]

After reading Lawrence J's full judgement, we can find that the learned judge did not oppose the notion that the assured must have a property right on the property insured. What he disapproved was the restriction of insurable interest to property right only. In his opinion, lack of insurable interest is only an excuse when the subject matter is not a specific property like the loss of voyage or contingent interest, the real reason is that the

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[31] (1987) 34 DLR (4th) 208, 216.
[32] See *ibid* at p.217-218.
[33] See Nicholas Legh-Jones QC, 'The elements on Insurable Interest in Marine Insurance law' in Rhidian Thomas, editor, Modern Law of Marine Insurance Vol. 2 LLP 2000, at para.4.23.
[34] See David Bailey, 'Insurable Interests', in Mance J, Rob Merkin, General editor, Insurance Disputes, 2nd ed, LLP 2003, at para.1.12.
[35] *Ibid.*
[36] [1905] 2 K.B. 555. The assured, as the agents in the United Kingdom of a foreign ship, was held to have a valid interest in the ship insured as 'on disbursements' because he as creditors of a single-ship company had an interest dependent on the safety of the company's ship and had the legal right under the Admiralty court Act, 1840, to proceed *in rem* for the recovery of the amount owing to them.
[37] *Ibid,* at p562.

insurers think of the 'impossibility of valuing'[38] and the difficulty of deciding the cause of damage. This is inconsistent with the nature of insurance business. To decide the existence of insurable interest, the assured's economic relation with the subject matter is a more important factor, which means that the factual expectation (in Lawrence J's word: moral certainty) of benefit or advantage from the existence of property and prejudice from the loss constituted valid insurable interest. Whether assured is required to have legal right or interest on the subject matter depended on the character of the subject matter the assured insured. If the assured insures directly on a kind of property right or right deprived from property right, the assured is definitely required to have legal right to it. If the assured insures on the benefit from success of sea voyage or the existence of property or loss from the interruption and destruction, he should prove that this benefit or loss to be in 'a very high degree or probability, although not demonstrable as a certainty',[39] 'to be a pecuniary benefit or loss',[40] to 'be in a reasonable sense capable of valuation in money'[41] or can be settled in an agreed sum of money between the assured and insurer, and to be permitted in law. As in *Wilson v Jones*,[42] Blackburn J delivered the leading judgement and gave full approval of Lawrence J's definition of insurable interest and held, by analogy that the claimant, as a shareholder, had a valid insurable interest upon his interest in the insured adventure instead of the cable because the plaintiff was in such position that 'if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss'[43]from the success of the adventure and lost from its failure, although he had no legal right or title in respect of the property. In *Mark Rowlands Ltd. v Berni Inns Ltd and Others*,[44] the defendant was a tenant who rented part of claimant's premise and agreed to pay insurance rent in the leasing covenant. Kerr LJ cited Lawrence J's dictum as authority and held the tenant to have insurable interest in the claimant's whole building policy in his leading judgment because 'the provisions of the lease cannot have the effect that the defendant was thereby deprived of any insurable interest as in the continuing existence of the building or ceased to be exposed to any prejudice if it were destroyed.'[45]

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[38] *Fitzgerald v Pole Willes* (1754) 4 Bro. Parl. Cas. 439, 445-446.
[39] Black's Law Dictionary 6th ed, West Publishing, 1991, at p.1008.
[40] *Macaura v Northern Assurance* [1925] AC 619.
[41] *Simcock v Scottish Imperial* (1902) 10 S.L.T.286.
[42] (1867) LR 2 Ex.139.
[43] *Ibid,* at p.151.
[44] [1986] Q.B. 211.
[45] *Ibid*, at p.227.

2.1.2. Legal Interest

2.1.2.1. Lord Eldon's 'Property Right'

In Lord Eldon's leading speech in *Lucena v Craufurd*,[46] besides delivering the different view on Lawrence J's opinion, he also clearly expressed his definition on insurable interest relating to assured's ownership of, or the right to possess, the insured subject matter, and said:

'··· it be 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'.[47]

This dictum on the definition of insurable interest which repeated Lord Hardwicke's opinion in *Salders Co. v Badock*[48] emphasised the assured's property right to, or right obtained from, the property right in the subject matter insured and showed that the insurable interest only existed if the insured had a legal or equitable right in the subject matter.

Lord Eldon's opinion was applied widely by the courts in determining whether insurable interest existed or not in subsequent cases. In *Seagrave v Union Marine Insurance Co.*,[49] Consignees were held to possess an insurable interest in cargoes awaited by them only if they had a duty under an existing contract to account for their loss in transit by an assured peril, but not if they were 'naked consignees' as the consignee had been. In a case they were required to insure on behalf of their principals, as in *Ebsworth v Alliance Mar Insurance Co.*[50] In *Irving v Richardson*,[51] Mortgagees possessed a charge over the ship as their security, which gave them an interest in it. Even though the charge had not been registered it was regarded as equitable interest and could be insured. Vendors and purchasers of goods possessed an insurable interest depending on whether at the time of loss these were at their risk or they had property in

[46] (1806) 2 Bos & Pul 269.
[47] (1806) 2 Bos & Pul 269, 321.
[48] (1743) 2 Atk. at p.556.
[49] (1866) LR 1 CP 305.
[50] (1873) LR 8 CP 596.
[51] (1831) 2 B & Ad. 193.

them.[52] In *Buchanan v Faber*,[53] the relationship between the assured and the subject matter insured was held to be only an expectation of benefit from the preservation of the property which arose from the possibility that the assured would in future make a contract which, if the goods survived, could confer benefits on him. This mere hope of a future relationship to the property could not be regarded as valid insurable interest because it is difficult to distinguish that relationship from a mere wager.

However, disputes also arose as to Lord Eldon's opinion, In *Wilson v Jones*,[54] The assured, as a shareholder, was held to have a valid insurable interest in his interest in the adventure itself as the subject-matter of the policy instead of the cable. This decision expanded the interest beyond a pure property right. A similar approach was taken with regard to contingent interests. Consistently with the opinion of Lord Eldon in *Lucena v Craufurd*,[55] insured shipowners had no insurable interest in the potential future freights to be earned on carrying prospective cargoes not yet contracted for[56] unless there was a carriage contract in existence entitled them to earn the future benefit and the owners had taken steps and incurred expenses towards earning it, or begun the ship's ballast voyage in the case of charter freight.[57] Nevertheless, by the end of 19th century, it was being suggested that the existence of an engagement to earn freight was sufficient in itself to create an interest in the freight so contracted, regardless of whether the shipowners had taken further steps referable to its performance, but there was no decided authority to support this suggestion.[58] In practice, the development in the insurance of future earnings arose from the recognition of a ship's earning capacity as a separate species of pecuniary interest, thereby dispensing with the precondition of a contract and avoiding the notion that the insurance was on freight.[59]

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[52] *Anderson v Morice* (1876) 1 App.Cas.713; *Colonial Insurance Co. of New Zealand v Adelaide Marine Insurance Co.* (1886) 12 App.Cas.128

[53] (1899) 4 Com. Cas.223.

[54] (1867) LR 2 Ex.139.

[55] 'I do not assert that it is not insurable; but I can not accede to that which has been stated as part of the doctrine upon this subject—that unascertained profits, which may or may not be made, may be insured.' (1806) 2 Bos.& Pul.269, 326.

[56] *Knox v Wood* (1808) 1 Camp 543; *Stockdale v Dunlop* (1840) 6 M.&W.224, 231-232; *Scottish Shire Line v London &Provincial Marine Insurance Co.*[1912] 3 K.B.51, 64-67.

[57] *Barber v Fleming* (1869) LR 5 QB 59. See below S. 6.1.2.2., Chapter VI for further discussion on charter freight.

[58] See Arnould 16th ed, at para 362. See below S. 6.1.2.1., Chapter VI for further discussion.

[59] *Robertson v Petrosnomikos Ltd* [1939] A.C. 371. *Papadimitriou v Henderson* [1939] 64 Ll.L.Rep.345, *The Capricon* [1995] 1 Lloyd's Rep.622. See below S.6.1.3. Chapter VI for further discussion.

In connection with Lord Eldon's obiter comment on loss of profits insurance, that an assured could not insure against loss of anticipated profits to be made from the sale of cargoes which he had still to acquire, this being an expectation upon expectation, he reserved his opinion upon the legitimacy of loss of profits insurances as a whole.[60] On the other hand, there were judicial comments on permitting the assured to recover an indemnity referable to the value of the cargo at its destination which appeared to contradict the standard measure of indemnity for loss of cargo, which was based upon its prime cost at the outset of the adventure, a rule designed to protect insurers from being answerable for fluctuations in market values.[61] The other judges took the view that this type of cover was both usual and fulfilled a legitimate commercial need[62] and it was supported by Lawrence J in an earlier case.[63] Thus, to have an valid policy on anticipated profits from the sale of goods, a valued policy on cargo was issued to include both the cargo value and contracted or expected profit to be made on its resale and was recognized by the courts.[64] Where the policy was unvalued, it was necessary as a part of proof of loss to show that the assured a profit would have been realised if the goods had arrived in safety.[65]

From the above examples, we can find that the definition of insurable interest given by Lord Eldon was too strict to comply with even early insurance practice, so there were some cases not capable of being reconciled with Lord Eldon's narrow view as early as 19th century.

2.1.2.2. Valid Bare Legal Title

To ascertain the existence of a valid insurable interest when the assured has a bare legal relation with the subject matter, commercial convenience is applied as the important principle. This was first expressed in the case *Waters v Monarch Fire & Life Assurance Co.*,[66] the claimant, a wharfinger, was held to have an insurable interest in goods 'in trust or on commission therein' in his warehouse. Lord Campbell first explained the

[60] (1806)2 Bos. & Pul.269, 321.
[61] *Lewis v Rucker* (1761) 2 Burr 1167; *Usher v Noble* (1812) 12 East 639.
[62] *Lucena v. Craufurd* (1806) 2 Bos.& Pul. 269, 313.
[63] *Barclay v Cousins*(1802) 2 East 544
[64] *M'Swiney v Royal Exchange Assurance* (1849) 14 Q.B. 646. *Stockdale v Dunlop* (1840) 6 M&W 224.
[65] *Eyre v Glover* (1812) 16 East 218.
[66] (1856) 5 E.&B. 870.

meaning of 'goods in trust 'in the policy and held that it means 'goods with which the assured was entrusted; not goods held in trust in the strict technical sense (equitable law)'. Then he said: 'They were so entrusted with the goods deposited on their wharfs; I cannot doubt the policy was intended to protect such goods; and it would be very inconvenient if wharfingers could not protect such goods by a floating policy. Then, this being the meaning of the policy, is there anything illegal in it? It cannot now be disputed that it would be legal at common law, and Mr. Lush properly admits that it is not prohibited by the terms of any statute. And I think that a person entrusted with goods can insure them without orders from the owner, and even without informing him that there was such a policy. It would be most inconvenient in business if a wharfinger could not, at his own cost, keep up a floating policy for the benefit of all who might become his customers. The last point that arises is, to what extent does the policy protect those goods. The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good 'all such damage and loss as may happen by fire to the property hereinbefore mentioned.' That is a valid contract, and, as the property is wholly destroyed, the value of the whole must be good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest.'[67]

Although this judgment was regarded as 'decided purely on the construction of the particular policies and turn on the express conditions contained in the policies' without any agreement on those three reasons in *North British & Mercantile Insurance Co. v Moffat*,[68] the House of Lord supported and confirmed Lord Campell C.J.'s dictum in *Hepburn v Thomlinson*,[69] In this case, Lord Pearce further clarified and confirmed that the assured, as a bailee or mortgagee or others in analogous positions, possessed insurable interest in the whole property even though he did not have personal interest, or had at best a part interest in the ownership of goods, because 'commercial convenience makes it reasonable for him to insure the whole property in the goods and to recover the whole property in the goods and recover the whole of the money, holding the balance in trust for those whose loss it represents. In such a case he is not gaming

[67] *Ibid,* p.881. This judgement was approved in later case of *London & North Western Ry. v Glyn*(1859), 1 El.&El. 652.
[68] L.R.7 C.P. 25, 30-31.
[69] [1966] A.C. 451.

and there is no reason why should not so act'[70] 'to hold otherwise would be commercially inconvenient and would have no justification in common sense'.[71] In these cases, commercial convenience was applied as an important principle to decide that a person with bare legal title (like a bailee) has insurable interest in the subject matter, even though he may not be prejudiced from the damaging of the subject matter insured and may be required to hold the proceeds on trust for the persons beneficially interested.

2.1.2.3. Legal or Equitable Relation in MIA 1906

The statutory definition of insurable interest was enacted in s. 5 MIA 1906:
'(1) Subject to the provision of this Act, every person has an insurable interest who is interested in a marine adventure.
(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therin, in consequence of which he 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.'

From the above definition, we can find that in accordance with MIA 1906, as long as an assured is interested in a marine adventure, he has an insurable interest in the subject matter insured. The meaning of 'be interested in a marine adventure' is explained in s.5 (2) and is interpreted by Mr. A.D. Colman Q.C. in the The '*Moonacre*',[72] as following:
'This does not provide an exhaustive definition, but it does identify three characteristics which the presence of an insurable interest would normally require: (a) The assured may benefit by the safety or due arrival of insurable property or be prejudiced by its loss or damage or detention or in respect of which he may incur liability. (b) The assured stands in a legal or equitable relation to the adventure or to any insurable property at risk in such adventure.' (c) The benefit, prejudice or incurring of liability referred to at (a) must arise in consequence of the legal or equitable relation referred to at (b).'
From the above illustration, we can say that to be interested in marine adventure, two

[70] *Ibid*, p.477.
[71] *Ibid*, p.481.
[72] [1992] 2 Lloyd's Rep.501 p.510.

co-existing conditions must be followed: the relationship between the subject matter and assured is recognized in law,[73] and the subject-matter insured will bring benefit to the assured if in safety or arrival in time and will cause damage, loss or liability to the assured if not in safety or arrival late.[74] Compared with the common explanation[75] of 'be interested in', s.5(2) emphasises more on the 'legal or equitable relation' which is regarded as the fundamental requirement. More specifically, the commonest and clearest basis is the property right based on legal or equitable title of the assured in the insured property, like the owner of ships,[76] goods.[77] It also embraces the insurable interest of one having a specific lien on property like mortgagee[78] and pledgee,[79] and the possible legal liability of the assured to the subject-matter.[80] On the other hand, an unsecured creditor has no insurable interest in his debtor's property,[81] nor does a shareholder in the company's property. The leading example is *Macaura v Northern Assurance*[82] in the House of Lords. The claimant who claimed for fire insurance payment on the damaged timber which was on his estate and was sold to a company in return to him for all shares of this company but not fully paid, was refused by the House of Lords because he had no legal or equitable interest to any item of property owned by the company either as sole shareholder or creditor although 'he is entitled to a share in

[73] "'Equitable' refers to those rights and interests, generally in property, developed in the Courts of Chancery as supplementary to legal rights, before the unification of English courts and Jurisdictions by the Judicature Acts 1873 to 1875." Robert Grime, Shipping Law, 2 ed, S&M 1991, at p.364.

[74] Professor Clarke generalises into two principles: 'first, a relation in fact to the subject-matter of the insurance giving rising to an economic interest and, second, a 'legal or equitable relation' to the subject-matter insured.' at p.139 para 4-3, Malcolm A. Clarke, The Law of Insurance Contracts 4th ed, S&M, 2004.

[75] 'A person is said to have an interest in a thing when he has rights, advantages, duties, liabilities, losses or the like, connected with it, whether present or future, ascertained or potential, provided that the connection, and in the case of potential rights and duties, the possibility, is not too remote. The question of remoteness depends upon the purpose which the interest is to serve.' See Jowitt's Dictionary of English Law, S&M, 1977, at p955.

[76] *Piper v Royal Exchange Assurance* (1932) 44 Ll.L Rep. 103, KBD. *cf* Chapter IV for further discussion on insurable interest in ship.

[77] *Anderson v Morice* (1875) LR 10 CP; *Mackenzie v Whitworth* (1875) 1 Ex D 36. See Chapter V for further discussion on insurable interest in cargo.

[78] *Samuel v Dumas*(1923-24) 17 Ll.L. Rep. See below S.4.2.Chapter IV, on ship's mortgagee's insurable interest.

[79] See below S.5.2.1. Chapter V on pledgee's insurable interest.

[80] See below Chapter VII on discussion of insurable interest in marine liability.

[81] *cf* Walton J's dictum in *Moran, Galloway &Co. v Uzielli* [1905] 2 K.B. 555, at p562. However, the creditor can insure against the insolvency of his debtor: *Waterkeyn v Eagle Star & British Dominions Insurance Co. Ltd.* (1920) 5 Ll.L.Rep. 42, and can insure the life of his debtor: *Godsall v Boldero* 9 East,72.

[82] [1925] AC 619. See below S.4.3, Chapter IV for further discussion.

the distribution of the surplus assets when the company is wound up',[83] which means a shareholder has an at most insurable interest in the profits to be made by the company.[84]

The principle of 'property right' stated by Lord Eldon was codified in MIA 1906 s.5(2) as 'legal or equitable relation and reaffirmed in *Macaura v Northern Assurance*[85] in House of Lords, and it became clear that someone had an insurable interest in property only if and to the extent that they had a proprietary or contractual interest in English law. Lawrence J's 'moral certainty' in *Lucena v Craufurd*[86] followed by later cases like *Wilson v Jones*[87] and *Moran, Galloway &Co. v Uzielli*[88] which raised the question of whether the existence of factual expectation of benefit (moral certainty) as a valid insurable interest, was not clearly confirmed in this Act[89] and was only treated as an exception to insurance of profit on property under specific circumstances with clear expression in the policy, as was the possibility of insuring a bare legal title as recognised in *Waters v monarch Fire & Life Assurance Co.*[90]

2.2. The Development in Recent Cases

2.2.1. Relief of the Requirement of Legal Interest

In *Polurrian SS Co. v Young*,[91] Warrington J commented that if the law in MIA 1906 has altered pre-existing law in plain and unambiguous language, the Court's duty is to decide in accordance with MIA 1906, and Viscount Cave also said in *Samuel v Dumas*:[92] 'It is, of course, legitimate to refer to previous cases to help in the explanation of anything left in doubt by the code, but, if the code is clear, reference to previous authorities is irrelevant.' In recent years especially after 1980's, the legal or equitable

[83] *ibid*, at p.626-627 per Lord Buckmaster.
[84] *Wilson v Jones* (1867) L.R. 2 Ex. 139.
[85] [1925] AC 619.
[86] (1806) 2 Bos & Pul 269 302,303
[87] (1867) LR 2 Ex.139.
[88] [1905] 2 K.B. 555.
[89] Regarding the scholar's opinion, Professor Bennett thinks it is occasionally recognised in English law on the absence of a vested legal or equitable interest in the subject matter insured, See Howard N. Bennett 'The Law of Marine Insurance', Clarendon Press, 1996, at p.17. Nicholas Legh-Jones QC opposes it to be a valid insurable interest, see Nicholas Legh-Jones QC, The Elements on Insurable Interest in Marine Insurance law', in Rhidian Thomas, editor, Modern Marine Insurance law Vol. 2 LLP 2002, at para. 4C4.
[90] (1856) 5 E.&B. 870
[91] [1915] 1 K.B. 922, p.936.
[92] [1924] A.C. 431, p.451.

relation stated in s. 5, MIA 1906 has been considered 'to be unduly technical and too inflexible a rule'.[93] We can find that in recent cases the courts have adopted decisions not consistent with the wording in MIA 1906,[94] or have extended the scope of 'legal and equitable relation' to cover not only legal or equitable interest.[95] The narrow view has been expressly rejected in Canada[96] and in this jurisdiction it has been said that 'it is clear that English law is, on occasion, prepared to recognise an insurable interest even in the absence of vested legal or equitable interest in the subject matter insured'.[97] Considering the important role of precedent in English legal system and that the MIA 1906 was only a codification of over 2,000 reported insurance cases from 18th century without any reforming measures,[98] in today's English legal practice, to decide the existence of insurable interest, the learned judges have begun to relax the rule of 'legal or equitable relation' to decide the validity of insurable interest.

In *The Moonacre*,[99] Colman Q.C. decided that the assured, Mr. Sharp, who bought a motor yacht but arranged Roarer Investments to be the registered owner for tax reason, had insurable interest upon the yacht insured in his name because 'Mr. Sharp by reason of the powers of attorney stood in a legal relationship to the vessel in consequence of which he would benefit from the preservation of the vessel and, if the vessel were lost or damaged, he would suffer loss of a valuable benefit.'[100] The learned judge looked back to the purpose of the requirement of insurable interest from 18th century and commented that the purpose behind the requirement of insurable interest was to avoid

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[93] See David Bailey, 'Insurable Interests', in Mance J, Rob Merkin, General editor, Insurance Disputes, 2nd edn, LLP 2003, at para.1.14.

[94] One reason is because that the definition in s.5 is not exhaustive. The effect of the words 'in particular' in s.5(2) is to make that sub-section merely illustrative of the broad statement in s.5(1), and thereby to create the impression that an insurable interest can be supported in unspecified circumstances lying without s.5(2). On the other hand, the scope of legal title defined in MIA 1906 was not as specific as that in Lord Eldon's speech because the word 'relation' provided opportunity for judges to make expanded interpretation in individual cases.

[95] The '*Moonacre*' [1992] 2 Lloyd's Rep.501, at p.510.

[96] in a Canadian case *Constitution Insurance Co. of Canada v Kosmopoulos* (1987) 34 DLR (4th) 208, 216., Wilson J criticised Lord Eldon's two reasons and praised Lawrence J's definition as 'provides a readily ascertainable standard.' The learned judge cited scholar's opinion on the first reason which commented that the ownership or property right also provides the illusion of great certainty. To the second reason, Wilson J thought it was the insurer's duty to decide whether to accept more policies on one subject matter and calculate the premium and final payment instead of the courts. For further analysis of this case, see below S.4.3, Chapter IV.

[97] See Howard, Bennett, The Law of Marine Insurance, Clarendon Press, 1996, at p.17.

[98] It 'is a snap shot of the law as it was in 1906. Unresolved issues remained unresolved, and no changes to the law were made, at least intentionally'. R. Merkin 'Doubts about Insurance Code' JBL 2002 Nov. 587-604, at p.596.

[99] [1992] 2 Lloyd's Rep 501.

[100] *Ibid,* at p.513.

wager by way of insurance. In his opinion, 'the essential question to be investigated in those cases which since 1745 have been concerned to test the existence of an insurable interest has been whether the relationship between the assured and the subject matter of the insurance was sufficiently close to justify his being paid in the event of its loss or damage, having regard to the fact that, if there were no or no sufficiently close relationship, the contract would be a wagering contract'. 'if the outcome of the future uncertain event upon the happening of which one party is entitled to be paid by the other would or might but for the contract cause loss or damage to the payee, then one essential characteristic of a wagering contract has gone and there is nothing in the Gaming Act 1845 or in subsequent betting and gaming legislation which renders that contract void and unenforceable. Neither the words of any statue since 1845 nor any judicial pronouncement suggest that there should be a category of contracts of insurance which were not wagering contracts but which on account of the absence of an "insurable interest" should not be enforceable. Accordingly, in approaching the construction and application of s.5 of the Marine Insurance Act it is, in my judgement, right to proceed on the assumption that, provided the assured has sufficient interest in the subject matter of the insurance to prevent his contract being a wagering contract, he is entitled to enforce that contract.'[101] He then exemplified the scope of 'legal and equitable relation' in s.5(2) MIA 1906 with the example of *Buchanan v Faber*[102] and said 'Once one can establish the existence at the time of loss of rights enjoyed by the assured in respect of the insured property and that if it is lost or damaged such rights will or may be less beneficial, an insurable interest exists, regardless of the precise nature of the rights or the means by which they have been acquired'.[103]

In a later case *National Oilwell (UK) Ltd v Davy Offshore Ltd.*,[104] Colman J (as he had now become) further commented that 'in order to establish a sufficient relationship to the property in question,' 'it might in some cases be unnecessary to establish that the assured had any proprietary legal or equitable interest in the goods',[105] which was also approved by Waller LJ, being an expert in insurance law for over 30 years, in the case

[101] *Ibid,* at p.510.
[102] (1899) 4 Com. Cas.223
[103] [1992] 2 Lloyd's Rep. 511.
[104] [1993] 2 Lloyd's Rep. 582.
[105] *Ibid,* at p.612.

of *Feasey v Sun Life Assurance Company of Canada*[106] in Court of Appeal. He agreed that at present the 'legal or equitable' interest in the property is not strictly required in property insurance.

There are three reasons why the requirement of legal title to the subject matter has been relaxed by the Courts. Firstly, for commercial interest or management convenience or tax avoidance, within the scope of lawful permission, the true owners try to set up paper companies as the legal owner of the subject matter but have erred in taking out insurance in the owners' own name: this was what occurred in *Macaura*, as distinguished in *The Moonacre.*

Secondly, in order to minimize the cost of premium, claims and litigation expense, insurers have produced new insurance products. These kinds of insurance products mix different kinds of traditional insurance lines together. It is difficult to decide the existence of insurable interest by the standard of strict requirement of legal title.

Thirdly, in a legal dispute, the non-existence of insurable interest more and more becomes a kind of tool for the insurer as a technical defence to refuse to pay the claim. This was the point in *Feasey,* where the real complaint by the retrocessionares was not want of insurable interest by the reinsured but rather the fact that the retrocessionares' underwriting agent had apparently acted without authority in binding the retrocessionares. Thus, to protect the insured's legal benefit, the Courts have become more and more favourable towards the insured and the relaxation of strict legal requirement is gradually accepted popularly by the learned judges. 'Insurance business is no longer conducted in the coffee shop. It is now a massive market and, for contracts between commercial men to be respected, the law should march with the times.'[107]

[106] [2003] Lloyd's Rep. I.R. 637.
[107] Ward LJ's comment in *Feasey v Sunlife Assurance Company of Canada* [2003] Lloyd's Rep. I.R. 637, at para.146.

2.2.2. Wider Application of Moral Certainty

2.2.2.1. Further Application of Commercial Convenience

The principle of commercial convenience applied in *Waters v. Monarch Fire & Life Assurance Co.*, [108] and *Hepburn v Thomlinson*[109] was referred to by De Grandpre J in the Supreme Court of Canada in *Commonwealth Construction Co. Ltd v Imperial Oil Ltd.*[110] An analogy was drawn with these cases and the learned judge held that Commonwealth Construction, a sub-contractor employed by the general contractor Imperial Oil Ltd, had a pervasive insurable interest in the whole of the construction work under a 'Course of Construction Policy' in the name of Imperial, together with their contractors and sub-contractors including Commonwealth. One reason was because the sub-contractor also had a special relationship with the construction works involving the possibility of liability to the safety of each other's property and the whole construction, which originated from the construction contract with the general contractor, just like the bailee of goods. A further reason was the complicated situation in the construction site with the existence of general contractor, sub-contractors, their own properties and the property of the construction: it would be very difficult to recognise whose negligence and cause commercial inconvenience to bring litigation if any damage occurred by reason of the negligence of any one person working on the site. With insurable interest recognized in one insurance policy covering of all parties concerned in the construction site on the basis of the above possibility, there would be little point in the parties bring proceedings against each other.[111]

De Grandpre J's opinion in this Canadian case was later applied by Lloyd J in *Petrofina (U.K.) Ltd v Magnaload Ltd.*[112] He concluded that there were three reasons why a bailee was entitled to insurable interest on the full value of the goods bailed from above

[108] (1856) 5 E.& B. 870 880-881.
[109] [1966] A.C.451.
[110] (1977) 69 D.L.R.(3d) 558.
[111] That of course leaves open the possibility of the insurer exercising subrogation rights against the wrongdoer in the name of the indemnified party, but the English cases now make it clear that there are no subrogation rights against a co-assured. See below S. 8.3.2. Chapter VIII. for further discussion.
[112] [1984] Q.B. 27.

mentioned cases:[113] firstly there was the historical reason that the bailee could always sue a wrongdoer in trover; secondly was that the bailee has responsibility for the goods even if he excluded his legal liability for loss or damage to the goods by contract in particular circumstances; thirdly it was always regarded as highly convenient from a commercial point of view to arrange such insurance. After analysing the present case in accordance with the principles listed above, especially the consideration of commercial convenience, the learned judge held that 'a head contractor ought to be insure the entire contract works in his own name and the name of all his sub-contractors, just like a bailee or mortgagee, and that a sub-contractor ought to be able to recover the whole of the loss insured, holding the excess over his own interest in trust for the others.'[114] Lloyd J also accepted the *Commonwealth Construction Co.* case as authority and said it 'is, in my view, indistinguishable from the present case, and is high persuasive authority, even if I had thought it wrongly decided, which I do not, I should have hesitated long before declining to follow it.'[115]

The case of *Petrofina* was approved in the Court of Appeal in *Mark Rowlands Ltd v Berni Inns Ltd*[116] and was applied in marine insurance cases[117] *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd*[118] and *National Oilwell (UK) Ltd v Davy Offshore Ltd.*[119] In these two cases, Colman J held that the sub-contractor, as co-assured under a multi-participant marine package policy on the full property of the construction project, has insurable interest in the entire project during the construction and commissioning stages. The important reason is this kind of insurance is highly convenient from a commercial point of view.[120] Richard Siberry QC also said in *O'Kane v Jones and others (The 'Martin P')* that '(2) Commercial convenience can be a relevant factor in determining the existence of an insurable interest'.[121]

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[113] *Waters v monarch Fire & Life Assurance Co.* (1856) 5 E.&B. 870; *Hepburn v Thomlinson* [1966] A.C. 451.
[114] *Ibid*, p136.
[115] *Ibid*, p 138.
[116] [1986] 1 QB 211.
[117] See also *State of the Netherlands v Youel* [1997] 2 Lloyd's Rep.440. 449. *Hopewell Project Management Ltd v Ewbank Preece Ltd* [1998] 1 Lloyd's Rep.448. *Deepak Fertilisers v ICI Chemical* [1999] 1 Lloyd's LR 387.
[118] [1991] 2 Lloyd's Rep. 288.
[119] [1993] 2 Lloyd's Rep. 582.
[120] *National Oil Wells (UK) Ltd v Davy Offshore Ltd.* [1993] 2 Lloyd's Rep. 582,609-610
[121] [2004] 1 Lloyd's Rep. 389, at para 154.

From the above illustration, we can find that commercial convenience has been expanded as an important factor to decide the existence of insurable interest not only on the condition that the assured are bailee and the subject matter are the full value of goods bailed, but also on the condition that the assured are sub-contractors or suppliers and the subject matter is the whole property under construction by the sub-contractors or suppliers who have possible legal liability or responsibility on the safety of the property[122] or would suffer disadvantage upon the damage to or destruction of the insured property without considering their strict legal or equitable relation to the insured property.

The fundamental purpose of underwriting these insurance lines is business advantage because this can reduce extra paperwork, minimize claims and cross-claims in the event of damage or accident, and save the cost on insurance premium to be more competitive on business.[123] Besides, the policy must concurrently satisfy two conditions: first, the policy must exclude the possibility of wagering; second, the construction of the terms in the policy must clearly reveal that the insurance contract is to insure the whole goods or property instead of personal liability. The reason why the courts agreed the principle of commercial convenience is mainly on the fundamental principle of public policy. Before brought to the courts, the new insurance lines in the above cases had been widely used and accepted in the insurance commercial practice for a long period, and the courts could not simply decide to reject them on lack of insurable interest at least without consideration of wider public interest considerations.

Furthermore, *Waters v Monarch Fire & Life Assurance Co*[124] and *Hepburn v Thomlinson*[125] and other relevant cases on warehousemen's insurable interest have recently been considered and upheld by the Court of Appeal in *Ramco (UK) Ltd v International Insurance Company of Hanover Ltd*,[126] albeit with some regret. In his leading judgement, Waller LJ upheld the judgement of Andrew Smith J in the first instance, who held that the words 'held by the insured in trust for which the insured is responsible' in the all-risks insurance policy restricts the insurers' liability to those

[122] However, there is dissidence on this point in late cases. See further discussion in S.8.3.3. Chapter VIII.
[123] See Lloyd J in *Petrofina (U.K.) Ltd v Maagnaload Ltd* [1984] Q.B. 127 at p.136.
[124] (1856) 5 E.&B. 870
[125] [1966] A.C. 451.
[126] [2004] Lloyd's Rep. I.R. 606.

goods damaged in a way which imposes liability on the bailee, but not otherwise. the learned judge applied the ratio in *North British & Mercantile Insurance Co. v Moffat*,[127] commented that 'the principles established by *Waters* were high convenient principles, but constituted an exception to the equally ancient common law principle that normally a claimant cannot sue for loss which he has not himself suffered;' and 'enabling a party to a contract to recover for a loss he has not suffered or enabling a goods owner to recover is still the exception rather than the rule; the ''exception'' established in *Waters* should not itself be extended beyond its proper limits without good reason and no such reason existed in the present case.'[128] He also criticized the views expressed by Lloyd J in *Petrofina (U.K.) Ltd v Magnaload Ltd*[129] and said 'The difficulty with placing reliance on Lloyd J's observations is that he too was expressing a view when neither *Moffatt* nor *Engel* nor indeed the judgement of Roskill J in *Tomlinson v Hepburn* had been cited to him.'[130] From the above we can find that the court is now in favour to restrict the ratio in relevant cases on warehousemen's insurable interest as exception on the construction of specific insurance policy instead of taking as general principles. We have to see what the influence will be on the cases on sub-contractor's insurable interest.

2.2.2.2. Application of Moral Certainty to New Insurance Lines

With the loose requirement of 'legal or equitable relation', the principle of 'moral certainty' has gradually been more widely accepted and developed in the courts in England 'to meet the modern demands of commerce and the convenience of composite and joint insurance'[131] and other new sorts of insurance products.

Starting from the case of *Petrofina (UK) Ltd v Magnaload Ltd*,[132] Lloyd J held that this was property insurance instead of liability line and that the assured as sub-contractor, who was analogous to that of bailee, had an insurable interest in the main contract

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[127] L.R.7 C.P. 25, 30-31.
[128] *Ibid*, para.32.
[129] [1984] Q.B. 127.
[130] [2004] 2 Lloyd's Rep. I.R. 595, at para. 30.
[131] Para.1.14, David Bailey, *'Insurable Interests'*, in Mance J, Rob Merkin, General editor, Insurance Disputes, 2nd ed, LLP 2003.
[132] [1984] QB 127.

works and was entitled to insure the entire contract works to 'recover the full whole loss insured, holding the excess cover over his own his interest in trust for the others'.[133] This was not prohibited in common law and statue, although the assured was neither the owner nor bailee of the works. More importantly, the judgement is also based on the fact that the assured had a special relationship to the property insured because he had very high and real probability of suffering economic loss on the damage of the single property or the whole construction on the complex site although this was not arising from his legal right but from the potential liability to all these properties on the site.

A similar approach was followed in *Stone Vickers Ltd v Davy Offshore Ltd*,[134] the claimant who supplied the propeller and ancillary equipment to a ship in building in defendant's shipyard brought claim because the defendant refused to make payment. The defendant asserted that the propeller was defective and had to be modified, and counterclaimed for the costs of the modification and damages for consequential losses to the ship. These losses had been paid by insurers under a British Shipbuilders Marine package Policy[135] so that the counterclaim was one brought under subrogation rights. Mr Colman Q.C. cited the cases of *Commonwealth Construction Co. Ltd v Imperial Oil Ltd*[136] and *Petrofina (UK) Ltd. v Magnaload Ltd*[137] as authority and made analogy to this case and held that the claimant, as co-assured sub-contractor and supplier, had a sufficient insurable interest in the whole of the contract works because he might face legal liability and pecuniary loss, in that the installed propeller may be 'materially adversely affected by loss of or damage to the vessel or other works by reason of the incidence of any of the perils insured against by the policy in question',[138] although the supplier did not have legal ownership to the installed propeller and building vessel and they were not in his custody or control.

In another marine insurance case *National Oilwell (UK) Ltd v Davy Offshore Ltd*,[139] the claimant, a supplier of components to the defendant's constructing floating oil

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[133] *Petrofina (UK) Ltd v Magnaload Ltd* [1984] QB 127, 136.
[134] [1991] 2 Lloyd's Rep 288. It was reversed in Court of Appeal on the ground that the plaintiff was not co-assured in the insurance policy without any comments on insurable interest. [1992] 2 Lloyd's Rep.578.
[135] [1991] 2 Lloyd's Rep 288, 288.
[136] (1977) 69 D.L.R. (3d) 558.
[137] [1984] 1 Q.B. 127.
[138] [1991] 2 Lloyd's Rep 288, 301
[139] [1993] 2 Lloyd's Rep.582.

production facility, was held to be a co-assured for the full scope of property insurance of Davy's Builders All Risks policy and to have insurable interest in any insured property. The learned judge Colman J. upheld the *ratio* in the above two cases and reaffirmed that an insurable interest could be based on 'potential liability arising from the existence of a contract between the assured and the owner of property or from the assured's proximate physical relationship to the property in question'.[140] From the above analysis, we can find that in composite insurance, the existence of a valid insurable interest derived from the co-assured's potential liability for causing damage to the insured property despite that he has not any determined legal right or liability to the subject matter insured has been approved in the lower Courts. The decisions are based on the principle of commercial convenience to secure the validity of long established insurance contracts and to protect the relevant parties' legal expectations. Furthermore, the economic effect on the sub-contractor as co-assured's of the preservation or destruction of the insured property during the course of its construction because its loss or destruction may prevent the contractor from working and earning its remuneration plays a dominant role on the deciding of insurable interest.

In the following case *O'Kane v. Jones*,[141] Richard Siberry QC rationalised the ratio in the above cases and others in relevant cases and listed into five points:

'(1) Ownership or possession (or the right to possession) of the property insured is not a necessary requirement of an insurable interest therein;

(2) Commercial convenience can be a relevant factor in determining the existence of an insurable interest;

(3) A person exposed to liability in respect of the custody or care of property may, as an alternative to taking out liability insurance to protect his exposure, insure the property itself, and in the event of loss or damage thereto by a peril insured against may recover in respect thereof up to the full sum insured, even if that exceeds the amount for which he is liable and even if the loss or damage has occurred without any actionable fault on his part. If and to the extent that he has suffered no personal loss he will be liable to account to the owner of the goods who has suffered the loss;

(4) A legal right to the use of goods, the benefit of which would be lost by their damage or destruction, may be sufficient to constitute an insurable interest therein;

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[140] *Ibid* at p.611.

[141] [2005] Lloyd's Rep. I.R. 174.

(5) A person may also have an insurable interest in property if loss of or damage to that property would deprive him of the opportunity of carrying out work in relation to that property and being remunerated for such work.'[142]

It is quite clear that the lower courts in England are in favour of the expansion of definition of insurable interest to comply with the demand of highly developed insurance business with indistinguishable subject matters in the modern complicated insurance products.

Nevertheless, the reactions from the Court of Appeal are not necessarily in full accord. In *Glengate-KG Properties Ltd v Norwich Union fire Insurance Society Ltd*,[143] Neill LJ recognised that the decisions as the above cases of *Petrofina* and *National Oilwell* put more weight on commercial interests and commented that they were an escape from the normal rules and should be closely defined. In *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals and Polymers Ltd*,[144] the claimants entered into an agreement with Davy McKee (London) Ltd, who were also a party to the action, for the provision of the ICI technology and know-how required for the construction of a substantial methanol plant near Bombay. The contract contained a co-insurance clause which provided that Davy were to be named as co-insured in all policies of insurance effected by Deepak in respect of the plant. A year after the completion of the plant, the methanol converter exploded and production ceased. Deepak sought to recover damages from Davy for negligence. Davy argued that as a nominated co-insured sub-contractor under the all risks policy, the claim against them was properly one of subrogation founded on a contract of insurance the benefit of which flowed to Davy, and was not, therefore, sustainable. In response, Deepak argued that Davy could not be regarded as having any insurable interest in the plant at the tie of the explosion. Rix J, at first instance, concluded that Davy did have an insurable interest in the plant, arsing from their potential liability in the case of damage caused by their negligence. The Court of Appeal reversed this finding of Rix J. In Stuart-Smith LJ's leading judgement, it was stated that the reason for Davy's undoubted insurable interest in the plant during its construction was because any damage to or destruction of the plant by any of the all

[142] *ibid* see p.421, at para.154.
[143] [1996] Lloyd's Rep.614.
[144] [1999] 1 Lloyd's Rep.387.

risks might affect Davy's ability to perform their contract and obtain remuneration even if they were not liable to that damage. Any breach of contract or damage to the plant due to their fault should be cover in a normal liability or professional indemnity policy which were included in the then 'Marine-cum-Erection Policy'.[145] However, after the completion of the plant, Davy would suffer disadvantage only on the condition that they were in breach of the contract and were liable for that damage.' This decision reveals the Court of Appeal's clear intention to restrict the wider application of moral certainty into a limited circumstance on specific policies which include potential liability for causing damage to the contractual works the property insurance.

The case of *Glengate-KG Properties Ltd v Norwich Union fire Insurance Society Ltd*[146] also evidenced the persisting different views on Lawrence J's broader notion of interest and its tension between the rule of 'legal or equitable relation.' On the question of whether a property developer had an sufficient insurable interest in a set of architect's plans which were located in the property being developed but owned by the architects and the developers had an implied licence to use them, with the contractual obligation to bear the cost of redrawing them should they be destroyed by a peril beyond the architect's control and insure the plans against material damage although it was common ground that the developers had an interest in the continued preservation of the plans which would support an insurance against the risk of additional expense or lost profits consequential upon their destruction. Relying on and applying the 'legal or equitable relation', Auld LJ held and reasoned that an insured must normally have a proprietary or contractual interest in the property to insure against the cost of repair or reinstatement. Neill LJ reached the same conclusion as Auld LJ but for different reasons. Neill LJ considered that, as a matter of construction, the reference to 'interest' in the material damage proviso meant a personal interest as opposed to an insurable interest in the broad sense used by Lawrence J. Sir Iain Glidewell also referred to the definition given by Lawrence J as approved by the Court of Appeal in *Mark Rowlands* and concluded that, on the facts of the case, Glengate had an interest in the continued existence of the drawings and thus an insurable interest for the purpose of material damage cover. Although on the issue of principle to be referred, Neill LJ's views are

[145] *Iibid,* 399-400.
[146] [1996] Lloyd's Rep.614.

more closely aligned to those of Sir Iain Glidewell than of Auld LJ, the conclusions reached were for different reasons.

The decisions in the above two cases suggested that the higher Court wanted to restrict Lawrence J's 'moral certainty' only to some new emerging insurance products and to retain the traditional definition of 'legal or equitable relation' to traditional property or liability insurance. However, the case of *Feasey v Sun Life Assurance Company of Canada*[147] made a big leap forward in the Court of Appeal itself. This was a reinsurance cover in the form of accident insurance. Steamship, as a mutual marine insurer, reinsured its liabilities originating from its insurance contract with its members against their liability in damages for death or personal injury of employees and other person onboard members' vessels, in the form of valued personal accident policy designed by the reinsurer, a Lloyds' underwriter Feasey, who then made retrocession with Sun Life and Phoenix. The retrocessionaires later denied that the Club had an insurable interest in the health of the employees of its members and asserted that the contracts of reinsurance and retrocession were therefore void in accordance with the LAA 1774. At first instance Langley J held the policy valid because the policy was not a gaming policy in the guise of insurance which was prohibited by the LAA 1774 and the policies in the form of life assurance as opposed to insurance of the Club liability should be valid, also applied the basic principles of contractual intention and consideration in contract law because as 'established and experienced professionals', the insurers should bear the risk from the assured after received the agreed premium instead of non-performance with the defence of lack of insurable interest without any legal exclusion.[148]

Same conclusion was arrived by Waller LJ, in his judgement delivered in Court of Appeal, although he rejected Langley J's test based on the question whether there was any gambling involved by following a different route. His view was that section 1 of the

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[147] [2002] Lloyd's Rep. I.R. 807. (QBD Commercial Court), [2003] Lloyd's Rep. I.R. 637.(CA)

[148] See para.182. *Feasey v Sun Life Assurance Company of Canada* [2002] Lloyd's Rep. I.R. 807. See Brett MR in *Stock v Inglis* (1883) L.R. 12 Q.B.D. 564 at 571: 'In my opinion it is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer. Of course we must not assume facts which do not exist, nor stretch the law beyond its proper limits, but we ought, I think, to consider the question with a mind, if the facts and the law will allow it, to find in favour of an insurable interest.'

LAA 1774[149] demonstrated that the critical question is whether or not there was an interest. Considering of the complexity of subject matters insured and different views in practitioner book, acts and cases listed in the judgment, the learned judge then suggested that 'it is difficult to define insurable interest in words which will apply in all situations. The context and the terms of a policy with which the court is concerned will be all important. The words used to define insurable interest in for example a property context, should not be slavishly followed in different contexts, and words used in a life insurance context where one identified life is the subject of the insurance may not be totally apposite where the subject is many lives and many events.'[150] In summarising the principles to be derived from many important cases on insurable interest, the learned judge said: 'it is not a requirement of property insurance that the insured must have a 'legal or equitable' interest in the property as those terms might normally be understood. It is sufficient for a sub-contractor to have a contract that relates to the property and a potential liability for damage to the property to have an insurable interest in the property.'[151] His lordship explained that the court's aim should be to identify the subject of the insurance, the nature of the assured's interest, and then determine whether the subject 'embraces that interest'. He emphasised that this latter question was essentially a question of construction of the policy and 'there is not hard and fast rule that because the nature of an insurable interest relates to a liability to compensate for loss, that insurable interest could only be covered by a liability policy rather than a policy insuring property or indeed properties or lives. Using this approach his lordship classified the former authorities in relevant case into four separate categories.[152] Further

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[149] 'From and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null to any intents and purposes whatsoever.' s.1, LAA 1774.

[150] *Ibid.* para.71.

[151] *Ibid.* para.97.

[152] 1) The subject matter is an item of property, and the assured must have a 'real or equitable interest' in the property which constitutes a valid insurable interest.

2) The subject matter is 'a particular life of a particular person', and the assured must face direct pecuniary loss because of his legal obligation in the event of that person which constitutes a valid insurable interest.

3) The subject matter is 'a particular item of property', the assured's interest is on the profit he will receive from the success of the property and is covered by the policy after proper construal, which constitutes a valid insurable interest although he has not direct legal or equitable relationship with the property,

4) The subject matter is 'a particular item of property', and the assured's interest is on his loss (not only pecuniary) or liability to the destruction of the property and is covered by the policy, which constitutes a

he expressly held that *Deepak* was not authority for the proposition that it is impossible to cover the insurable interest of liability by virtue of a policy on property if the terms of the policy embrace the insurable interest. Consequently, the Club's insurable interest arising from its potential liability to its members was sufficient to support an insurance of the lives of its members' employees. Dyson LJ delivered his judgement in agreement with Waller J.[153] Ward LJ reluctantly dissented. He decided that the mere fact that the Club could anticipate a potential disadvantage on the event of an employee's death could not give rise to an insurable interest in the lives of the employees themselves in the absence of a legal or equitable relationship between the assured and subject matter by adhered on the stricter established precedent in *Macaura* and s.5 MIA 1906. Ward LJ also observed that 'there is no merit in this appeal' and suggested that there was no convincing reason why such a rigid definition of an insurable interest should be retained.[154]

From the above analysis, we can see that the real definition of insurable interest, the dispute between Lawrence J's wider explanation of 'moral certainty' and Lord Eldon's 'property right' has been discussed in the courts from the outset. Until today, there is still serious disagreement, as to what the law is and what the law should be, among the learned judges in English courts. Recent attempts by the Court of Appeal to rationalise the conflicts in the case law have meant that the purpose of the rule that an assured must have an insurable interest has been lost sight of and the distinction between different forms of insurance has become confused. Some adhere to the narrow view that there has to be a clear legal or equitable interest, whereas others-like the majority in *Feasey* are of the view that the requirements of the law should be tailored to fit commercial practices. It will be the House of Lords or the Parliament to decide on whether or to what extent economic or factual interest in the subject matter of the insurance, in the wider sense

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valid insurable interest although he do not have close or even has not legal or equitable relationship with the property. -- *ibid.*, para. 81-96.

[153] The learned judge said: 'I accepted that contingency and liability insurance are different forms of insurance. But I find it difficult to see why in principle Steamship's contingent liability to indemnify its members against their liability for bodily injury/illness to Original Persons is not sufficient to give Steamship an insurable interest in the well-being of those persons. It is a non-sequitur to reason that because (a) Steamship would have an insurable interest in the liability of its members to those persons, therefore (b) it cannot have an insurable interest in those persons themselves.' – *ibid.*, para.114

[154] This is concurred by Professor John Birds as 'a much more conventional analysis of insurable interest and read at least as logically as that of Waller L.J.' John Birds, 'Insurable Interest—Orthodox and Unorthodox Approaches', J.B.L. 2006, Mar, 224-231, at 230.

explained by Lawrence J, will suffice to sustain a claim under a contract of insurance.[155] Nevertheless, before we receive the clear answer from the House of Lords or the Parliament, in English law, the 'legal or equitable relation' is still the dominant rule with many exceptions on the construction of policy in which 'moral certainty' is applied.

[155] On the other hand, another problem was raised, that is whether a reinsurance of a marine risk expressed in a life form is governed by the LAA 1774. It was assumed that this is the case. As LAA 1774, which clearly does not apply to marine insurance in section 4: 'Provided, always, that nothing herein contained shall extend or be construed to extend to insurances bona fide made by any person or persons on ships, goods, or merchandises, but every such insurance shall be as valid and effectual in the law as if this Act had not been made.', was applied as authority in *'Feasey'*. Will it be a rule, or only an exception on the construction of the policy? We will also have to wait for the answer from House of Lords.

CHAPTER III:
GENERAL CONSIDERATION OF INSURABLE INTEREST

3.1. The Parties Who Must Have the Insurable Interest

3.1.1. The Assured (Insured)

Who must have the insurable interest[1] in a marine insurance contract? From the enactments of section 4 and section 6 in MIA 1906, we can see that it is the assured who must have an insurable interest upon the subject matter insured. Who is the assured? This term is defined as 'the persons interested, the person for whose benefit the insurance is made, that is the ordinary meaning of the term ''assured'' in insurance law'.[2] The word has also been interpreted as 'A person who has been insured by some insurance companies, or underwriters, against losses or perils mentioned in the policy of insurance',[3] and is 'ordinarily synonymous with insured'.[4] From the above definitions, we can see that in the English law of marine insurance, the assured refers to the person who will receive the benefit from the insurer in the agreed policy upon the happening of said losses. The assured can be named or unnamed in the marine policy, or as the undisclosed principal without clarification of his identity in the policy.[5] In either situation, the assured is required to have an insurable interest in the subject matter insured under the marine policy. In specifically, the assured can be any of the ship's owner, operator, charterer, manager, agent, vendor and vendee, trustor and trustee, mortgagor and mortgagee, pledgor and pledgee, bailor and bailee or crew who will occur losses incident to marine adventure.

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[1] Lord Reading C.J. distinguished 'insurable interest' and 'interest insured' in Hewitt Brother *v* Wilson (1915), 20, Com. Cas. 241: '''Interest'' is a term well known in insurance. It is used very often in the Marine Insurance Act 1906, and it is always held to mean ''insurable interest''. ''interest insured'' is a phrase which is very useful to indicate the subject matter of the insurance in which the assured has an interest.' at p.243.

[2] Per Mathew J in *Ocean Iron Steamship Insurance Association (limited) v Leslie* (1889), 22 Q.B. 722, at p.726.

[3] Black's Law Dictionary 6th ed, West, 1990, at p.124.

[4] *Ibid.* Insured is 'The person who obtains or is otherwise covered by insurance on his health, life, or property. The 'insured' in a policy is not limited to the insured named in the policy, but applied to anyone who is insured under the policy.' at p.808.

[5] There is dissidence on this point, see below, p.47, also in S.8.1.2., Chapter VIII.

Besides that, the assured must have contractual capacity required in the general law of contract to enter into the insurance contract. Thus, enemy aliens do not have capacity to insure their interests with English insurers,[6] neither do the mental patients. Minors, who are under the age 18[7] and do not have the full capacity of their persons, can also insure for their own benefit and the insurers who contracted with them will be liable for the loss.[8]

3.1.2. The Agents of the Assured

3.1.2.1. Broker

In this country's marine insurance and reinsurance market, the broker, who is assured's or reinsured's agent, plays a major role in writing the business. He is authorised by his principal to seek the underwriter, prepare the policy, collect the premium[9] and collect the benefit of a claim should one arises.[10] When the policy is procured by the broker and the assured's name is inserted in it, the principal has the right to sue the insurer to claim the benefit on proof of his insurable interest and on proof that the broker was authorised to insure on his behalf and intended to do so.[11] Also quite commonly in marine insurance practice, it is the broker who signs the policy with the insurer without insertion of the principal's name. The full details of the assured or assureds are also unknown to the insurer. Consequently, the question of insurable interest arises from the broker's title to sue the insurer and claim the benefit.

The principal/assured who is not identified in the policy is referred to in general agency law as either the unnamed or the undisclosed principal. An unnamed principal is one

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[6] See Arnould 16th ed, Chapter 5.
[7] S.19(1), Family Law Reform Act 1969.
[8] *Clements v London and North Western Rly Co.* [1894] 2 QB 482, CA. See Robert Merkin, Colinvaux's Law of Insurance, 7th edn, S&M, at para.14-02.
[9] And indeed to pay the premium: s.53, MIA 1906. The broker is personally liable to the insurers for the premium, although the fiction upon which this rule is based—that the premium has been paid by the broker but loaned back to him by the insurers—was all but abolished by the Court of Appeal in *Heath Lambert Ltd v Sciedad de Corretaje de seguros* [2004] Lloyd's Rep. IR 905.
[10] For general account, see Hugh Cockerell, Gordon Shaw, Insurance Broking and Agency, The Law and the Practice, Witherby & Co., Ltd (1979).
[11] *Sutherland v Pratt* (1843) 12 M & W 16; *Boston Fruit Co. v British and Foreign Marine Insurance Co.*[1905] 1 KB 637; *National Oilwell v Davy Offshore* [1993] 2 Lloyd's Rep 582. The assured may also ratify the unauthorised acts of his broker as long as the assured was identified in the policy: see *National Oilwell.* See below footnote 14.

whose existence but not identity is known to the third party. 'The unnamed principal situation is one where the third party to a transaction negotiated through an agent is aware that there is a principal but does not know who he is, no necessarily has any way of finding out'.[12] It is quite common in marine insurance practice that the broker makes the insurance in his own name as agent on behalf the unnamed principal assured[13] with or without his authority.[14]

The general doctrine of undisclosed principal is 'one of whose existence the third party is unaware at the time of contracting'.[15] 'if a person who actually has authority to act for another does so without indicating that he acts for a principal at all, *i.e.* appears to the third party to be acting completely on his own account, a contractual situation may arise where the principal can nevertheless intervene and sue on the contract between the agent and the third party on the basis, at least on the face of it, of a form of agency reasoning.'[16] The main limitation on this doctrine is that it is not open to an undisclosed principal to claim to be a party to an agreement which the agent had no authority to

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[12] *Cf* Francis Reynolds: Some Agency Problems in Insurance Law in F.D. Rose, editor, Consensus ad Idem, Essays in the Law of Contract in Honour of Guenter Treitel, S&M 1997, at p77.

[13] *Bell v Gibson* (1798) 1 Bos & P 345; *Yangtsze Insurance Association v Lukmanjee* [1918] AC 585. *Siu Yin Kwan v Eastern Insurance Co.* [1994] 2 A.C. 199; *North Atlantic Insurance Co. v Nationawidel General Insurance Co.* [2004] Lloyd's Rep. I.R. 466.

[14] The general agency law on ratification recognised that the principal, not only named, but also unnamed to the third party at the time of contracting, can ratify his unauthorised agent's act if the agent purports to act on behalf of him and thus may acquire right and incur liability accordingly, at any time, even after a breach of contract by the third party, subject to the overriding rule that ratification cannot unfairly prejudice the third party and in particular cannot remove his vested rights (For specific description, please see para.2-047 – para.2-098 in Francis Reynolds, Bowstead and Reynolds on Agency, 17th ed, S&M 2001) are also applied to marine insurance. Thus the marine insurance policy may be taken out 'for and on behalf of any person interested', and such persons can ratify if their identies, or the class of persons into which they fall have been disclosed to the insurer, although they are not named in the policy and this is confirmed by s.23, MIA 1906: 'A marine policy must specify— (1) The name of the assured, or of some person who effects the insurance on his behalf'. The ratification can be made by the person after the loss has happened and become known to the principal, s.86 MIA 1906, *Lucena v Craufurd* (1808) 1 Taunt 25; *Routh v Thampson* (1811) 13 East 274; *Barlow v Leckie*(1819) 4 J.B. Moore 8; *Willams v North China Insurance Co* (1876) 1 CPD 757; or even two years after the making of insurance and nearly as long after he had become aware of the loss, expressing the hope that the party who had effected the policy had procured a final settlement from the underwriters. *Hagedorn v Oliverson* (1814) 2 M.& S. 485. However, this ratification must be made by the person on whose behalf the insurance is effected, *Boston Fruit Co. v British and Foreign Marine Insurance Co.*[1906] AC 336 and he is aware of the insurance. The same rule is codified in section 86 of the Marine Insurance Act 1906 'Where a contract of marine insurance is in good faith effected by one person on behalf of another, the person on whose behalf it is effected may ratify the contract even after he is aware of a loss.'

[15] P.672, Treitel, The law of Contract 10th ed, S&M, 1999.

[16] See Francis Reynolds, Some Agency Problems in Insurance Law in F.D. Rose, editor, Consensus ad Idem, Essays in the Law of Contract in Honour of Guenter Treitel, S&M 1997, at p. 89. Also see Bowstead and Reynolds on Agency, 17th ed, S&M 2002, at s. 8-073.

make.[17] This is one of the differences between the undisclosed principal and unnamed principal because the unnamed principal can ratify his agent's act but the undisclosed principal can not. Furthermore, if the agent is acting on behalf of the undisclosed principal, he is regarded as the contracting party to the third party, while on behalf of the unnamed principal, the principal will be regarded as the contracting party to the third party in the contract.

Although it was in some cases agreed that undisclosed principal can be applied to marine insurance,[18] surely the learned judge Cooke J did not agree in recent case *Talbot Underwriting v Nausch Hogan & Murray, The Jascon 5*,[19] as he held that the wording of the policy took priority and excluded the party to be insured in the co-insurance policy. Furthermore, the doctrine of undisclosed principal is not fully consistent with the principle of utmost good faith and disclosure[20] because the agent fails to disclose the material facts relating to the true insured which he knows to the insurer, no matter in his intention or unawareness, and which entitles the insurer to avoid the contract.[21] Thus, the undisclosed principals mentioned in many insurance cases[22] actually are unnamed principals regarded by the scholars[23] because in these cases the insurer knew that his other party in the policy insured on behalf of his client whose name is not on the policy.

Whether the agent acts on behalf of an unnamed principal or undisclosed principal, the issue of insurable interest arises alongside other problems, including the identification of the principal and the principal and agent's title to sue on the policy.[24] It is quite clear that if the assured has authorised his broker to take out the policy, he is entitled to bring

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[17] *Keighley, Maxsted &Co. v Durant* [1901] AC 240. *The 'Moonacre'* [1992] 2 Lloyd's Rep. 501.
[18] *Provincial Insurance Co. of Canada v Leduc* (1874) L.R. 6 P.C. 224. *Siu v Eastern insurance Co. Ltd* [1994] 1 All ER 213.
[19] [2005] EWHC 2359 (Comm), referring at to the views of Professor Merkin in different writing on this issue at para 78.
[20] Ss.17, 18, 19, MIA 1906. *Black Burn, Law & Co. v Vigors* (1887) 12 App. Cas. 531. *Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co.* [1994] 3 All ER 581.
[21] *Cf* John Birds, Agency and Insurance, JBL 1994, Jul, 386-393 at 386. Rob Merkin, Butler & Merkin's Reinsurance Law (loose leaf), S&M, para.A-0636, herin after Merkin's Reinsurance; Rob Merkin, Colinvaux's Law of Insurance 7th ed, at para 15-10.
[22] *Siu v Eastern insurance Co. Ltd* [1994] 1 All ER 213. *National Oilwell (UK) Ltd v Davy Offshore Ltd*[1993] 2 Lloyd's Rep.582.
[23] *Cf* John Birds, Agency and Insurance, JBL 1994, Jul, 386-393.
[24] For specific description, please see Francis Reynolds, Some Agency Problems in Insurance Law in F.D. Rose, editor, Consensus ad Idem, Essays in the Law of Contract in Honour of Guenter Treitel, S&M 1997, at p.79-88.

an action upon the policy.[25] And the same will apply if the assured has subsequently ratified the acts of an unauthorised broker. At the same time, it is a well established principle that the broker who effects insurance in his own name, even though he is acting on behalf of unnamed principal or undisclosed principal, can sue for and receive in his own name the full amount of his principal's loss under the insurance, holding the same thereafter in his fiduciary capacity for his principal.[26]

3.1.2.2. Bailee

Different considerations arise where the insurance is taken out by a person with a limited interest, with the intention of covering the interests of others. The requirement of insurable interest in marine insurance law is one of the important relevant factors in the identification of the unnamed (undisclosed) principal. That the agent acts as the party without disclosure of the assured's identification in the policy does not remove his obligation to have valid insurable interest. If the agent intends the policy to cover something in respect of which he or his principals do not have insurable interest at the time of loss, the policy may be one of wagering and void. This is neatly stated in the case of *Tomlinson (Hauliers) Ltd v Hepburn* by Lord Pearce: 'But as concerns an agent who has no interest and is effecting an insurance for others, his unilateral intention is of importance to the extent that, unless he intends to effect the insurance on behalf of his principal, he is simply wagering and there is nothing which an undisclosed principal can ratify.'[27]

Given the principle of the agent's title to sue on the policy, the requirement of insurable interest is one of the important relevant factors in determining the extent of this title to sue. A person who has a limited interest on the subject matter has insured under a policy which covers a greater interest than his. Here it has been long established that he can sue for the whole sum insured, and any excess is held for the person or persons with their own insurable interest in the subject matter. In practice, it is very common for

[25] *Pan Atlantic Insurance Co. Ltd v Pine Top Insurance Co.* [1994] 3 All ER 581.
[26] *Provincial Insurance Co. of Canada v Leduc* (1874) L.R. 6 P.C. 224; *Transcontinental Underwriting Agency v Grand Union Insurance Co. Ltd* [1987] 2 FTLR 35. *Siu v Eastern insurance Co. Ltd* [1994] 1 All ER 213.*National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep.582. See Arnould 16th ed. para.1354: 'An action on a policy may be brought in the name of a broker or other agent who has effected in his own name'.
[27] [1966] A.C.451, at 479.

bailees to insure the whole subject matter upon which they only have limited, possessory or liability, interest, and it has consistently been held that a bailee liable only for negligence may insure the goods bailed to their full value against any loss,[28] and even where the bailee is not liable for the loss, he can make an insurance also covering the interest of the owner of the subject matter insured.[29] Under such circumstance, it is probably not correct to treat the bailee, as an agent who signs the insurance contract on behalf of the unnamed assured, as it is far from clear that those interested in the insured subject matter have an action against the insurers in their own right, although this will depend upon the wording of the policy and the authorisation of the bailee. Nevertheless, the question of the amount recoverable by a bailee, is 'one of construction of the policy'[30] and depends strictly upon the circumstances of each individual case. It is traditional to use phrase such as 'goods in trust or on commission therein'[31] or on goods the property of third party 'while being carried &/or in transit anywhere in the United Kingdom including loading and unloading. Including risk during halts &/or whilst garaged &/or elsewhere overnight'[32] to express the interest of the bailee covered.[33] The point, however, is that the bailee is treated as having a full insurable interest in the subject matter insured for the purposes of recovery under the policy even though as a matter of law his interest is limited. However, in *North British and Mercantile Insurance Co. v Moffatt*,[34] it was held that if a phrase such as 'goods...for which they are responsible' is used, *Waters* is ousted. The phrase was held in these cases to mean that the assured who had limited interest in the subject matter insured could recover only in respect of those goods for which he had assumed a legal responsibility and could not recover all benefit as bailee for the bailor. This was reaffirmed in Court of Appeal in *Ramco (UK) Ltd v International Insurance Co. of Hannover Ltd*,[35] Ramco the appellant took out all risks policy covering goods in his possession. The Court of Appeal agreed with Andrew Smith J in the first instance that coverage under the policy was restricted

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[28] *Waters v Monarch Fire & Life* (1856) 5 E.&B.870; *London & North Western Ry v Glyn* (1859) 1 E. & E. 652, p.655 per Hill J.
[29] *Hepburn v A. Tomlinson (Hauliers)* [1966] A.C. 451.
[30] *London & North Western v Glyn Ry* (1859) 1 E. & E. 652, per Hill J at p.655.
[31] *Waters v Monarch Fire & Life* (1856) 5 E.& B.870, at p.871.
[32] *Hepburn v A. Tomlinson (Hauliers)* [1966] A.C. 451, at p.454
[33] See Erle and Hill, JJ's dicta in *London & North Western v Glyn* (1859) 1 E. & E. 652, p.655 and p.665, cited by Keating J in *The North British and Merchant Insurance Co. v Moffatt* (1871) LR 7 CP 25, at p.31. Also see *Ramco (UK) Ltd v International Insurance Company of Hanover* [2004] Lloyd's Rep. I.R. 606.
[34] (1871) LR 7 CP 25, also see *Engel v Lancashire & General Assurance co. Ltd* (1925) 21 LIL Rep.327.
[35] [2004] Lloyd's Rep. I.R. 606.

to goods for which Ramco who was liable as bailee instead of the full value of the goods. Waller LJ noted that it had long been accepted by the market that the addition of words like 'for which he is responsible' restricted liability to goods held by a bailee for third parties to those circumstances in which the bailee was liable for the damage, and that it would be inappropriate given the market understanding for the Court of Appeal to overrule *Moffatt*. The Court of appeal also held that *Waters* was anomalous in common law, in that it operated in a manner inconsistent with the doctrine of privity of contract. While the privity doctrine had been abolished by the Contracts (Rights of Third Parties) Act 1999, it nevertheless remained appropriate not to extend the *Waters* exception any further and to allow recovery even if the policy was limited to goods for which the assured was responsible.

The rules on bailees take effect as exception to the general principal that 'a party is only entitled to recover substantial damages for breach of contract in respect of his own loss, and not therefore in respect of loss suffered by a third party'.[36] In the leading modern case on the question when damages are recoverable by a person who does no suffer loss, *Albacruz* (Cargo Owners) *v Albazero*(Owners),[37] Lord Diplock, holding that damage are usually not recoverable, made a special exception for such claims on insurance policies, referring to 'The right of an assured to recover in an action on a policy of insurance upon goods the full amount of the loss or damage to them, on behalf of anyone who may be entitled to an interest in the goods at the time when the loss or damage occurs, provided it appears from the terms of the policy that he intended to cover their interest.'[38] However, the agent can not rely on the insurable interest of a third party who is not his principal for the purpose of effecting the insurance. As Colman J said 'It is difficult to envisage as a matter of principle how a mere agent with no insurable interest can enforce in his own name a policy relying solely on the insurable interest of a party who has no right to sue on the policy in his own name'. 'anyone who did not have an insurable interest and who was not acting as agent for an undisclosed or unnamed principal at the relevant time could derive rights of action merely from his being named as assured in the policy'.[39]

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[36] Lord Goff of Chieveley in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001]1 AC 508, at 538.
[37] [1977] A.C.774. In a subsequent case *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001]1 AC 518, the Law Lords also support Lord Diplock's holding and applied to building contract.
[38] *Ibid,* at 846.
[39] *The Moonacre* [1992] 2 Lloyd's Rep. 501, at 516.

3.1.3. Assignor and Assignee

It is quite common in marine insurance practice that the assured assigns his right under a policy to a third party as assignee. The relevant provisions were originally contained in s.1, Policies of Marine Insurance Act 1868,[40] later was repealed by section 92 of the MIA 1906 and re-enacted in ss. 50 and 51 of the MIA 1906.[41] Three forms of assignments are regarded to be distinguished: assignment of the subject matter of the policy, assignment of the policy and assignment of the proceeds (benefit) of the policy. Relevant questions relating to insurable interest[42]arise in respect of each.

3.1.3.1. Assignment of Subject Matter

The assignment of the subject matter of the policy means that the assured disposes his entire interest in the insured property to a third party by sale or gift.[43] When such assignment occurred, difficulties arise where the assured does not assign the policy simultaneously, as the interest in the subject matter and the ownership of the policy are thereby divorced.

It is the generally accepted view that once a contract for the sale of property is entered into the purchaser acquired the risk in the property, although the vendor retains the legal title. At this stage, both parties clearly have an insurable interest in the property and, in practice, both may well be insured. On completion of the purchase, or where the title to

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[40] 'Whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon was effected.' s.1, Policies of Marine Insurance Act 1868.

[41] '50. (1) A marine policy is assignable unless it contains terms expressly prohibiting assignment. It may be assigned either before or after loss.
(2) where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arsing out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.
(3) a marine policy may be assigned by indorsement thereon or in other customary manner.
51. Where the assured has parted with or lost his interest in the subject matter insured, and has not, before or at the time of so doing, expressly or impliedly agreed to assign the policy, any subsequent assignment of the policy is inoperative:
Provided that nothing in this section affects the assignment of a policy after loss. – MIA 1906.

[42] It is regarded as original interest to the assured and derivative interest to the assignee.

[43] See Merkin's Insurance at paragraph D-0004.

the vessel is registered by the purchaser as new owner, the legal title vests in the purchaser, thus because the vendor has lost his entire insurable interest on the subject matter transferred to the purchaser, the vendor can not claim the benefit of the policy on the happening of an insured peril as he does not suffer any loss and the policy will lapse automatically on loss of interest.[44] In this situation, if there is no assignment of the policy at the same time as the transfer of title to the insured subject matter, the assignor is not entitled to recover on the basis that he will hold the proceed of the policy for the purchaser. This is made clear in *Rayner v Preston*[45] and MIA 1906, s.15, 'Where the assured assigns or otherwise parts with his interest in the subject matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.'[46] In *Powles v Innes*,[47] a part owner of a ship, after insurance and before loss, and by bill of sale absolutely transferred his share to a third party who was an entire stranger to the insurance. It was held that the claimants, who had effected the policy under the vendor's directions, could neither recover as his agents under a count averring interest in him—for he had no interest left at the time of loss—nor as trustees for the purchaser of his share, because there were no facts stated in the case to warrant the inference that the policy had been handed over with the bill of sale, or that there had been an order on the broker to hand it over, or any understanding that the policy should be kept alive for the purchaser's benefit.

If the original assured assignor takes out a mortgage on the subject matter, or if the assured has retained the risk in or ownership of the assigned subject matter,[48] or if the assured has assigned the subject matter absolutely but has retained possession by way of security for payment, the assured has a continuing insurable interest and the validity of the policy is at that stage unaffected.[49] An illustration is *Hibber v Carter*,[50] where K having consigned a cargo of produce to Britain, and directed an insurance to be made

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[44] *Lynch v Dalzell* (1729) 4 Bro. P.C. 431.
[45] (1881) 18 Ch. D.1. Lord Esher said:'...where the subject matter of the insurance is sold during the running of the policy, no interest under the policy passes unless it is made part of the contract of purchase and sale, so that it would be considered in a Court of Equity as assigned.'
[46] *Hibbert v Carter* (1787) 1 T.R. 745; *Powles v Innes* (1843) 11 M&W 10; *North of England Pure Oil Cake Co. v Archangel Maritime Insurance Co.* (1875) LR 10 QB 249.
[47] (1843) 11 M.& W. 10.
[48] *Collingridge v Royal Exchange Assurance Corporation* (1877) 3 Q.B.D. 173; *Rayner v Preston* (1881) 18 Ch.D.1.
[49] *Hibbert v Carter* (1787) 1 T.R. 745; *Alston v Campbell* (1779) 4 Brown's P.C. 476.
[50] (1787) 1 T.R. 745.

thereon by the claimants, his correspondents in London, subsequently, but before the policy was actually effected, assigned the bill of lading over to D, the Court of King's Bench, proceeding upon the ground that an indorsement of the bill of lading passed the whole property to D, held that the claimants could not recover on the policy, because K had absolutely divested himself of all interest before the policy was effected, nor as trustees for D, because there had been no transfer to him of the policy and no agreement to transfer it. Subsequently, however, on proof that K had no intention to pass the whole property by indorsement of the bill of lading, a new trial was ordered and judgement was given for the claimants. Again, if the policy is stated to cover the interests of the vendee, it necessarily remains in force as regards that person even though the assured may have lost the right to sue under it. Further, if the insurance covers property and other interests which are independent upon the assured's continued ownership or possession of that property, the disposition of the insured property will leave the policy intact.

3.1.3.2. Assignment of Policy

Being itself a chose in action, a marine policy[51] is prima facie freely assignable either before or after loss unless it is prohibited in the policy.[52] In practice the right to assign both the policy and its proceeds is not excluded, but is limited by the relevant Institute Clauses.[53] What constitutes a valid assignment before loss? It is thought that in order for there to be a valid assignment, the assignor must have an insurable interest in the subject matter of the policy before and during the assignment and the insurable interest in the subject matter of the policy must have been assigned to the assignee contemporaneously with the assignment of the policy; furthermore, the risk insured in the policy must be continued after assignment. This was clearly expressed in the case of *North of England Oil Cake Co. v Archangel Maritime Ins. Co.*,[54] A cargo of linseed

[51] Unlike other forms of insurance policy other than life policies.
[52] MIA 1906, s.50 (1).
[53] 'No assignment of or interest in any moneys which may be or become payable hereunder is to be binding on or recognised by the Underwriters unless a dated notice of such assignment or interest signed by the assured, and by the assignor or in the case of subsequent assignment, is endorsed on the Policy and the Policy with such endorsement is produced before payment of any claim or return premium hereunder.' Institute Hulls Clauses 2002, cl.23; Institute Time Clauses Freight, cl.6; Institute Voyage Clauses Freight, cl.4. Breach of these clauses nullifies the purported assignment: *Laurie v Hartlepool SS Indemnity Association* (1899) 4 Com. Cas.322.
[54] (1875) L.R.10 Q.B. 249.

was insured from Constantinople to a port of call and discharge in United Kingdom to be named subsequently. Each lighter carrying the cargo was deemed to be separately insured. During the course of the voyage, the cargo was sold in London to the claimant on terms that it would be delivered to any safe floating port in the United Kingdom. A safe floating port was in due course named. The brig duly arrived and the cargo was being landed in public lighters employed by the claimant when one of the lighters with her cargo onboard was sunk. It was accepted that there was a loss within the meaning of the risk in the policy. The policy was later assigned to the claimant the assignment indorsed on it. The claimant sued on the policy in his own name, but did not recover, because at the time of the assignment the assignor had no interest to assign, that interest having ceased the same by delivery of the goods in the claimant's lighter. Further, there was no agreement to assign the policy to the claimant which might otherwise have kept it alive for his benefit when he had become capable of taking an assignment. As Cockburn CJ said: 'we are agreed on one point, which entitles the defendants to judgement, viz. that, the policy not having been assigned until after the interest of the assignors had ceased, an effective assignment was impossible'.[55]

It will be seen, therefore, that, based on the rules of insurable interest the assignment of policy requires the contemporaneous assignment of the subject matter. Otherwise the assignee can not claim the benefit because of lack of insurable interest. Thus, an assignment of the subject matter of the policy before the policy itself will terminate the policy automatically if the assignor has no remaining insurable interest, the principle of indemnity will also deprive the assured's right to recover.[56] And the assignee will also not able to obtain any right to sue under the policy because of the invalid assignment. What about the assignment of policy to the third party before the assignment of subject matter? It was held by Blackburn J. in *Lloyd v Fleming*[57] that assignment in these circumstance defeats the rights of both the assured and the third party assignee: the assured cannot recover as he has assigned the policy, While the assignee cannot recover as, at the date of the assignment of the policy to him, he did not possess insurable interest and can not be indemnified. As this judgement was delivered in 1882, considering that s.6 (1) MIA 1906 has well stated that a policy is not void for want of

[55] *Ibid* p. 253.
[56] *Powles v Innes* (1843) 11 M.& W. 10.
[57] (1872) L.R. 7 Q.B. 299, at p 302

insurable interest at its inception as long as the assured is not gambling, the assignee may be indemnified as long as he gets insurable interest at the time of loss.

The marine policy is also assignable after partial or total loss, in which case the assignment is of a claim for a loss for unliquidated damages.[58] The assignee is not required to have insurable interest on the subject matter and he can sue on his own behalf.[59] As Blackburn J said in *Lloyd v Fleming*: 'after the loss the right to indemnity no longer depends on the right of property in the subject-matter of the insurance, so far as it still exists, but on the right of property in the thing or the portion of the thing lost. After a loss the policy of insurance and the right of action under it might, like any other chose in action, be transferred in equity, though at common law the action must have been brought in the name of the original contractor, the assignor. Such an assignment may be objectionable on the ground of maintenance or champerty, but it is not necessarily so, and no circumstances are stated on this record to raise such a defence.' [60] The learned judge then analysed that the object of section 1, Policies of Marine Insurance Act 1868 was to permit the assignment of a policy not only before loss but also after loss assignable at law for commercial convenience as in international trade, the price including cost, freight and insurance will be paid after the receipt of bill of lading and marine policy and which is regarded as the successful completion of sale with ignorant of the safety of goods. Thus the assignee is regarded to be 'entitled to the property thereby insured' after the assignment of policy with 'all rights under and by virtue of it' after loss to him. His interest in the damages as the chose in action is treated as the property covered by the policy which is literally complied with the words in section 1, Policies of Marine Insurance act 1868. As this section is re-enacted in s 50 and 51 MIA 1906, it is still valid today.

MIA s.50 (2) sets out the circumstances in which a valid assignment of the policy can be effected under that Act. The words 'so as to pass the entire beneficial interest in such policy' was explained by the learned judges in *Williams v Atlantic Assurance Co. Ltd*[61] to mean that the right of the assignee to sue in his own name is available only where the entire sum due under the policy has been assigned to him. In this case, an unvalued

[58] See Arnould 16th ed, at para 253.
[59] *Lloyd v Fleming*(1872) L.R. 7 Q.B. 299.
[60] (1872) L.R. 7 Q.B. 299, p.302, 303.
[61] [1932] 43 Ll. L.Rep.177.

policy to the extent of £8,000 was effected by the firm of Constantinou, Valsamis &Co to cover 20 cases of textile goods on a voyage from Alexandria. The goods were lost at sea. The claimant had established a claim against the firm for £7,000. The claim was settled on the terms that the policy was assigned to him, the firm retaining the right to receive the first £1,000 of any sum recovered. The action was failed because the claimant has not proved the value of the goods which had been lost. Greer and Slesser LJJ also held that the claimant could not sued the insurance company in his own name without joining the firm as co-claimant because the assignment to the claimant did not pass to him the whole beneficial interest which means the claimant was only an equitable assignee.[62] This was affirmed by Mocatta J in *The First national Bank of Chicago v West of England P&I Association*[63] as an absolute right to receive payment has been assigned to him. The assignee of a part interest in the policy was no more than an equitable assignee and was not entitled to sue without joining the assignors as co-plaintiffs.[64]

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[62] Greer LJ said: 'But the appellants also contended that inasmuch as in assigning the policy to Williams, Constantinou representing the firm stipulated as part of the arrangement that the first £1000 received under the policy should be paid to him, the beneficial interest in the policy was partly in Constantinou as representing the firm and partly in Williams, and that even if the interest of Constantinou in the first £1000 had been created by a separate transaction, it would have amounted to an equitable assignment of an interest in the policy. It seems to me this is established by the decision of Lawrence, L.J., then Mr. Justice Lawrence, in *In re Steel Wing Company* [1921] 1 Ch. 349, and the decision of Luxmoore, J., in *Cotton v. Heyl* [1930] 1 Ch. 510. I think that these decisions correctly lay down the law, and that it is impossible to say that the claimant Williams obtained the beneficial interest in the policy which would be necessary to enable him to sue in his own name under Sect. 50 of the Marine Insurance Act. It is not material whether the beneficial interest in part of the policy moneys arose from an assignment by the beneficial owner of the whole interest, or, as in the present case, by a retention of part of the beneficial interest by the assignor at the time of the assignment.' *ibid*, at 186.
Slesser LJ also said: 'At common law, the assignee could not sue in his own name on the policy, but an action could be brought by the assignor as trustee for the assignee: *Gibson v. Winter* (1833) 5 B. & A. 96. The power of the assignee to sue in his own name was conferred by the Policies of Marine Insurance Act, 1868, Sect. 1, and amended by the Act of 1906, and it is incumbent upon an assignee who wishes so to sue and does not join the assignor to satisfy the section. For the reasons I have stated, Mr. Williams has failed to bring himself within the Act, for he is not, in my view, possessed of more than part of the beneficial interest in the policy, part of which is either still in the legal ownership of the liquidator on behalf of the assignors or at least is impressed with an equitable interest in their favour. (See per Lawrence, J., in *In re Steel Wing Company* [1921] Ch.349, and Luxmoore, J., in *Cotton v. Heyl* [1930] 1 Ch.510. In neither view has the beneficial interest passed within the meaning of the 1906 statute. The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot, while it remains in force, be severed from the interest assured. *ibid,* at p.188-189.
Nevertheless, Scrutton LJ expressed a contrary view and took this as technical defences from the defendant. The learned judge relied on s.14 MIA 1906 and thought that it is permissible for the assignee to accept the assignor's whole beneficial interest and to account for outturn part to the assignor. Assignment of part or whole interest is only between assignor and assignee, can not be taken as a defence by the defendant. *ibid,*at p.185.
[63] [1981] 1 Lloyd's Rep.54.
[64] *Williams v Atlantic Assurance Co. Ltd* [1932] 43 Ll. L. Rep.177.

Another question is what is the time that the 'entire beneficial interest' in a policy had passed to the assignee. This was answered in *Raiffeisen Zentralbank Osterrich AG v Five Star General Trading*[65] in the Court of Appeal. Its conclusion was that a distinction had to be drawn between pre- and post-loss assignments. In the case of a pre-loss assignment of the policy, the policy itself remains alive and the assignor can not be said to have parted with the entire beneficial interest in the policy unless the assignor's entire insurable interest in the subject matter of the policy has been transferred to the assignee: if the assignor retains any insurable interest covered by the policy, it follows that the entire beneficial interest cannot have been transferred, even if the entire right to recover the proceeds has been assigned to the assignee. If the assignor retains the right to make claims for certain forms of loss under the policy, it is even more obviously the case that the entire beneficial interest has not been assigned and that s. 50 (2) of MIA 1906 is inapplicable: this point proved a further barrier to the purported statutory assignment in *Raiffeisen*. Accordingly, s.50(3) applies to a policy assignment prior to loss only if the assignor's entire insurable interest accompanies the assignment. In the case of a post-loss assignment, at least in a case of a total loss, or a partial loss which has exhausted the policy,[66] the only property covered by the policy is the claim under it, so that an assignment of the claim operates as an assignment of the entire beneficial interest in the policy and can be effected under s.50 (3). Presumably, therefore, if there is a partial loss and the property remains in existence, an assignment o the right to make a claim in respect of the partial loss cannot be effected under s.50(3) and has to be effected by an equitable assignment or under s.136 of LPA 1925.[67] If the assured no longer has an

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[65] [2001] Lloyd's Rep. IR 460.

[66] As in *Swan v Maritime Insurance Co. Ltd* [1907] 1 K.B. 116.

[67] (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice--
(a) the legal right to such debt or thing in action;
(b) all legal and other remedies for the same; and
(c) the power to give a good discharge for the same without the concurrence of the assignor:
Provided that, if the debtor, trustee or other person liable in respect of such debt or thing in action has notice--
(a) that the assignment is disputed by the assignor or any person claiming under him; or
(b) of any other opposing or conflicting claims to such debt or thing in action;
he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into court under the provisions of the Trustee Act 1925.
(2) This section does not affect the provisions of the Policies of Assurance Act 1867.
[(3) The county court has jurisdiction (including power to receive payment of money or securities into

insurable interest at the date of assignment, then he has nothing to assign as the policy will have lapsed automatically at that point. The policy may in terms cover the interests of others as well as that of the assured, and in this case an assignment by the assured to such person would be effective, whether or not he has parted with his interest at the time of the loss. But in the absence of such a clause, or at any rate of an implied intention to cover others,[68] no assignee, whether so by contract or by operation of law, can recover once the assured has parted with his interest. Thus, while claims occurring before the assured's death will be enforceable by his personal representatives, they will be unable to recover under a policy of indemnity where the loss occurs after his death, unless they can rely on an express provision in the policy, in which case the subject matter insured and the benefit of the policy passes to the assured's legatees.[69] Mere recognition of the assured's right to assign in a term of the policy is not sufficient: the policy must be one which was taken out as an indemnity not to the assured only, but also to his assignees.

3.1.3.3. Assignment of Proceeds

The proceeds or benefit of an insurance policy, the right to recover under a policy of insurance, being a chose in action and a right to unliquidated damages, is freely assignable and may be assigned either at law under the terms of s.136 of LPA 1925 or in equity. In practice, it is quite common, especially for hull policies, to include provisions, commonly known as 'loss payable' clauses, directing payment to be made to someone other than the assured, usually the mortgagee of the vessel.[70] Generally, it is thought that such assignment of the proceeds does not give rise to a new contract between the insurer and the assignee and the assignor remains the assured,[71] so that the assured retained title to sue the insurers for breach of contract and any obligations imposed on him under the policy remain to be performed by him even after assignment. Thus, the assignee need not possess any insurable interest, so that no assignment of the subject matter of the policy is also required. The amount of the assignee's recovery is,

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court) under the proviso to subsection (1) of this section where the amount or value of the debt or thing in action does not exceed [£30,000].
--- s.136, Legal Assignments of Things in Action, Law of Property Act 1925, Ch. 20.

[68] *Castellain v Preston* (1883) 11 Q.B.D. 380, 406.

[69] *Mildmay v Folgham* (1797) 3 Ves. 471.

[70] *American Airlines Inc. v Hope* [1973] 1 Lloyd's Rep. 233 (aviation insurance); *Amalgamated General Finance Co. v Golding &Co.* [1964] 2 Lloyd's Rep. 163.

[71] *Weldon v GRE Linked Life Assurance Ltd.*[2000] 2 All E.R. (Comm) 914.

however, necessarily limited to the amount of the assurd's insurable interest measured at the date of loss. In particular, if the loss payee is one of those on whose behalf the contract was made and he has an insurable interest or he is an assignee of the whole beneficial interest, he is able to sue on the policy.[72] The loss payee has, since the implementation of the Contracts (Rights of Third Parties) Act 1999, been able to maintain an action in his own name against the insurers for direct payment of the proceeds to him.

3.2. Timing of Insurable Interest

3.2.1. General Description

In marine insurance, with regard to the question of when the interest must attach, the law appears to have developed to suit the practical operation marine insurance business. Some early marine insurance cases laid down the rule that the assured, besides being interested at the time of the loss, must be interested at the time of effecting the policy. In *Marsh v Robinson*,[73] it was decided that the claimant did not have insurable interest on the ship insured because he was not an owner standing in the registry at the time of the underwriting the policy. In the case of *Lucena v Craufurd*, the judges commented that 'the insured shall be interested in the arrival of the thing insured, at the event of the voyage at the time of effecting the policy and at the time of loss'.[74]

When it was in practice to effect insurances in which the allegation of interest at the time of effecting the policy could not be made with any degree of truth, for example, it was every day's practice to insure goods on a return voyage, long before they were bought,[75] it was held that it was necessary for the assured to have obtained insurable interest at the time of the ship's sailing or at the commencement of the risk. As it was said in *Rhind v Wilkinson*:'...as to the time of the commencement of the plaintiff's interest, that if the declaration has averred that he was interested at the time of the ship's sailing, or that the policy was made on a certain day, and that afterwards on a

[72] See Arnould 16th ed, at para. 259.
[73] (1804) 4 Esp.98.
[74](1806) 2 B.&P.N.R.269 at p.295.
[75] (1810) 2 Taunt. 237.

subsequent day of the plaintiff acquired an interest, it would have sufficed, and of that would have been good, the allegation of interest at the time of effecting the policy an immaterial allegation, and needed not to be proved. It was immaterial to aver interest at any day previous to the commencement of the risk.'[76] If the claimant had an insurable interest when the policy was effected and also at the time of loss but parted with it after the loss, the underwriter could not, on that ground, refuse his claim on the policy.[77]

When the courts consider the assignee's interest, the insurable interest was required at the time of the loss. In *Powles v. Innes*,[78] it was held that there was no right of joint action in the three part-owners of a ship because one of them had, before the loss, parted with his share to one of the other part-owners. As Lord Abinger, C.B. said 'since the legislature has adopted it, it is a contract of indemnity only, and nobody can recover in respect of the loss who is not really interested. The policy is but a chose in action, and can not pass merely by the assignment of the ship.'[79] This was adopted in *Watson v Swann*[80] and approved by Blackburn J in *Lloyd v Fleming.*[81] Therefore, it must be proved in all cases that the party for whose benefit the policy was made was interested in the subject of insurance at the time of loss in accordance with the principal of indemnity.

The principles in the above cases were codified in s. 6 of MIA 1906.[82] Section 6(1)[83] confirms that in marine insurance the assured need not have an interest at the inception of the policy, but he must possess insurable interest at the date of loss. Thus, if the assured has lost insurable interest by the date of the occurrence of the insured peril, he

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[76] *Ibid*, at p.243.
[77] *Sparkes v Marshall* (1836) 2 Bing. N.C. 761 at p.776.
[78] (1843) 11 M.& W. 10.
[79] *Ibid.* at p.13.
[80] 1862, 11 C.B. (N.S.) 756.
[81] (1871-72) L.R. 7 Q.B.299. 'If the assured, before the termination of the adventure, has parted with all interest in the subject matter of the insurance, he can suffer no damage from any subsequent loss; and consequent to his transfer of the property.' at p.302. Also see *North of England Oilcake Co. v Archangel Insurance Co.* (1875), L.R. 10 Q.B. 255; *Rayner v Preston* (1881), 18 Ch. D 12.
[82] (1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:
Provided that where the subject matter is insured 'lost or not lost,' the assured may recover although he may not have acquired his interest until after the loss, unless at the time o effecting the contract of insurance the assured was aware of the loss and the insurer was not.
(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.'--s.6, MIA 1906.
[83] This enactment is codified from the principle in *Anderson v Morice* (1875-76) LR 1 App. Cas.713, for discussion in detail, please see below S.5.1.2.2. Chapter V.

may claim the benefit.[84] This should be in contrasted with life insurance which requires the existence of insurable interest at the inception of the policy[85] but not at the date of the loss. However, the assured must not be a gambler. Accordingly, he must have at least a reasonable expectation of acquiring one at the time the policy is effected to satisfy MIA 1906, s.4 and Gaming Act 1845, s.18. However, this expectation will not suffice as an insurable interest at the time of loss. In the case *Stockdale v Dunlop*,[86] the claimant was held to have not any insurable interest in the goods insured because according to the contract they had entered into with the seller, the claimant, had no interest at the time of the goods being put onboard, but only upon their arrival. At the time of the insurance of and of the loss, there was merely an expectation of possession on the part of the claimants. In another case *Buchanan v Faber*,[87] on the question of whether the assured, the insurance brokers and the managing owners of the ship who insured the brokerage fee and the commission which they had hoped and expected to continue to earn from the ship, the learned Justice Bingham answered: 'I think they had none. They had nothing more a hope that, if the vessel lived, they might continue to earn their commissions and brokerage. No contract... was produced to show that they had a permanent right to be employed as managing owners. Every ship's husband and insurance broker has a right to entertain a similar hope, perhaps not so likely to be realised, but in its character the same.' This dictum stressed that what the claimants had at the time of loss was only a hope of earning a commission or brokerage fee. This mere expectation is not in itself sufficient to establish that they had an insurable at the time of loss because it did not materialise into a contract.

[84] *The Capricorn* [1995] 1 Lloyd's Rep.622.

[85] *Dalby v India and London Life Assurance Co.*(1854) 15 C.B. 365. In life insurance, the assured only requires an insurable interest at the time of entering into the contract as the policy is contingent rather than based upon indemnity. Consequently, life policies can be sold or assigned as security unless they are taken out by A as a nominal insured for the specific benefit of B.

[86] (1840) 6 M&W 224.

[87] (1899) 4 Com. Cas. 223.

3.2.2. 'Lost or not Lost' Clause

The 'lost or not lost' clause, *proviso* to s.6 (1)[88] echoed by First Schedule rule .1[89] is an exception to the general rule. This was developed to meet the difficulties of communication between distant geographical locations which frequently meant that assured would be seeking to insure a vessel or cargo in which he had just obtained an interest but might by the time of his acquiring his interest have in fact been lost or damaged. It is a technical rule to secure the fundamental principle of indemnity not damaged by the narrow interpretation of insurable interest.[90] The assured was permitted to make a claim even if the subject matter had been the subject of a casualty prior to the agreement. To fulfil this aim, firstly, the policy should be inserted with 'lost or not lost' clause.[91] Secondly the loss must be happened during the insured period. Thirdly, the assured[92] should not know the loss.[93] Thus, the policy is made retrospective and the assured does not need acquire an interest at the time of loss.[94] There is a suggestion that the stipulation in the Institute Cargo Clause A, B, and C, cl.11.2[95] do not give the same effect on the 'lost or not lost 'clause in S.G. policy as the assured has to prove his valid insurable interest at the time of loss subject to cl.11.1.[96] However, because the validity of the *proviso* depends on the insertion of 'lost or not lost' clause in the policy, clearly such clause as exception to the general condition shall be interpreted subject to the *proviso* in s. 6(1) MIA 1906 instead of the general rule stated in cl.11.1 and s.6(1) MIA 1906 and shall have the same scope of the 'lost or not lost' clause. In the consideration

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[88] Also based on the cases of *Mead v Davidson* (1835) 3 Ad & El 303; *Sutherland v. Pratt* (1843) 11 M&W 296; *Gibson v Small* (1883) 4 HL Cas 353; *Gledstanes v Royal Exchange Assurance Corporation* (1864) 34 LJQB 30.

[89] 'Where the subject-matter is insured 'lost or not lost', and the loss has occurred before the contract is concluded, the risk attaches unless, at such time the assured was aware of the loss, and the insurer was not.' This is also a clearer exposition of the law, for the words 'that the loss occurred before the contract of insurance was concluded' are helpful as they clarify the time of loss.

[90] *Cf* Arnould 16th ed, at para 31, fn 89.

[91] Lloyd's S.G. Policy.

[92] The status of insurer of known or unknown of the loss does not affect assured's claim. Nevertheless, this will affect the returnable or not-returnable of the premium as sated in s.84 (3) (b) MIA 1906 'When the subject-matter has been insured 'lost or not lost,' and has arrived in safety at the time when the contract is concluded, the premium is not returnable unless, at such time, the insurer knew of the safe arrival.'

[93] If the insurer wants to reject to indemnify the loss, he can rely on MIA 1906 s.18 (1) on the assured's un-disclosure of material circumstance. The burden of proof is thus transferred to the assured.

[94] Another kind of retrospective policy which covers loss earlier before the time of its effect is also retrospective should be distinguished. See para 32, Arnould 16th ed.

[95] 'The assured shall be entitled to recover for insured loss occurring during the period of this insurance, not withstanding that the loss occurred before the contract of insurance was concluded, unless the assured were aware of the loss and the underwriters were not'.

[96] Arnould, 16th ed, vol. 3, at para.285.

of the high developed communication technology now adopted in the shipping and insurance industries, it is simplicity itself today for any person on shore to obtain any information as regards the whereabouts or safety of his property at sea. The 'lost or not lost' clause does not have too much practical application.

3.3. Consequences of lack of insurable interest

A policy made without insurable interest has been variously described as void[97] or even illegal[98] and the assured certainly cannot recover any benefit from the insurer[99]even if the insurer has paid the insurance money.[100] The settled rule today is that the policy is not illegal but merely void. This is reflected in the early cases which held a policy without interest at the outset was void.[101] Even if there was interest, s. 1 MIA 1745, in an attempt to prevent gambling contracts being disguised as marine policies by having the requirement for insurable interest removed, provided that marine insurance contracts made on the terms of 'interest or no interest' or without further proof of interest than the policy or without benefit or salvage to the insurer (the so called p.p.i. policy), or for gambling or wagering were 'null and void to all intents and purposes'. In some later cases,[102] p.p.i. policies were held to be illegal. This view was rejected in *Tasker v Scott*,[103] Gibbs C.J. holding that a person who authorised another to effect a wager policy was liable to repay him the premium, on the ground that MIA1745 made the insurance not illegal but only unavailable. The enactment in s.4, MIA 1906 which replaced s.1 MIA 1745, also confirms those policies without insurable interest and without expectation of acquiring such an interest and p.p.i. policies are deemed to be gaming or wagering contract and are void. This is confirmed by s.18 of the Gaming Act

[97] 'Void' means having no legal force or binding effect; unable, in law, to support the purpose for which it was intended'—p.1573, Black's Law Dictionary 6th ed. In English contract law, void contract means 'a contract that does not exist at law; a contract having no legal force or binding effect. Expression denotes that the parties to the transaction have gone through the form of making a contract, but that non has been made in law because of lack of some essential element of a contract, and such contract creates no legal rights and either party thereto may ignore it at his pleasure, in so far as it is executory.' — p.1574 *ibid.*
[98] 'illegal' means 'against or not authorised by law'—p.747, Black's Law Dictionary 6th ed. Illegal contract means 'Contract is illegal where its formation or performance is expressly forbidden by a civil or criminal statue or where penalty is imposed for doing act agreed upon.' – p.747. *ibid.*
[99] *Macaura v Northern Insurance* [1925] A.C. 619.
[100] *Piper v Royal Exchange Assurance* (1932) 44 LlL Rep.103.
[101] *Goddart v Garratt* (1692) 2 Vern. 269; *Harman v Vanhatton*(1716) 2 Vern. 716; *Le Pypre v Farr* (1716) 2 Vem, 716.
[102] *Lowry v Bourdieu* (1780) 2 Dougl. 468; *Atkins v Jupe* (1877) 2 C.P.D. 375; *Gedge v Royal Exchange Assurance* [1900] 2 Q.B. 214.
[103] (1815) 6 Taunt. 234

1845 which rendered wagers unenforceable but not illegal. Furthermore, the enactments in MIA 1909, which supplement to s.4 of MIA 1906 and are aimed at penalising certain gambling insurance which the latter Act merely avoided, clearly prohibits and renders criminal sanction on the action of gambling on loss by maritime perils, Thus, some marine policies without insurable interest and some p.p.i. policies under certain circumstances are not only void pursuant to s.4 MIA 1906 but also illegal in law with criminal sanction pursuant to s.1 MIA 1909.

From the above analysis, we can find three different rules with different legal consequences when there is absence of insurable interest. The first rule is that if an insurance is made without any insurable interest through any innocent causes like mistake or misinformation, for example, the assured effects the policy with the expectation to acquire insurable interest but loses the interest at the time of the loss, or he has no insurable interest from the beginning of the contract because of the arrangement of insurance on a wrong ship, not being deemed to be a gaming or wagering contract, the insurance contract is regarded as a valid policy but the consideration for which has totally failed and the insurer has never been on risk. The assured can recover the whole premium from the insurer[104] according to ss 84 (1)[105] and 84 (3) (c)[106] MIA 1906.[107]

Secondly, if the assured effects the policy without insurable interest which relates to the time when the contract is made and without expectation to acquire insurable interest and either do not have the interest at the time of the loss, or the policy is a p.p.i. policy, the insurance contract is void and is deemed to be a gaming or wagering contract.[108] The

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[104] *Routh v Thompson* (1809) 11 East 428.

[105] 'Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his agents, the premium is thereupon returnable to the assured'.— s.84 (1) MIA 1906.

[106] 'where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, provided that this rule does not apply to a policy effected by way of gaming or wagering; — s.84(3) (c) MIA 1906.

[107] However, the premium is not returnable if the assured loses the existing insurable interest at the time during the period of the policy because the risk has run. *Boehm v Bell* (1799) 8 TR 154.

[108] In *Kent v Bird* (1777) 2 Coup. 583. Without remark on any property, an agreement the claimant reached with a passenger onboard the same ship on payment of £20 in exchange of £1,000 on the condition that the ship could save her passage to China was held to be a gaming or wagering contract and void within s.1 MIA 1745, although the claimant's goods on board would suffer loss if in delay. In *Lowry v Bourdieu* (1780) 2 Dougl.468, the claimant insured on the security of a common money bond was held to be void as a gaming policy and can not recover the premium because the learned judges thought this insurance is actually a hedge and the claimant would not have any actual loss in the

assured can not recover the premium[109] according to s.84(3)(c) MIA 1906.[110] Furthermore, a p.p.i. policy on one subject matter also rendered void to all other insurance contracts made by the same assured on the same adventure. We can find this opinion in Lord Shaw's dictum in *Thames & Mersey Mar.Ins.Co. v 'Gunford' Ship Co.*[111] In which the learned Lord said: 'It is necessary to examine fundamentally the position of an owner who has made legitimate insurances upon ship, cargo, or freight, and also made separate gambling insurances. My lords, it appears to me that, whenever owners enter into gambling transactions of this kind, these transactions themselves are not only invalid, but they infect and invalidate the entire insurances which the same assured have made upon vessel, freight, or cargo. The reason of that is: the voyage is one, and the ship, its earnings, its cargo, its crew, all are involved in that one and single hazard which has been undertaken and which is by the gambling transaction improperly weighted towards loss—a loss which, falling upon the ship, would not rest there, but spread to unsalved cargo and to freight, not to speak of the peril to human life which would be thus encountered. The line of plain duty for all parties to the contract is that the ship shall be preserved; but when a gamble has been made by one of the parties for gain upon the event of loss of ship, although the subject of the particular gamble be not the ship itself, the interest of that party is that the ship shall be destroyed. This hazard against the life of the vessel humbly appears to me to taint every policy entered upon by the same gambling adventurer, and no such policy thus depending upon the same hazard

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adventure. Valued policy is regarded as a wager policy if it dispenses with all proof of the existence of interest; or is good if the policy contains on the face of it no such dispensation, but only saves the claimant the trouble of showing the amount of his interest, leaving him still to prove some interest. See *Lewis v Raker* (1761) 2 Burr.1167 at p.1171; *Marphy v Bell* (1828) 4 Bing 567 at p.572. On the condition where there appears to be an enormous difference between the real value of the subject matters insured and the agreed value in the policy, it is thought that the breach of disclosure should be applied instead of being a wager policy. See para.395, Arnould, 16th ed.

[109] In pursuant to *Tasker v Scott* (1815) 6 taunt.234, the assured should repay the premium to the agent who was authorised to effect a wager policy because MIA 1745 only made the insurance void instead of illegal. *Read v Anderson* (1883-84) L.R.13 Q.B.D. 779. As s.4 of MIA 1906 also declares wager policy void, it is thought the assured has the liability to pay the premium on the condition of inapplicable of Gaming Acts 1845 and 1892 and MIA 1909. See footnote 69, para.391, Arnould 16th ed.

[110] Although the policy is made as p.p.i. policy and is deemed to be a wagering policy which is void, the assured can recover back the premium as the consideration for the payment of the premiums has totally failed if there is an insurable interest existence and there is no fraud or illegality on the part of the assured or reassured or their agents. See *Re London County Commercial Reinsurance Office Ltd* [1922] 2 Ch 67. This reversed the judgement in *Allkins v Jupe* (1877) 2 CPD 375, in which the learned judge regarded the wager policy as illegal and hence the premium could not be recovered. There is also an opinion that if there is an insurable interest in the assured in a p.p.i. policy, the policy should not be regarded as a wagering or gaming contract by s. 4(2) MIA 1906 as it is not wagering contract and void under Gaming Act 1845. See para.391, Arnould 16th ed.

[111] [1911] A.C. 529 at p.543. However, there is not any direct authority on this point.

is enforceable. The rule governing this is simple and familiar, namely, that the law will not enforce a transaction which is thus tainted by conflict between duty and self-interest. The rarity and difficulty, my lords, of a right adjustment of the wavering balance swayed by self-interest have been memorably phrased. But the law does not attempt the task; the penalty against such a conflict between interest and duty is the invalidation of the bargain. I remark, however, that the foregoing observations are not directed to the case of insurance upon ships in which third parties have acquired, in ignorance of the other and over-insurances and in good faith and for valuable consideration, separate interests. The right of such parties would require to be separately and fully considered.'

Thirdly, if the marine policy falls into the category listed in s.1(1) MIA 1909, it is regarded as gambling contract and is illegal and prohibited in law with criminal sanction which renders not only to the assured, but also to the broker and insurer with details as following:

1. Prohibition of gambling on loss by maritime perils.—

(1) If—

(a) any person effects a contract of marine insurance without having any *bona fide* interest, direct or indirect, wither in the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject matter insured, or a *bona fide* expectation of acquiring such an interest; or

(b) any person in the employment of the owner of a ship, not being a part owner of the ship, effects a contract of marine insurance in relation to the ship, and the contract is made 'interest or no interest', or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insure,' or subject to any other like term,

the contract shall be deemed to be a contract by way of gambling on loss by maritime perils, and the person effecting it shall be guilty of an offence, and shall be liable, on summary conviction, to imprisonment, (with or without hard labour)[112], for a term not

[112] Words in brackets are omitted by Criminal Justice Act 1948 (c.58), s.1(2) and Criminal Procedure (Scotland) Act 1975 (c.21), s.221 (2).

exceeding six months or to a fine not exceeding (one hundred pounds),[113] and in wither case to forfeit to the Crown any money he may receive under the contract.
(2) Any broker or other person through whom, and any insurer with whom, any such contract is effected shall be guilty of an offence and liable on summary conviction to the like penalties if he acted knowing that the contract was by way of gambling on loss by maritime perils within the meaning of this Act.

Accordingly, if a marine policy is effected without any insurable interest stated in s.1(a) MIA 1909 or of a p.p.i. policy[114] relating to a ship is effected by a person in the employment of the owner of the ship except as part-owners, this policy is illegal and the criminal sanction would be rendered to the person who effects the insurance. On the other hand, this Act does not apply to the insurance effected by a assured with genuine insurable interest, even if it is an excessive valued policy.

The above listed legal responses of the policy lack of insurable interest or in p.p.i. form especially the second and third effects become less certain if s.4 (1) MIA 1906 is unenforceable with reference to s. 335(2) in Gaming Act 2005.[115] Thus, insurer can only refuse to pay the benefit to the assured on void policy lack of insurable interest on breach of the principle of indemnity instead of a wager or gaming policy. That is to say, a marine insurance policy is void because the assured has not insurable interest on the subject matter insured to prove his loss on its destruction. Another uncertainty is whether the premium is still not returnable with s.84 (3)(c). As marine policy without insurable interest or in p.p.i. form is not void by way of gaming or wagering, the premium should be returnable on the reason of failure of consideration. A dilemma is that although the marine policy by way of gaming or wagering is not void in the civil sense, all parties involved may also commit criminal offences pursuant to MIA 1909 which has never been used since it received Royal Assent without any relevant authorities. In the consideration of the above confusions, further confirmation and interpretation are needed from the legislator and the learned judges.

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[113] Words in brackets are substituted as [level 3 on the standard scale] by Criminal Justice Act 1982 (c.48), ss.38, 46 and Criminal Procedure (Scotland) Act 1975 (c.21), ss.289f, 289G.
[114] It is the person's onus to prove his innocence if any proceeding on p.p.i. policy under this act are taken against him except he is employed by the owner of a ship to make insurance. See s.1(5) MIA 1909.
[115] On the effect this section in marine policy, please see above S. 1.2., Chapter I.

In practice, it is not a strong defence relied by insurers on the absence of insurable interest to refuse the payment of benefit.[116] There are several reasons. Firstly, as the insurance contract is usually regarded as void policy if there is no insurable interest, it is not illegal for the insurer to make payment voluntarily to the assured without insurable interest except those circumstances being prohibited in MIA 1909. Secondly, as this onus is on the insurers to make an enquiry as to assured's valid insurable interest, the insurers may prefer to stay silent in order to their reputation in the insurance market. Moreover, as regarded by the learned judges, 'the objection that there was no insurable interest is often, as nearly as possible, a technical objection', 'it is the duty of the Court always to lean in favour of an insurable interest, if possible...'. [117] Mance J also commented: '... the present policy is not on its face one which the parties made for other than ordinary business reasons; it does not bear the hallmarks of wagering or the like. If underwriters make a contract in deliberate terms which covers their assured in respect of a specific situation, a Court is likely to hesitate before accepting a defence of lack of insurable interest.'[118]

[116] As Buller J said in *Wolff v Horncastle* (1798) 1 Bos.& Pul. 316: 'Time was ... when no underwriter would have dreamed of making such an objection; if his solicitor had suggested a loophole by which he might escape he would have spurned at this idea.' from p.320 to 321.
[117] *Stock v Inglis* (1884) 12 QBD 564 at 571 per Lord Brett MR.
[118] *The Capricorn* [1995] 1 Lloyd's Rep.622 at 641. However, if the court itself comes to know for certain that the insured has no insurable interest, then the court must act accordingly because it is a matter of public policy.

CHAPTER IV:
INSURABLE INTEREST IN SHIP

4.1. Owner and others

4.1.1. Owners and Charterers

Obviously, a ship's owner seeking to recover on a policy must have been interested in the subject of insurance at the time of loss subject to section 6(1), MIA 1906. If therefore, the insurable interest depends upon a sale, the owner must have acquired a complete title to the thing insured before the loss, or it must be at his risk under the contract of sale, otherwise he can recover nothing on his policy. On the same grounds, the owner, if he has not absolutely parted with all his interest before the loss, may still recover on respect of such interest as remains in him at that time.

Thus, in *Reed v Cole*,[1] where the owner of a ship had sold her under an agreement that he would pay the purchaser £500 if a loss happened within three months, the court held that to this extent he still had an insurable interest in the safety of the ship, and therefore might recover against the members of a mutual insurance society, to which he belonged, for such amount of contribution as, by the rules of the society, he was entitled to received.

In *Piper v Royal Exchange Assurance*[2], the claimant insured in 1926 bought a yacht in Norway 'as she lies' and the risk would transfer to him until she arrived in London. The claimant effected a policy in respect of her. During the voyage to England, the yacht sustained damage and the assured's claim was fully paid by the defendant. In 1928, the claimant made a further claim against the insurers for damage which she had suffered by stranding. The insurers refused and counterclaimed for the sum which they had paid him in respect of damage suffered by her on the voyage from Norway to London in 1926 on the ground that he had no insurable interest in her. Roche J held that the

[1] (1764) 3 Burr. 1512.
[2] (1932) 44 LlL Rep.103.

counterclaim succeeded on this ground because the risk of the voyage was not upon him and the insurance moneys paid by the insurer was recoverable.[3]

According to rule 15 in the Rules for Construction of Policy, Schedules of MIA 1906, The owner's interest in the ship not only includes the hull and machinery, but also extends to materials and outfit, stores and provisions for the officers and crew and the ordinary fittings requisite for a special trade which are to be specified in the description of the subject matter insured. How about the bunkers or engine stores onboard? If they are owned by the owner assured, it is thought they are covered by a voyage hull and machinery policy if they are necessary for this voyage. In a time hull and machinery policy, reasonable quantities will be covered on the words of the policy and the ship's service engaged with the allowance of average adjuster.[4] If the bunker are not owned by the ship's owner, as in time charter, it is usually the charterer's obligation to provide and pay for fuel and such bunker are owned by the time charterer, thus it is charterer who has insurable interest on the bunker and he can make bunker insurance to cover the value of the bunker onboard at the time of the casualty in the case of a total loss (actual or constructive) of the ship. Shipowner can only acquire interest in the bunker after accepting and paying for all fuel remaining onboard at the time of redelivery. Nevertheless, the owner always remain the bailee of the bunker and is responsible for exercising due care toward the goods in trust. He have insurable interest on such responsibility. The anology from the relevant cases relating to bailee can be made here. The shipowner can make insurance on the bunker as bailee of the charterer 'in trust' to

[3] By applying s.5 and 6 MIA 1906, Roche J said: 'In my judgement, the underwriters are so entitled. ... Suffice it to say that in my judgement the plaintiff had no interest here. It is unnecessary to decide, but it is probable that he had an interest, not in the ship itself, but in its arrival, which might have been insured and constituted an insurable contingent interest, but I think it ought to have been so described, and this is just one of those matters of interest which requires to be define, because it necessary still to define the subject-matter insured, although it is not necessary to specify the nature and extent of the injuries to the subject matter insured. ... I am not saying that the plaintiff ought to or could have insured it under the designation of profits; I am only saying that he could not insure it under the title of the ship itself so as to enable him to recover for particular average to that ship upon a voyage in a case when he was not concerned with what happened to the ship by way of damage on that voyage, and where he had nothing to pay but by reason of any particular average which was suffered by the ship'. (1932) 44 LIL Rep.103. at p.116,117.

[4] In *Roddick v Indemnity Mutual Marine Insurance Co.* [1895] 1 Q.B. 836; affirmed [1895] 2 QB 380, CA, both the learned judges held that bunkers were not included in the term 'hull'. This is doubted in Arnould 16th, para.304.

receive the full value of the fuel oil for the charterer.[5] He may insure the bunker 'for which he is responsible' to receive the amount to which he is liable.[6]

The owner can insure the ship notwithstanding that some third person like charterer may have agreed, or be liable, to indemnify him in case of loss as it would be highly dangerous for any owner to rely solely on such an undertaking to protect his interest. This is pursuant to s. 14(3) MIA 1906[7] which uphold the common law rule established in *Hobbs v Hannam.*[8] The assured chartered his ship '*Jane*' to a charterer who covenanted by the charter party to pay the owner a sum of money that in case the ship was lost during the voyage. The assured made a policy on the ship with the defendant insurer. The ship was seized and condemned in charterer's fault. Lord Ellenborough held that the owner was not 'bound to trust exclusively to the credit of the charterer; but might likewise protect himself by a policy of insurance.'[9] On the other hand, the time or voyage charterer also has insurable interest on the chartered ship as he is liable to pay the owner the value, full or moiety, in case of loss according to the clauses in the contract of affreightment[10]. The bareboat charterer's insurable interest in the charterer vessel under a hull policy is also confirmed in the court because his obligation to repair any damage and to make insurance.[11]

The above listed valid insurable interest in ship is originated from its clear legal or equitable right or responsibility to the subject matter insured. This is in consistent with the definition in s.5(2) MIA 1906 and fell into Group (1) of Waller J's classification in *Feasey.*

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[5] *Waters v Monarch Fire & Life Assurance Co.*(1856) 5 E.&B. 870. *Hepburn v Thomlinson* [1966] A.C. 451.
[6] *North British and Mercantile Insurance Co. v Moffatt* (1871) LR 7 CP 25. *Ramco v International Insurance Co. of Hannover Ltd* [2004] Lloyd's Rep. I.R. 606.
[7] 'The owner of insurable property has an insurable interest in respect of the full value thereof, notwithstanding that some third person may have agreed, or be liable, to indemnify him in case of loss'. s.14(3) MIA 1906.
[8](1811) 3 Camp.93.
[9] *Ibid* at p.94.
[10] As in an American case, *Oliver v Greene* (1807) 3 Mass. R. 133 cited Arnould 16th ed, para 343.
[11] *Linelevel Ltd v Powszechny Zaklad Ubezpieczen SA, The Nore Challenger* [2005] 2 Lloyd's Rep. 534.

4.1.2. Ship's Agent

Some other insurable interest in ship recognised in courts is not strictly based on the assured's legal interest. As a ship's agent was held to have insurable interest on the ship to the extent of advances on disbursements for ship's purposes if he can enforce his claim for such advances by an action *in rem*, and in such an action to arrest the ship. This is held by Walton J in *Moran, Galloway & Co. v Uzielli.*[12] The assured was the UK agent of a foreign shipping company who was largely indebted to the agent for advances in respect of necessary ship's disbursements. The assured took out a voyage policy on disbursements against the risk or total loss of the company's ship, the *Prince Louis* who performed a cargo carrying voyage from Vancouver to Cardiff. The ship was severely damaged on her voyage by bad weather and was declared a constructive total loss after arrival at Cardiff. The insurer refused on the condition of lack of insurable interest. Although the assureds possessed no lien or other security right in the ship at the time of loss, they were held to possess at the date of loss an existing right under the Admiralty Court Act 1840 to arrest the ship upon her arrival by commencing *in rem* proceedings to recover their debt. Walton J differed this situation with the position of a creditor for an ordinary debt as 'who has no right to arrest the property of his debtor except after judgement, under a writ of execution.'[13] This decision was doubted by some learned scholars as it is not consistent with s.5 MIA 1906.[14] Nevertheless, considering that Walton J's decision was based on Lawrence J's opinion in *Lucena v Craufurd* and reasonable in commerce, the ship's agent under the above condition should be regarded to have valid insurable interest. This can be classified into group (3) of Waller J's classification in *Feasey*.

4.1.3. Ship's Manager

The ship's manager also has insurable interest on the ship managed by him. This was held by Mr. Siberry QC in *O'Kane v Jones (The 'Martin P').*[15] He started his point on

[12] [1905] 2 K.B. 555.
[13] *Ibid*, at p.564.
[14] See Arnould, 16th ed, para 337; Legh-Jones, Nicholas QC, para 4.36, '*The elements on Insurable Interest in Marine Insurance law*' in Rhidian Thomas, editor, Modern Law of Marine Insurance Vol. 2 LLP 2000.
[15] [2004] 1 Lloyd's Rep.381.

the identification of the insured subject matter, which was clearly the vessels rather than an interest designated in general terms meant that s.26(3) MIA 1906 could have no application. The learned judge then focused on the nature of assured ship manager ABC's interest in the insured vessels. The first one is ABC's remuneration under the management agreement with Nanice for the services to be provided by ABC and if a vessel was lost, then ABC would in turn lose its right to remuneration. The second one is ABC's liability to Nanice if the vessel was lost by the negligence of ABC. With Mr Siberry QC's acknowledgement, clearly such kind of insurable interest does not fell strictly into the requirement under s.5(2) MIA 1906.[16] We can find this reasoning almost perfectly anticipates that of the majority of the Court of Appeal *Feasey v Sun Life of Canada*,[17] although this case was handed down before this landmark ruling.[18] Certainly, ABC as manager who will face economic loss on the destruction of the insured vessel determined his valid insurable interest in the insured ship.

4.2. Mortgagor and Mortgagee

4.2.1. Mortgagee Insured under Mortgagor's Hull Policy

Mortgage is one of the important means of ship finance. It is a restricted transfer of all mortgagor's legal title in the thing mortgaged to the mortgagee as security for the loan.[19] However, it was realised that the traditional methods of protecting a mortgagee of his interest in the security of the ship were inadequate. To acquire more protection, banks and other institutions as mortgagees also require insurance protection on the money advance to the mortgagors. From section 14(1) MIA 1906, the mortgagor and mortgagee both have insurable interest on the mortgaged subject matter insured. In practice, the mortgagee may protect his interest either by obtaining insurance under the mortgagor's hull policy or taking up his own policy as an original assured in the form of either the version of the Institute Time Clauses, Hulls and /or the Institute Mortgagees

[16] *Ibid*, at para. 158.
[17] [2003] Lloyd's Rep IR 637.
[18] *Cf* Contribution Between Insurers: The Consequence of Double Insurance, Insurance Law Monthly, Vol.15, No.11, Nov. 2003, at p.4.
[19] *Keith v Burrows* (1876) 1 C.P.D. 722.

Interest Clauses(IMIC). Relevant questions relating to insurable interest arise in respect of each.

Pursuant to s.14 (1) MIA 1906, mortgagor as shipowner can insure his mortgaged ship in a hull policy as he has an insurable interest on the full value of the ship, because he still keeps equitable title on the mortgaged ship and in case of loss he is still liable for the mortgaged debt. This was held in *Alston v Campbell* [20] that the mortgagor of the ship has an insurable interest although the ship is mortgaged to her full value. Making the shipowner's hull policy as a security for his loan, the mortgagee can recover the loss upon his derivative interest[21] on the mortgaged ship by an assignment from the mortgagor of his interest under his hull policy.[22] The assignment can be amounted by the delivery of the policy without endorsement of the policy.[23] When the mortgagor has convenanted to insure the mortgaged property on account of the mortgagee, he is regarded as a trustee for them of the proceeds of the policy.[24] As a marine policy is assignable in general rule,[25] the mortgagee can act as assignee of the shipowner's hull policy either before or after loss.[26] However, his position is dependent on the assignor's valid insurable interest in the policy. A shipowner who does not have an insurable interest in the ship at the time of the assignment obviously cannot pass on to the mortgagee, the assignee, an interest which he does not possess, which is made clear by s.51, MIA 1906. An assignment would therefore be inoperative, if the shipowner were to sell his ship before entering into an agreement to assign the policy to the mortgagee; for once he parts with his interest in the ship he would have nothing left to assign. A mortgagee should therefore be cautious to ensure that any agreement

[20] (1779) 4 Brown's Parl. Cas. 476; this was also approved by U.S. Supreme Court in *Ins. Co. v Stimson* 103 U.S. 25 (1880) (fire insurance). Also *cf Hutchinson v Wright* (1858) 25 Beav. 444 ; *Ward v Beck* (1863) 13 CBNS 668, in which it was held that he circumstance that in from the registered deed of mortgage is an absolute transfer of the ship does not affect the mortgagor's insurable interest.
[21] Arnould 16th ed, para. 251.
[22] A hull policy may also contain a 'loss payable' clause to instruct the insurer to make payment to the mortgagee of the ship instead of the assured.
[23] *Swan v Maritime Insurance Co.* [1907] 1 KB 116; *Baker v Adam* (1910) 15 Com.Cas. 227; *De Mattos v Saunders* (1872) LR 7 QB 299. Also *cf* Roche J in *Safadi v Western Assurance Co.* (1933) 46 L.l.L. Rep. 140 at 144: 'upon proof, assignment in some customary manner other than by written assignment or indorsement thereon can be a good assignment'.
[24] *Landbroke v Lee* (1850) 4 De. G. & Sm.106. *Swan v Maritime Insurance* [1907] 1 KB 116.
[25] S.50 MIA 1906.
[26] *Hagedorn v Oliverson* (1814) 2 M & S 485; *Lloyd v Fleming* (1872) L.R. 7 Q.B. 299.

(expressed or implied) regarding the assignment of the mortgagor's interest in the policy should be made before the mortgagor parts with his interest in the ship.[27]

According to s.50 (2), MIA1906, the mortgagee as assignee has the right to sue upon the policy in his own name only if the assignment operates to transfer the entire beneficial interest in the insured subject matter.[28] However, it must be clear that as assignee the mortgagee is in the same position of assignor mortgagor and has to face the defence arisen from the policy by the insurer to the original assured.[29] On the other hand, if there is an assignment by way of mortgage prior to any loss, and the assured has retained any insurable interest in the insured subject matter which is covered by the policy, the mortgagee as assignee has to bring the suit together with the assignor[30] and the insurer can not make the defence as to the original assured.[31]

The mortgagee can also act as co-assured in mortgagor's hull policy. Under this condition, the interests of a mortgagor and mortgagee are separated. Thus the insurer can not deny a claim to the mortgagee on the defence against the mortgagor. This was upheld by Lord Esher M.R. in *Small v United Kingdom Marine Mutual Insurance Association.*[32] The claimant advanced money to enable the borrower to carry out an arrangement by which he was to become part-owner of a ship, and to be appointed her captain with the security of mortgage of his shares in the ship and an insurance on the ship to cover the mortgagee's interest. The ship had been wilfully cast away by her captain as the mortgagor. Lord Esher M.R. held that because the claimant Small, as the mortgagee of Wilkes's shares in the ship, had an insurable interest to the amount for which the ship was his security. Therefore, Small was insured by this policy against a loss of the ship by perils of the sea or other perils insured against to the extent of his interest as mortgagee. For this purpose the interests of the mortgagor and mortgagee are distinct interests; the mortgagee does not claim his interest through the mortgagor, but by virtue of the mortgage which has given him an interest distinct from that of the

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[27] *Alston v Campbell* (1779) 4 Bro Parl Cases 476.
[28] *Swan v Maritime Insurance Co.* [1907] 1 KB 116; *William Pickersgill & Sons Ltd v London and Provincial Marine and General Insurance Co. Ltd* [1912] 3 K.B. 614. For further discussions on assignment by way of mortgage, See Merkin's Insurance paras. D0026--D0032.
[29] For further illustration, see Susan Hodges, Mortgagee's Interest Insurance, in Rhidian D. Thomas, editor, Modern Law of Marine Insurance, vol.1, LLP, 1996.
[30] *Swan v Maritime Insurance Co.*[1907] 1 KB 116.
[31] *First national Bank of Chicago v West of England P&I Association* [1981] 1 Lloyd's Rep.54.
[32] [1897] 2 QB 311, also concurred by A. L. Smith and Rigby L.JJ.

mortgagor, thus the mortgagee was entitled to recover upon the insurance policy either in respect of a loss by perils of the seas if he had nothing to do with the appointment of the mortgagor as captain or in respect of a loss by barratry of the master if he had taken part in his appointment.[33]

4.2.2. Mortgagee as Original Assured

Instead of relying on an assignment of the mortgagor's hull policy, a mortgagee could take out his own insurance on the mortgaged ship or arrange a mortgagee's interest policy with the incorporation of the Institute Mortgagee's Interest Clauses Hulls [IMIC (86) or (97)].[34] To qualify as an original assured, a mortgagee has to establish that he has an insurable interest in the ship, the subject matter insured. This is not difficult to prove, for as a mortgagee he has without a doubt, under s.14 (1), MIA 1906, an insurable interest in respect of any sum due or to become due under the mortgage. The mortgagee's interest is based on his limited proprietary right on the mortgaged ship and his right to enter into possession in the collateral deed of covenants.[35] This is clearly in consistent with the definition in s.5 (2) MIA 1906. As a result, a mortgagee has a distinct insurable interest in the mortgaged ship and may recover in an action upon a policy effected for his benefit, averring the interest to be in himself, to the full amount of the mortgage debt.[36] Furthermore, he had an equitable right in the mortgaged property even if the mortgage is unregistered. This is confirmed in *Samuel v Dumas*.[37] In this case, an unregistered mortgagee of a Greek ship claimed against the insurer under a time policy and was refused because according to Greek law all unregistered mortgages were void. The House of Lords held that he had an insurable interest under s.5(1) MIA 1906 as he had an equitable right to a mortgage.[38]

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[33] *Small v United Kingdom marine Mutual Insurance Association* [1897] 2 QB 311. at .313. Also see Viscount Cave's *dicta* in *Samuel v Dumas* [1924] AC 431 at p.445-446. However, if the mortgagor has been guilty of scuttling the vessel, the loss is not by perils of the sea and the mortgagee insured on standard hull conditions will be defeated by want of insured peril. *Samuel v Dumas* [1924] AC 431.

[34] See N. Geoffrey Hudson, Mortgagees' Interest Insurance: an examination of the Institute Mortgagees' Interest Clauses—Hulls 1/3/97 [1999] International Journal of Shipping Law, 31-41.

[35] '...any creditor having a claim on property pledged to him for advances has an insurable interest to the extent of his claim.' Arnould 16th, para 380.

[36] ' ... the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage.' S.14 (1) MIA 1906. *Irving v Richardson* (1831) 2 B & Ad 193.

[37] [1924] AC 431, HL.

[38] As Viscount Cave observed: 'In the present case the appellant held a British mortgage on the ship and a deed of covenant which recited an agreement by the owner to deliver to the mortgagee a 'formal first

When the mortgagee takes out his own hull policy as an original assured to cover his own interest, sometimes the value insured is more than the loan to the shipowner who mortgages the vessel as security. Then can the mortgagee recover the whole value insured from the insurer? According to s.14(2) MIA 1906,[39] a mortgagee may not only insure for himself, but may also insure and recover to the full value of the ship if he intends to cover not only his but also the mortgagor's interest.[40] Nevertheless, the mortgagee must clearly state his intention in effecting the policy. If he intends the policy to cover the whole legal and equitable interest, he may recover the whole benefit of the insurance. He then acts as trustee of the surplus part as trust to the mortgagor. If he intends to insure only his own interest as mortgagee, and the insured value is more than the mortgage debt, his recovery can not exceed the debt.[41] If he retains the surplus of the whole sum, he must return to the underwriter.[42]

As a mortgagee not only have derivative interest to receive the benefit as assignee in shipowner mortgagor's hull policy, but also can insure his direct interest in the mortgaged ship in a hull policy as original assured, then the question arisen on whether he is the original and independent assured to claim the benefit directly or is the assignee

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mortgage of the said steamship duly executed and registered in Greece', and contained a covenant by him to 'take such steps as might be necessary to effect the complete registration of the said steamship as a Greek steamship': and he was entitled in equity to enforce these agreements. This being so, I think it impossible to say that he was not interested in the adventure within the meaning of the above section; and, if so, he clearly had an insurable interest to the extent of the sum secured by the mortgage.' [1924] AC 431. at p.444.

[39] 'A mortgagee, consignee, or other person having an insurable interest in the subject-matter insured may insure on behalf and for the benefit of other persons interested as well as for his own benefit.' S.14(2) MIA 1906.

[40] As Bowen LJ said 'A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property.' *Small v United Kingdom marine Mutual Insurance Association* [1897] 2 QB 311. at p323.

[41] *Irving v Richardson* (1831) 2 B & Ad 193; *Ladbroke v Lee*(1850) 4 De G & Sm 106; *Scott v Globe Marine Insurance Co. Ltd* (1896) 1 Com. Cas. 370. However, according to the judgements in recent cases, if the assured including the mortgagee who want to recover the full value of the insured property as a contracting principal, he must prove that he is acting as an agent for the other persons and has disclosed his intention to the insurer at effecting of policy instead of proving his limited interest in the insured property. *Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C.451. at 479; *Ramco(UK) Ltd v International Insurance Company of Hanover* [2004] Lloyd's Rep. I.R. 606. Also Arnould, 16th ed. para.247-251; above, S. 3.1.2., Chapter III.

[42] *Irving v Richardson* (1831) 2 B & Ad 193.

to be dependent on the mortgagor. This is in each case a question of fact to be determined by extrinsic evidence and upon a consideration of all circumstances.[43]

Two cases decided by the same law lords in House of Lords within few days illustrated their opinions on the importance of the distinction. In these two cases, the insured ships were both mortgaged and scuttled with the permission of her owner as mortgagor. The claimants were all mortgagees who did not know the owner's fraud. In *Graham Joint stock Shipping Co. v Merchants Mar. Ins,*[44] based on the documentary evidences provided, the learned Law Lords held that the policy was effected on behalf of the owner as it is him who authorised his agent to effect insurance, pay the premium and consented to maintain the policy and endorse in favour of the mortgagee in the form of mortgage. The mortgagee could only claim as assignee of the owner because the only evidence provided by the mortgagee to prove him as original assured was only oral evidence from the broker who effected the policy was held not sufficient. The claim therefore failed on account of the owner's fraud. In *Samuel v Dumas,*[45] the claimant mortgagee was held to be original assured as he personally instructed his broker to effect the insurance with sufficient evidence.[46] Thus he may sue upon the policy directly. However, the claim failed by reason of the scuttling of the vessel.

From the above analysis, we can find that clearly the mortgagor and mortgagee's insurable interests on the ship mortgaged are both based on their legal or equitable relation with the ship. This is in consistent with the definition in s.5(2) MIA 1906 and fell into Group (1) of Waller J's classification in *Feasey*.

4.3. Shareholder

It is a well-established proposition of English law that a shareholder has no insurable interest in the property of the company in which he holds the shares, even if he is the sole beneficial owner of all the company's issued shares. This proposition rests firstly

[43] The intention of the broker or other agents who effects the insurance upon instruction is immaterial. *Cf* Vaughan Williams L.J. in *Boston Fruit Co. v British Foreign Mar. Ins. Co.*[1905] 1 K.B. 637 at p.648.
[44] [1924] A.C.294.
[45] [1924] A.C. 431.
[46] *Cf* the witnesses in *Samuel v Dumas* (1922) 12 Ll. L. Rep. 73 in King's Bench Division.

on the principle established by the House of Lords in *Salomon v Salomon & Co.*[47] that a corporation is said to enjoy the status of a legal entity, separate and distinct from those who have incorporated it, even in the situation where all of its share is held by a single person.[48] The shareholder in such a company has no property in the estate or chattels of the company, such a chattel, though exposed to maritime perils, cannot for him be the subject of a valid policy. Furthermore, it depends on the narrowness interpretation of the concept of insurable interest in English law which requires that an insured have a legally recognised proprietary or contractual right in property he insures;[49] a mere factual expectation of loss is not sufficient.

This rule was laid down by the House of Lords in *Macaura v Northern Assurance Co.Ltd.*[50] Macaura, the only substantial shareholder in a company to which he had sold timber on credit, insured the timber in his own name and sought to claim against the policies destroyed upon fire. The issue before the House of Lords was whether Macaura had an insurable interest in the timber owned by the company.[51] Lord Buckmaster delivered leading speech. He firstly cited with approval Walton J's reasoning in *Moran, Galloway & Co. v Uzielli*[52] and dismissed the idea that a creditor has an insurable interest in the assets of a debtor. Then he mainly objected to Macaura's valid interest in the company's property as shareholder. He commented that if Macaura's argument was accepted, then each shareholder in every company would have an insurable interest in corporate assets and the extent of that interest 'could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset—a calculations almost impossible to make.'[53] and explicitly attacked Lawrence J by saying, 'I find...difficulty in understanding how a moral certainty can be so defined as to render it an essential part of a definite legal proposition.'[54] On the basis that neither the company's debt to the insured or his shares were exposed to fire, Lord

[47] [1897] A.C. 22; also *cf R. v Arnaud* (1846) 9 Q.B. 806; *Myers v Perigal* (1852) 2 De G.M. & G. 599; *Jason v Driefontein Mines Ltd.* [1902] A.C. 484; *Harburg Indiarubber Co. v Martin* [1902] 1 K.B. 778.
[48] This separate entity will be discarded by the courts only when it becomes necessary to do so to prevent fraud or injustice. *Woolfson v Strathclyde Regional Council* (1978) 38 P & CR 521, HL. *Adams v Cape Industries plc* [1990] BCLC 479.
[49] *Lucean v Craufurd* (1806) 2 B. & P.N.R. 269 at 321, per Lord Eldon.
[50] [1925] A.C. 619.
[51] An initial allegation that Macaura's claim was fraudulent and dishonest was dismissed by an arbitrator and, apart from a brief statement to that effect, this was not mentioned in the House of Lords.
[52] 'in so far as the plaintiffs' claim depends upon the fact that they were oridinary unsecured creditors... I am satisfied it must fail.' at p.562.
[53] [1925] A.C. 619, at 627.
[54] *Ibid*, at 627.

Sumner delivered further opinion: 'the fact that he was virtually the company's only creditor, while the timber is its only asset, seems to me to make no difference...he was directly prejudiced by the paucity of the company's assets, not by the fire.'[55] He reaffirmed that the insured had no 'legal or equitable relation to' the timber at all and his relation was to the company, not to its goods. He also refused an interest based on bailment because Macaura is a gratuitous bailee thus he was not liable for the safety of timber. From the above analysis, we can find that on the House of Lords' strong inclination of Lord Eldon's narrow test based upon proprietary interest and definite rejection on the broad conception of insurable interest put forward by Lawrence J, the shareholder is held to have no insurable interest in the property of the company in which he holds the shares. Nevertheless, he can insure his interest in a particular marine adventure carried by the vessel owned by a company in which he holds shares, upon which profit is to be earned. This was held in the case *Wilson v Jones*[56] by Mr. Justice Blackburn with the application of Lawrence J's 'moral certainty' test in *Lucena v Craufurd*[57] instead of Lord Eldon's property right.

With the recent trend on expansion of the definition of insurable interest, the shareholder's insurable interest gets some recognition in a Canadian case *Constitution Insurance Company of Canada v Kosmopoulos*,[58] the reasoning in *Macaura* has been rejected principally on the basis that an overly technical determination of the insurable interest requirement has the potential to defeat the reasonable commercial expectations of the parties, based on a pragmatic approach in response to the perceived social and commercial benefits which widespread insurance offers. In this case, the facts closely resembled *Macaura.* Kosmopoulos had incorporated his business into a company of which he was sole shareholder and director, but by an oversight and even though the agency through which he insured was aware of the facts, the insurance of the business premises and assets continued to be in his name. Following a fire, the insurer refused to indemnify him on the ground that he had no insurable interest in the company's

[55] *Ibid*, at 630.
[56] (1867) L.R. 2 Exch.139. The subject matter insured should be described clearly in the policy. In another relevant case *Paterson v Harris* (1861) 1 B&S 336; 30 LJQB 354, it was held that the policy was, in effect, an insurance on 'moveables', property belonging to a third party and the assured as shareholder does not have insurable interest on that.
[57] (1802) 2 East 544.
[58] (1987) 34 DLR (4^{th}) 208.

property, but his claim was allowed by the Supreme Court, affirming the Ontario courts at first instance and on appeal.

One of the Supreme Court judges, McIntyre J., reached his decision by in effect lifting the veil in respect of a one-man company; he was content to follow the narrow *Macaura* view of insurable interest but held that as Canadian company law permitted the creation of companies with just one shareholder and director, it would be consistent with that narrow view to hold that such a person had an insurable interest in the company's property. His expedient solution was refused by Wilson J, who delivered the major judgement with the concurrence of other five judges who adopted the broad view of insurable interest and explicitly refused to lift the veil. On the latter point they held that those who had chosen the benefits of incorporation had to bear the burdens and would lift the veil only in the interests of third parties who would otherwise suffer. They also and easily rejected an argument that Kosmopoulos was bailee of his company's property and as such had an insurable interest.

In Wilson J's leading judgment which is a valuable review of the relevant history of the law of insurable interest in property since *Lucena*, she firstly pointed out that Lord Eldon's reason for adopting a narrow view, namely the uncertainty which he saw would result from a broad view, does not really stand up to serious investigation. Wilson J. proceeded to criticised the two reasons underlying the requirement of insurable interest necessitated the narrow view. The first was the certainty of the 'legal or equitable relation'. With citation from Brown and Menzes' comment in their book,[59] the learned judge clarified that 'legal or equitable relation' is not more certain than Lawrence J's 'moral certainty'. The second reason was said that a broader definition of insurable interest would lead to too much insurance. Wilson J found it 'may also be illusory'. As it is the insurer's right to assess the risk on the assurd's duty of full disclosure of all

[59] 'After *Macaura*, it is no longer possible to claim merely that one would be adversely affected by the loss; the insured must assert that he owned an interest in the objects destroyed. This provides the illusion of great certainty. Property law is among the most technical and certain segments of the law. This certainty is totally illusory because the new formulation makes no concessions either to the reasons for which insurable interest is a component of insurance law or for common place business transactions....Assuming that an insurable interest in 'things' must mean property, among the simple questions raised are matters such as how does one own a direct interest in property which is not in existence at the time of the contract? Can next season's crops or fluctuation inventory be insured? Are warehousing and other bailee policies subject to the law as set out in *Macaura* so as to limit the right to insure to the bailee's liability to the bailor.'—C. Brown and J Menzes, Insurance Law in Canada Sarborough, Ontario: Carswell, 1982, at p. 84.

material facts and the nature of their interests, they should make their own decision to write the policy on their sound business judgement and actuarial expertise to minimize their liability instead of relying on court's judgements.[60]

Wilson J then rejected the view of Lord Buckmaster in *Macaura* that the difficulties of valuing interests other than legally recognised ones militate against a broad view of insurable interest. She pointed to provisions in the Ontario Business Corporations Act, which require, in certain circumstances, such valuations to be made.

Wilson J. also reviewed whether the three policies underlying the requirement of insurable interest necessitated the narrow view. The first of these three policies was the policy against wagering under the guise of insurance. While recognising the validity of this policy, the judge held that a narrow principle of insurable interest did nothing to further it; anti-wagering policy is upheld so long as the insured is able to show a pecuniary interest.[61] The second policy was said to be that which restricted the insured to a full indemnity for his loss. While a requirement of an insurable interest is obviously a crucial prop to that policy, it was easily demonstrated how the definition of insurable interest was irrelevant to that policy and indeed how a narrow ruling like that in the *Macaura* case might deny indemnity to someone who had suffered a real loss. The third policy underlying insurable interest was the policy to prevent temptation to destroy the subject-matter of the insurance. However, as Wilson J. pointed out, frequently an insured with an interest in the narrow *Macaura* sense would have better access and opportunity to destroy the property than an insured with an interest of the wider sort. In so far as the case of a shareholder insuring the company's property was concerned, the law contained sufficient provisions to ensure that he did not benefit unduly from insurance effected by him on the company's property at the expense of the company's creditors or other shareholders.[62]

Having disposed of the policy questions, Wilson J. pointed out how many American courts have dispensed with a narrow insurable interest requirement with no evidence of

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[60] *Constitution Insurance Company of Canada v Kosmopoulos* (1987) 34 DLR (4th) 208. p.215-219.
[61] As s.335 (1) Gaming Act 2005 declares that a contract with the fact involving in gambling is enforceable, to exclude wager policy is less important in insurable interest's function. See above, S.1.2., Chapter I.
[62] *Ibid* p.221-226.

insoluble problems of calculation, difficulties in ascertaining insurable interests, wagering, over-insurance or wilful destruction of property. In addition, commentators generally favoured a wide test. She concluded that *Macaura* and the previous Canadian decisions in line with it should no longer be followed in Canada. Applying the factual expectation test, she finally stated:

'Mr. Kosmopoulos, as sole shareholder of the company, was so placed with respect to the assets of the business as to have benefit from their existence and prejudice from their destruction. He had a moral certainty of advantage or benefit from those assets but for the fire. He had, therefore, an insurable interest in them capable of supporting the insurance policy and is entitled to recover under it.'[63]

Wilson J's analysis not only validates sole shareholder's insurable interest in his company's property, but also reflects a shift of narrow definition by Lord Eldon to a broader conception that recognises the economic and social benefits of insurance. Similar opinion can also be found in American court that the shareholder, being the only natural person with a substantial interest in the preservation of the property of the corporation, should be allowed to protect this interest through the medium of insurance.[64] In recent English litigation, the definition of insurable interest is also re-examined towards a broader and relaxing scope, which can be found in Waller J's judgement in *Feasey*. As the learned judge has pointed that 'It is not a requirement of property insurance that the insured must have a 'legal or equitable' interest in the property as those terms might normally be understood....That is intended to be a broader

[63] *Ibid* at p.228.

[64] *Cf* Andrews J.'s comments in *Riggs v Commercial Mut. Ins. Co.* 125 N.Y. 7, 12-13, 25 N.E. 1058, 1060 (1890): 'The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter.... But stockholders in a corporation have equitable rights of a pecuniary nature, growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises, and gains so made are distributable among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders. So, also, on the winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders--viz., the right to dividends and the right to share in the final distribution of the corporate property--may be prejudiced by its destruction. .... It is not necessary, to constitute an insurable interest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence.'

concept,'[65] especially in his classification of valid insurable interest in group (4) that 'even in the case of property something less than a legal or equitable or even simply a pecuniary interest has been thought to be sufficient',[66] the shareholder's insurable interest in the company's property shall be reconsidered. Because the shareholder's rights with respect to corporate property are not illusory, but rather are directly dependent on the continued existence of the property. If the assured have enough evidence on his economic loss caused by the damage or destruction of the company's property in which he holds shares, his insurable interest will be regarded as valid. Furthermore, the court should not provide opportunity for the insurer to avoid liabilities under contracts which they have freely entered into and for which they have received premiums and secure the assured's indemnification to encourage the widespread insurance to bring more benefit to the society in the modern commercial world.

[65] [2003] Lloyd's Rep. I.R. 637, at para. 97.
[66] Para.90, *ibid.*

CHAPTER V:
INSURABLE INTEREST IN CARGO

5.1. Buyer and Seller

5.1.1. Transfer of Property or Passing of Risk

To prove his valid insurable interest on the cargo insured, it is generally thought that the assured should have property right on the goods or it is under his risk at the time of cargo loss.[1] From the point view of the absolute rights of ownership, the cargo owner definitely has an insurable interest to his cargo, despite the fact that the goods have been bound by a sale of contract[2] or is under the seizure for exercise duty.[3] When the goods under sale need to be transited from seller to buyer, neither the cargo seller nor the cargo buyer is in possessive or custodial circumstances, the question then arises on who has a valid insurable interest during the transit as there is a change of ownership and transfer of risk at some stage of the policy. In English law, it is suggested that the solution is to ascertain when the property or the risk of goods being lost or destroyed passes from the seller to the buyer irrespective of the delivery of the goods or documents of title and payment.[4] the passing of the property in the goods sold is often modified by special arrangements made between the parties to a sale, or is enacted in the terms of the Sale of Goods Act 1979 and Sale of Goods (Amendment) Act 1996,[5] The Act provides two fundamental rules: the first is that where the contract is for the sale of unascertained goods, the property does not pass to the buyer unless and until the goods are ascertained;[6] the second rule is that where the contract is for the sale of specific or ascertained goods, the property passes at such time as the parties intend it to pass.[7] And the risk of accidental loss of the goods sold passes prima facie when the

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[1] Ss.5(2),6, MIA 1906.
[2] *Rayner v Preston* (1881) 18 ChD 1.
[3] *Geismar v Sun Alliance & London Insurance Ltd* [1978] QB 383.
[4] Sales of Goods Act 1979, s.18, r.1, herein after SGA 1979; *Rugg v Minett* (1809) 11 East 210; Lord Blackburn in *Anderson v Morice* (1875) L.R. 10 C.P. 609, 619. also *cf* Para. 366, Arnould 16th ed. Also *cf* Merkin's Contract Law of Insurance
[5] Ss16-26, SGA 1979.
[6] 'Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.' S.16, Sale of Goods Act 1979.
[7] 'Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.' S.17(1) Sale of Goods

property passes.[8] However, in practice, the passing of property and risk are not always concurrent,[9] especially in international sale of goods carried by sea, the main part of marine cargo insurance. Thus, either the transfer of property or passing of risk is both regarded as the rules to decide valid insurable interest.

Nevertheless, especially in international trade, it has already been regarded that the transfer of risk plays the important role on determination of valid insurable interest.[10] This is because firstly, although property plays a pivotal role in the Sale of Goods Act, in commercial practice, the location of the ownership of the goods may frequently be of less important than the location of the risk. As we have known, in the modern commercial codes like the American Uniform Commercial Code (U.C.C.), the Uniform Law on International Sales (ULIS) and the United Nations Convention on Contracts for the International Sale of Goods (CISG 1980), contrary to the presumption contained in s.20 (1), SGA 1979, the passing of risk and the transfer of property are regularly separated[11] and the statutory presumption may be displaced by agreement of the parties.[12] In the absence of contracting parties' agreement, the risk will generally pass in a contract for the sale of goods abroad when the goods leave the custody of the seller.[13] Besides, s.20(1), SGA 1979 is thought as 'hardly ever applies to sale contracts concluded on shipment terms',[14] it is quite often in practice that the risk has passed from the seller to buyer when the good is onboard while the seller still retains property right. The reason is in international trading practice, the seller does not wish the

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Act 1979. The effect of this rule has been mitigated by the insertion into the Act of section 20(A) by the Sale of Goods (Amendment) Act 1995, s 1(3).

[8] 'Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery ahs been made or not.' S.20 (1), Sale of Goods Act 1979.

[9] S. 20(1) is even regarded as an 'antiquated rule of the Sale of goods Act 1979 derived from its predecessor, the Act of 1893.' Para. 4-010, D'Arcy, Leo; Murray, Carole; Cleave, Barbara: Schmitthoff's Export Trade, The law and Practice of International Trade, S&M, 2000.

[10] As Professor Merkin pointed out: 'This will occur most commonly under export contracts under which risk passes to the buyer on shipment but property passes only where the buyer has paid for them on receiving the shipping documents.' Merkin's Insurance, para. A-0508.

[11] *Cf* C.M. Schmittoff, 'The Risk of Loss in Transit in International Sales' in Chen Chia-Jui, editor: Clive M. Schmitthoff's Select Essays on International Trade Law, Martinus Nijhoff Publishers/ Graham & Trotman, 1988, at p306.

[12] Special arrangements may be agreed between the parties: *eg*, in *President of India v Metcalfe Shipping Co* [1969] 2 Q.B. 123; affirmed [1970] 1 Q.B. 289, CA passing of the risk(and of the property) under an F.O.B. contract was postponed until delivery of B/L.

[13] As in CISG 1980, articles 66-70., the risk of loss of the goods sold is not linked to property but to control. Also *cf* Incoterms 2000 (ICC publication 560), in which property and risk are often separated in relevant contract terms like CIF, FOB etc.

[14] P.4-03, Charles Debattista, Sale of Goods Carried by Sea, 2nd ed, Butterworth, 1998.

ownership of the goods to be passed too early to the buyer in long distance because he will acquire fewer guarantees of payment[15] as the difficulty on the full information of buyer's financial capability and arrangement of payment. To solve this predicament, it has long been treated that risk passing is divorced from property passing.[16] To gain a clear idea of apportionment of risks, it could be decided according to when the risk passes from the seller to the buyer; as a result, it can be ascertained which party is entitled to insure the goods, and who can acquire the indemnity of a loss occurs. Although this is not strictly adhere to the traditional definition of insurable interest as 'legal or equitable relation' because property right has not yet been transferred, considering that passing of risk means the passing of the loss resulting from the goods' damage or destruction,[17] this is clearly in conformity with the classification of valid insurable interest in Lawrence J's 'moral certainty' and group (4) of Waller J's classification in *Feasey*, passing of risk shall be regarded as the dominant role to decide valid insurable interest in the insured cargo in transit.

5.1.2. Buyer's Insurable Interest

In insurance practice, a buyer will have an insurable interest in goods if they are at his risk, whether or not the property has passed to him,[18] which does not prevent the buyer to claim remedies for damage or loss from the cargo insurer.[19] Pursuant to s.7, MIA 1906, a buyer's interest on the goods is contingent because he has the right to reject the goods and return them to the seller if they are found on arrival not to comply with the terms of the sale even though the interest in the goods has already passed to the buyer, or occasionally, the sale contract comprises a right which will allow the buyer's liberty to reject the goods on the condition of delayed delivery, the buyer's interest will thus be

[15] As Staughton J stated in *The Ciudad de Neiva* [1988] 2 Lloyd's Rep. 208: 'It seems to me that in the ordinary way a seller will not wish to part with the property in his goods if they are shipped overseas until he has been paid in full.'

[16] As Black Burn J. stated in *Martineau v Kitching* (1872) LR 2 QB 436. 'As a general rule, res perit domino, the old civil law maxim, is a maxim of our law; and when you can shew that the property passed the risk of the loss, primâ facie, is in the person in whom the property is. If, on the other hand, you go beyond that, and shew that the risk attached to the one person or the other, it is a very strong argument for shewing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other.' at p.454.

[17] For discussion in detail, please *cf* L.S. Sealy, Risk in the Law of Sale [1972] 31 CLJ 225; Goode, Commercial Law, Chapter 9, Risk and Frustration, Penguin Books, 2004, p.242-262.

[18] *Anderson v Morice* (1876) 1 App. Cas.713

[19] *Inglis v Stock* (1885) 10 App. Cas 263.

restored to the seller if the buyer exercises the right to reject the goods.[20] Also this interest is defeasible because the buyer's interest might be defeated or forfeited by the action of the seller who would exercise his right of stoppage in transit if the price is unpaid.

5.1.2.1. Has Insurable Interest When Risk Passes 'on or as from Shipment'

In general rule, the risk passes to the buyer 'on or as from shipment' if the seller who still owns goods does not run the risk of their loss or damage in transit if sea or inland waterway transport are concerned in the sale contract.[21] That is to say, as soon as the cargo has been loaded on board, the risk passes conclusively to the buyer. This can be applied to CIF, CFR or FOB contracts.[22] Because the buyer is bound to pay for the goods even if they are destroyed before property was due to pass to him, he acquires an insurable interest in the cargo loading and during marine transit, consequently the buyer's remedies for the cargo's loss or damage within the transit process will not lie against the seller but against the insurer if the cargo has been insured.[23]

When is the risk regarded to be transferred to the buyer 'on or as from shipment'? In principle, the case *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd*[24] serves as reference to judge which party owns the risk or the insurable interest of the goods during loading. It is held that before the goods pass the ship's rail during loading, if they fall from the ship's loading equipment, and damage occurs, the risk will lie with the seller. According to this case, it was deemed that the buyer had not acquired any interest in the goods at the time of damage, as long as the goods had still not passed

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[20] Brown. R. H., Marine Insurance, Vol.1- The Principles, 4th ed, Witherby, 1978, at p.47.
[21] *The Julia* [1949] AC 293; *The Parchim* [1918] AC 157. *Ginzberg v Barrow Haemaite Steel Co., Ltd* [1966] 1 Lloyd's Rep. 253. *Golodetz (M) & Co. v Czarnikow-Rionda Co.(The Galatia)* [1980] 1 Lloyd's Rep.453.
[22] As under contract terms like the 'Free Carrier' term in FCA A4, Incoterms 2000, that the seller must deliver the goods to the carrier in advance, subsequently, the carrier will load the cargo on board. The division of passing risk is at the time the carrier accepts the seller's cargo while the cargo seller delivers the cargo to the carrier. From that time, an insurable interest in respect of the sale cargo passes from the seller to the buyer.
[23] 'even if by reason of some special circumstances the property did not pass on shipment, yet, by reason of the risk, the buyer might insure the cargo in respect of the interest he ad in it.' –per Willes J in *Joyce v Swann* (1864) 17 CBNS 84 at p.104, approved in *Anderson v Morice* (1876) 1 App. Cas.713 also *cf Colonial Insurance Co. of New Zealand v Adelaide Marine Insurance Co.* (1886) 12 App Cas 128; *Ambler v Graves-Tago* (1930) 36 LI LR 145.
[24] [1954] 1 Lloyd's Rep. 321.

over the ship's rail. The opinion is that that if goods fall onto the wharf, the damage is to the account of the seller. Otherwise, if the goods are dropped on board, the loss belongs to the buyer. Thus 'passing the ship's rail' is regarded as a division, but its applicability seems doubtful nowadays.[25] Consequently, some dissimilar views have been addressed as well. Another opinion is that, 'it can be argued that the seller has fulfilled his obligations under an FOB contract only if the goods are deposited safely on board the vessel and the loading operations is completed...'.[26] This is also depends on the terms in contracts and the cargo type.

As under contract terms like the 'Free Carrier' term in FCA A4, Incoterms 2000, that the seller must deliver the goods to the carrier in advance, subsequently, the carrier will load the cargo on board. The division of passing risk is at the time the carrier accepts the seller's cargo while the cargo seller delivers the cargo to the carrier. From that time, an insurable interest in respect of the sale cargo passes from the seller to the buyer.

If the liquid goods such as oil, or molasses, are carried by tankers, the time of passing risk or acquiring insurable interest can be found 'at the permanent hose connection of the vessel receiving the molasses at loading port,'[27] or the division can be '...Risk: Passes at vessel's manifold flange at load port.'[28]

5.1.2.2. Buyer's Insurable Interest in FOB and CFR Contract

When goods are sold on FOB or CFR terms, the cargo's insurance is arranged by the buyers themselves.[29] The buyer will have the insurable interest as long as the risk belongs to the buyer after the cargo has crossed the ship's rail. The buyer can claim and recover under his insurance policy regardless the transfer of property, whether it is a

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[25] In *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd*[1954] 1 Lloyd's Rep. 321., Devlin J states:'The division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth-century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.'

[26] Schmitthoff's, Export Trade, The Law and Practice of International Trade (10th ed, 2000) at p.25.

[27] *The San Nicholas* [1976] 1 Lloyd's Rep.8.

[28] *Vitol SA v Esso Australia Ltd, The Wise* [1989] 1 Lloyd's Rep. 96.

[29] As in The *Golodetz (M) & Co. v Czarnikow-Rionda Co.(The Galatia)* [1980] 1 Lloyd's Rep.453, the sellers had agreed to sell sugar under a C&F sale thus the sellers would not be liable to insure the goods. A fire destroyed part cargo loaded onboard. As the buyers were in charge of insurable affairs and were treated as having an insurable interest in the sugar. But he failed to insure the goods and was not able to gain any indemnity.

conditional or irrevocable transfer, or the seller reserves a security title, or when the goods are as yet unascertained, or a partial interest only has been transferred. [30]

In specific, when a loss occurs before the entire contract quantity has loaded, whether the insurer can refuse to honour a policy effected by the buyer on the grounds that he did not acquire an insurable interest in the goods prior to complete performance is depends on the terms of the sale contract. In *Anderson v Morice*,[31] the assured was the purchaser of the cargo of new crop Rangoon rice loaded on *M.V. Sunbeam*. The payment was 'by sellers' draft on purchaser at six months sight, with documents attached'. After loading most of the cargo, the vessel sank and both vessel and cargo on board were lost. The bills of lading were signed and delivered by the captain afterwards and the assured accepted and paid the seller's drafts. The Court of Exchequer Chamber overruled the judgement in the Court of Common Pleas and decided that the assured was not entitled to recover because he had no insurable interest when the loss occurred.[32] This judgement stood affirmed because in the House of Lords their Lordships were equally divided. Based on the sale and purchase contract term that 'Payment by sellers' draft on purchaser at six moths sight, with documents attached', the assured was held not to have insurable interest at the time of loss because in the true construction of the policy, the seller had to load a full cargo before being able to prepare shipping documents and require the purchaser to accept the goods and pay, thus the risk on the cargo did not pass to the purchaser at the time of loss. Moreover, as Lord Chelmsford said:'After the loss the purchaser was not bound to pay for the rice, the vendor could not have insisted upon payment. If there had been no insurance, it cannot be supposed that the purchaser would have taken to and pay for the rice at the bottom of the river. The payment was entirely voluntary, and instead of being the exercise of a *bona fide* option by the purchaser, was only made by him, and accepted by the vendors,

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[30] *Inglis v Stock* (1885) 10 App. Cas, 263, also see *Castle v Playford* (1872) L.R. 7 Ex, 98, and further *The Parchim* [1918] A.C. 157, in which Lord Parker remarked, 'The goods then most certainly were at [the buyer's] risk, and he had an insurable interest whether he had the property or not' at p.167. Also *cf* Williams J's comments in an Australian case, 'A person who has the conditional property in goods for which he had paid the price and of which he has taken the delivery must have the right to receive the goods without forfeiting his right to reject the goods...By insuring the goods he does nothing which is inconsistent with the ownership of the seller. If a loss occurs and he makes a claim on the insurance company for the loss and receives payment, the payment takes the place of the goods that have been lost and, if the buyer subsequently became entitled to reject the goods, he would have to credit the seller with the insurance monies. *J.S. Robertson (Aust.) Pty. Ltd. v Martin* (1954) 94 C.L.R. 30.

[31] (1874-75) L.R. 10 C. P. 609, in Court of Exchequer Chamber; (1876) 1 App. Cas.713, House of Lords.

[32] See Blackburn J's judgement in (1874-75) L.R. 10 C.P.609, at p.620.

with the view of relieving themselves and throwing the loss upon the underwriter.'[33] The payment of the purchaser after loss was regarded by his lordship as the unanimous act of vendor and purchaser to recover vendor's who was not the assured in the policy instead of the assured's from the underwriter and was certainly refused.[34]

In contrast, the above decisions were not applied in *Colonial Insurance Co. of New Zealand v Adelaide Marine Insurance Co.*[35] A cargo of wheat was contracted to supply to supply at the port of Timaru free on board the *M.V. Duke of Sutherland* chartered by the buyer, who made relevant insurance on 'wheat cargo now on board, or to be shipped' in the ship. The vessel and part wheat on board were lost by a covered peril after commencement of loading. By interpretation of the word 'cargo' with reference to the sale contract and insurance policy, the Lordships in Privy Council referred it to be a number of bags of wheat as the vessel could properly carry and to be insured by the insurer accordingly, therefore the risk passed to the buyer when each bag was loaded on board. This was opposed to the condition in *Anderson* that the risk was commenced only once the full quantity of cargo sold and insured had been loaded on board. More than that, in contrast with the situation in *Anderson* that the carrying vessel was chartered by the sellers who were to receive freight for the carriage of the rice and the buyer's right on the cargo was on the delivery of the shipping documents under the seller' direction instead of the loading into *Sunbeam*, in the *Colonial* case, pursuant to the contract of sale on FOB terms, as the carrying vessel was chartered by the buyer, the cargo was delivered to the him as long as it was loaded and the master acted as agent for the buyer to receive the cargo and issue bills of lading under instructions.[36] Furthermore, the buyer had full title in the cargo partly delivered like the retaining them against proportional payment, returning or reselling them. Accordingly the seller had no right to repossess and unload the goods unless rejected by the buyer. From the above analysis of these two cases, we can find that although the learned law lords delivered opposite judgements on the validity of the insurable interest based on substantial difference of the facts, the rationale was in resemblance, which was constructed upon

[33] *Ibid*, p.727.
[34] This principle is codified in s.6(2) MIA 1906. It reinforces the point, that an assured can not recover the benefit of a marine policy if he exercises any right or option over the insured subject matter to obtain insurable interest when he is aware of the loss.
[35] (1886) 12 App. Cas. 128.
[36] As Sir Barnes Peacock commented: 'the sellers had nothing to do with the wheat or the destination therof after it was on board.' at p.137.

the insured's possession of property right and bearing of the risk of the cargo at the time of loss.

Another question is on a 'transit clause' which was named the 'warehouse to warehouse clause' in Institute Cargo Clauses (A), (B) and (C) of marine policy forms.[37] Under these clauses of the ICC policies, the duration of the insurance contains whole transit processes, which could include carriage of goods by sea and land, commences from the goods leaving the storage warehouse and terminates at the warehouse directed by the consignees. When the buyers themselves manage the insurance under FOB and CFR contracts, except it is stipulated clear in the sales contract[38] that the risk in the goods is to be borne by the buyer prior to delivery FOB or CFR, although the cargo insurance policies stipulate the 'transit clause', the cargo buyers will have no insurable interest at the moment of the loss if the goods have not loaded on board because it has been point out, 'the buyer having no pecuniary interest in the goods at the time has no claim for indemnity which he can transfer...'.[39] and 'an intention to assume the risk in the goods at any point prior to that at which delivery f.o.b. was to be completed is not to be implied from the mere fact that the buyer's insurance extends beyond the ship's rail and covers certain pre-shipment'.[40]

5.1.2.3. Buyer's Insurable Interest in CIF Contract

As in CIF contract, it is the seller's duty to make the insurance policy and assign it to the buyer only if assignment of prohibiting terms are stipulated in them expressly, The policy is usually assigned to the buyer at the same time, when he gains the other documents, such as bills of lading in which letters of credit are expressed. Buyer acts as the assignee of the policy. In normal practice of CIF sales, Assignment of policies might be after the goods have been loaded for several days. In other words, the policies

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[37] *Cf* Clause 8 of Institute Cargo Clauses (A), (B) and (C).

[38] See e.g. The standard form of F.O.B. Contract for Sale and Purchase of Rice Drawn under the auspices of the London Rice Brokers' Association which provides that 'The Rice to be at Buyers risk from warehouse to warehouse and they engage to effect Marine Insurance, including War Risk...at their own expense covering the full amount of Invoice and to hold the policies at Seller's disposal until documents are required.' Cited from David Sassoon, C.I.F. and F.O.B. Contracts, 4th ed., S&M, 1995, in fn.3 at p.511.

[39] Victor Dover, A Hand Book to Marine Insurance, 5th ed, Witherby, 1957, at p.79.

[40] David Sassoon, C.I.F. and F.O.B. Contracts, 4th ed., S&M, 1995, at para. 666.

are assigned to the buyers after the risk and ownership has been assigned to the buyers. Although the sellers still retain the insurance policies but have lost insurable interest. Subsequently, even though the insurance policies are assigned, it is still doubtful whether the assignors have insurable interest or not.[41] As a basic rule, if the insurable interest have ceased, the insurance policies can not be assigned, the assignees cannot recover under the marine insurance policies.[42] However, as the second paragraph in s.51 MIA 1906 is enacted 'Provided that nothing in this section affects the assignment of a policy after loss', thus where the goods are damaged or lost before shipment, the CIF buyer may sue on the policy, provided it has been assigned to him, although he has no insurable interest in the goods at the time.[43]

Accordingly, there is no difficult position under a CIF sales contract while the 'transit clause' is applied in the marine insurance policy. The insurance policy, which the cargo buyer obtains, is assigned from seller by means of endorsement. Even if the loss and shortage occurred in the warehouse at the loading port, the cargo buyer has no insurable interest when the accident happens, but the seller's right of insurance claim is assigned to the buyer following the assignment of the insurance policy. This was held in *J.Aron and Co. (Incorporated) v. Miall*,[44] where a quantity of cocoa, which was covered from the time of leaving its original warehouse in the African interior until delivery at a warehouse in Boston, was ultimately resold to the claimant under a CIF contract. The cocoa was in fact damaged before shipment, and the underwriters declined a claim under the policy including 'warehouse to warehouse' terms on the ground that at the time when the goods were damaged the claimant had no insurable interest in them. Making analogy to assignment of policy after loss in *Lloyd v Fleming*,[45] the Court of Appeal held that by assignment of the policy, the assignee became entitled to sue on any claim of the assignor. The claimant therefore was entitled to recover.

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[41] See the illustration:'A, who is abroad, insures a cargo being carried to London, including all risk of craft. While the cargo is afloat, A's agent sells the cargo to B, but A retains the policy, as the cargo is not to be paid for until arrival. Part of the cargo is damaged while being landed in B's lighters. After A's interest has ceased, he assigns the policy to B. B cannot recover under the policy.' Ivamy, Chalmers' Marine Insurance Act 1906 10th ed, Butterworth, 1993, at p.75.

[42] *North of England Pure Oil Cake Co. v Archangel Maritime Insurance Co.*, (1875) LR 10 QB 249. s. 51, MIA 1906. Whether risk can pass retrospectively in the CIF contract is also doubted by Dr. Tania McDonald in 'The Insurable Interest of International Buyers on CIF terms' JIML 10 [2004] 5 413.

[43] *Lloyd v Fleming* (1928) 34 Com.Cas. 18. *infra.* 3.1.3.2.

[44] (1928) 34 Com.Cas. 18.

[45] (1872) L.R. 7 Q.B. 299, p.302, 303.

5.1.3. Seller's Insurable Interest

5.1.3.1. Seller's Insurable Interest on His Risk

The seller's interest is the mirror image of that of the buyer and is also defeasible or contingent. Under a documentary sale, the seller has goods to be shipped and insures them as a result of possession of insurable interest. Nonetheless, the bills of lading which are documents of title are subsequently assigned to the buyer during transit if the seller sells on the goods to the buyer. The insurable interest of the seller will be terminated. Under this circumstance, the premium will not be refunded to the assured.[46]

Nevertheless, the seller is advised to maintain insurance (irrespective of whether he is required to do so by contract with the buyer) if the cargo has not been sold to the buyer. As in *Re National Benefit Assurance Co. Ltd (Application of H L Sthyr),*[47] the assured claimed on an 'all risks' policy for a loss in respect of thirty bales of woollen goods 'from Tilbury to Novorossisk for Rostoff-on-Don', the insurers contended that he has no insurable interest in them because he had already sold them. Maugham J, held that the claim succeeded, for the assured has an insurable interest as the sale was only conditional subject to their safe arrival at Rostoff-on-Donon.[48] Under such circumstance, the risk has not been passed to the buyer, and the seller's insurable interest is still valid.

5.1.3.2. Seller's Insurable Interest under FOB and CFR Contracts

Where goods are sold on FOB or CFR terms, the seller normally has the sole interest in them up to the time they have crossed the ship's rail since they are his property and at his risk. If the seller also wants to have the goods insured for his own benefit, the

[46] S.84 (3)(d), MIA 1906.
[47] (1933) 45 LlL Rep 147.
[48] As the learned judge commented: 'Then remains the more serious question as to whether there was not an out-and-out sale to Mr Vitouchnosky and the present claimant is unable to make a valid claim. In that matter there is this difficulty, that all the documents which were in existence at the time, or practically all of them, have been destroyed and the records of the Russo-Scandinavian Bank have been taken over by the People's Bank and there is some difficulty in ascertaining the facts. Mr. Harald Sthyr have been called, and the former says he never saw the goods and that the sale conditional on the goods reaching Rostoff-on-Don. I think that taking into consideration what took place when the State bank took possession, I should be quite wrong in coming to the conclusion that the property passed before the goods reached Rostoff-on-Don.' *ibid*, at p.151.

insurance duration will merely continue till loading is complete. Basically, the seller and the buyer obtain their different sorts of insurable interests in accordance with their individual times of assignment. It is stated that 'where there is a transfer of risk from seller to buyer in the process of transit, a seller needs to insure 'up to FOB', for the transit before the goods are shipped on board the carrying vessel and the buyer must effect separate insurance for the remainder of the transit.'[49] Thus two policies are required to cover the seller and buyer's separate interest on sold goods in different period,[50] the insurance policy of the buyer cannot be assigned to the seller in order to protect against the seller's pre-loading loss under an FOB contract.[51] However, in practice, the seller can cover his interest in buyer's policy by both parties' agreements in the contract of sale of the goods and arrange one policy for the through transit, accordingly the benefit of the policy can be assigned to the seller.[52]

5.1.3.3. Seller's Insurable Interest under CIF Contracts

After the risk on the cargo has passed to the buyer and assignment of the policy together with other document, the CIF seller will lose his interest in the insured cargo and can not claim under the assigned policy[53] unless he can claim the damage as agent on behalf of the buyer assignee,[54] or he only assigns the insurable interest to the buyer instead of

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[49] Victor Dover, A Hand Book to Marine Insurance, 5th ed, Witherby, 1957, at p.75. eg. If the insurance is under 'warehouse to warehouse' terms, the seller is advised to procure insurance for transmission to the ship as buyer has no insurable interest before that. If the goods are damaged or lost they are at the insurer's risk. The buyer who make advance payment may also wish to add such condition to seller in the sales contract.

[50] Upon delivery of the goods FOB and the buyer immediately acquire an insurable interest, where the seller reserves a security title, or when the goods are as yet unascertained, or a partial interest only has been transferred, the seller is regarded to have retained a right of possession in the goods, and still has an insurable interest. See David Sassoon, C.I.F. and F.O.B. Contracts, 4th ed., S&M, 1995, para.667.

[51] Victor Dover, A Hand Book to Marine Insurance, 5th ed, Witherby, 1957, at p.76.

[52] *Sparkes v Marshall* (1836) 2 Bing. N.C. 761.

[53] *Powles v Innes* (1843) 11 M. & W. 10 Even if the seller holds special policy issued pursuant to an open cover, his right to claim was denied by the United States Court of Appeals for the Fifth Circuit in *York-Shipley Inc. v Atlantic Mutual Insurance Co. etal.* 474 F.2d 8 (1973). In this case, a boiler was damaged while in transit. The seller held an open cargo policy issued by the respondent company covering all their international shipments and permitting them to issue special policies when selling on terms which require them to obtain insurance for the benefit of customers abroad. The court stated that once the sellers 'put the boilers in the possession of the carrier in Miami, [they] no longer had any interest in them. Indeed, [they were] prohibited from tendering the goods instead of the appropriate documents. [They] therefore [had] no insurable interest in the cargo and, consequently,... no standing to sue.. York-Shipley has no interest in the outcome of this suit, other than that of an unsecured creditor of its foreign customer. Such an interest is insufficient to meet the requisites of standing.'

[54] *Provincial Insurance Co.of Canada v Leduc*(1874) L.R. 6 P.C. 224.

the policy,[55] or the assignment to the buyer does not pass to him the whole beneficial interest.[56]

Another argument is raised when the policies are restored to the sellers. On condition that the goods are in breach of the contracts' conditions or the documents are not in order; therefore, the buyers discover, and then reject the goods,[57] when they arrive at the discharging port. If the buyer returns all documents including the assigned policy to the seller, can seller claim on the policy if any damage occurred? This was confirmed by the judgement delivered by Bailhache J in *Fooks v Smith*,[58] 'Under a CIF contract, of course, the policy is taken out for the benefit of and is debited to the buyer, being included in the inclusive price of the goods, but if when the goods come to hand it is found that they are not in accordance with the contract and therefore are rightly rejected, or if for some reason, good or bad, the buyer refuses to accept the bill, then, if there is a claim under the policy, the seller may use the policy and sue upon it, although the buyer has been originally debited with the price of it.' Under CIF trade terms, if the buyer has taken the burden of risk of cargo damage or loss, he will gain the insurable interest of the goods. After acceptance of the seller's documents that contain the bill of lading and insurance policies, the buyer will hold conditional ownership of the goods.[59] If the goods or cargo documents are rejected to the seller, unless otherwise agreed, the property in the rejected goods will be reversed in the seller[60] and the goods are again at his risk.[61] Even if the seller refuses the rejection, he is still regarded to hold the property if later the court or arbitration tribunal affirm the rejection because the property passes to the buyer subject to a condition on examination the goods with the contract.[62] Thus

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[55] *Hibbert v Carter* (1787) 1 T.R. 745; *Alston v Campbell* (1799) 4 Brown's P.C.476.
[56] S.50(2) MIA 1906, *Williams v Atlantic Assurance Co. Ltd.* [1933] 1 KB 81, CA.
[57] S.30 (1) SGA 1979, *Behrend & Co., Ltd v Produce Broker's Co. Ltd* [1920] All E.R. Rep. 125. *Kwer Tek Chao v British Traders & Shippers Ltd.* [1954] 2 Q.B. 459, *Gill & Duffus SA v Berger & Co. Inc.* [1984] A.C.382. Also *cf* A.G. Guest, Benjamin's sale of goods, 6th ed, S&M,2002, para 19-139 to 19-145.
[58] (1924) 19 Ll.L. Rep.414.at p.416.
[59] *Cf Kwer Tek Chao v British Traders & Shippers Ltd.* [1954] 2 Q.B. 459, 487. it expresses 'He (the buyer) gets only conditional property of the goods, the condition being a condition subsequent. All his dealings with the documents are dealings only with that conditional property of the goods....'
[60] *J.L. Lyons & Co. v May & Baker* [1923] 1 K.B. 685, 688; *Tradax export S.A. v European Grain & Shipping Ltd* [1983] 2 Lloyd's Rep. 100 per Bingham LJ at 107; *Gill & Duffus S.A. v Berger & Co. Inc.*[1984] A.C. 382 at 395.
[61] *Head v Tattersall* (1871) LR 7 Exch. Per Cleasby B at 19: 'The person who is eventually entitled to the property in the chattel ought to bear any risk arsing from any depreciation in its value caused by an accident for which nobody is at his fault.
[62] 'if the property passes conditionally the only ownership left to the seller is the reversionary interest in the property in the event of the condition subsequent to restore it to him...'at 487. *Kwer Tek Chao v British Traders & Shippers Ltd.* [1954] 2 Q.B. 459.

he is entitled to claim benefit on the original policy if any damage occurred. The buyer will concurrently lose his insurable interest, if by the rejection, he is no longer responsible for their safety;[63] even if he has paid the price in advance because he is not entitled to retain the goods by virtue of an 'unpaid buyer's lien' until the price is refunded.[64]

5.1.4. Insurable Interest in the Effect of Stoppage in Transit

If an unpaid seller exercises the right of stoppage in transit,[65] *ie*, a vendor who has divested himself of the property and the possession of goods which are in the course of transit to the buyer resumes possession of them in the event of the buyer becoming insolvent by the seller physically retaking possession of the goods or by his giving notice to the carrier or other bailee in whose possession the goods are.[66] As the effect of exercising the right is that the seller 'may resume the right to possession of the goods'[67] and therby regain his lien as unpaid seller before he delivered the goods to the carrier, which entitles him to retain the goods until the price is paid or tendered, he is obviously has an insurable interest by virtue of his lien.[68]

There are disputes over whether the unpaid seller has an insurable interest if the goods lost before he has given notice of stoppage. This is more a concern of an FOB seller who has sold on credit terms and has not received payment of the purchase price. As there are not any conclusive judicial authorities on this issue, different opinions are formed among the commentators. Where Arnould holds the view that the unpaid seller has no insurable interest before stoppage in transit is exercised because 'It would be contrary to the principles on which an insurable interest depends if a seller who had parted with the property and possession could insure the goods and, if they were lost and the buyer afterwards became insolvent, recover their value, since at the time of loss

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[63] *Colonial Insurance v Adelaide Marine Insurance* (1886) 12 App. Cas. 128.
[64] *J.L. Lyons & Co. v May & Baker* [1923] 1 K.B. 685, 688. Also *cf* Clive M. Schmitthoff, Schmitthoff's Export Trade, 9th ed, Stevens & Sons 1990 at p. 145.
[65] S.44, SGA 1979.
[66] S.46, SGA 1979.
[67] *Booth S.S. Co. Ltd v Cargo Fleet Iron Co.* [1916] 2 K.B. 570, at 581. s.48(1), SGA 1979.
[68] Merkin's Insurance, para A-0509, Arnould 16th ed, para 369. If the seller has not been paid and has exercised his lien on sold goods still in his actual possession, s.41, 42, SGA 1979, he has an insurable interest on the goods and may insure and recover under the policy. Merkin's Insurance, para A-0509.

he had no right to take possession.'[69] As we all know, the right of stoppage in transit arises strict *sensus* only when the risk in the goods has passed to the buyer; so long as the seller remains the owner of the goods, he may withhold delivery to the buyer by virtue of his ownership. 'Unless the property passed, there would be no need of the right of stoppage in *transitu*. The only effect of the property passing is, that from that time the goods are at the risk of the buyer.'[70]As the seller no longer bears the risk on the insured good's loss or damage, his insurable interest on the goods is thereby transferred to the buyer. This is, like the situation in *Moran Galloway & Co. v Uzalli & Ors*[71] where the ship's agent was held to possess at the date of loss an existing right under the Admiralty Court act 1840 to arrest the ship upon her arrival by commencing *in rem* proceedings to recover their debt. As the unpaid seller's right of stoppage of transit can be exercised even if the goods are lost in course of transit and the buyer is insolvent,[72] his insurable interest should be a valid one as his situation is in the same circumstance of that the agent in *Moran Galloway & Co. v Uzalli & Ors.*[73]

Another question is on the buyer's insurable interest on the goods when the unpaid seller exercises the right of stoppage in transit. As this right does not rescind the contract,[74] the buyer still remains the property or risk of the goods subject to the seller's lien, he is regarded to possess insurable interest in the same position as a mortgagor who has an insurable interest to the full value of the goods.[75] However, if the seller's resumed possession of the goods is more than a mere lien and he resells the goods under the circumstances set out in s.48 (2), (3), SGA 1979, then the original contract of

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[69] Arnould 16th ed, para.369.
[70] *Bolton v Lancs & Yorks Ry* (1886) L.R. 1 C.P. 431 at 439.
[71] [1905] 2. K.B. 555.
[72] *Clay v Harrison* (1829) 10 B 7 C 99.
[73] [1905] 2. K.B. 555. While Schmitthoff is of the opinion 'that the unpaid seller has in these circumstances a contingent interest because he may have to exercise his right of stoppage in transit.' Clive M. Schmitthoff, Schmitthoff's Export Trade, 9th ed, Stevens & Sons 1990 at p. 508. Sasson takes it as sounder position from business point of view and comments that 'a recognition of the seller's interest in these circumstances is not within the mischief which the Marine Insurance Act was designed to cure'. Sasson's CIF and FOB Contracts 4th ed, at para.670. He also places the unpaid seller in the same position with the agent's valid insurable interest in the ship to the extent of their advances by virtue of their right to enforce their claim by an action *in rem* in *Moran Galloway & Co. v Uzalli & Ors.* [1905] 2. K.B. 555. As the practical importance of the right of stoppage in transit has greatly diminished with the development of more sophisticated methods of payment, like the use of banker's commercial credit in export trade, and with the development of new forms of security, such as retention of title clauses ('Romalpa Clause' in *Aluminium Industrie Vaassen B.V. v Romalpa Aluminium* (1976) 1. W.L.R.676, and the seller can procure export credit guarantees or export credit insurance, the seller's reliability on the original cargo insurance is less effective now.
[74] S.48(1), SGA 1979.
[75] Arnould 16th, para 369.

sale is rescinded, the buyer has no property right or risk on the goods and loses his insurable interest.[76]

Besides, the seller's right to stop in transit does not entitle him to claim for the insurance money under the policy procured by the buyer if the goods are damaged since the right of stoppage in transit is a right exercisable only against the goods themselves, the unpaid seller has no right against money paid or payable to the buyer under a policy for damage suffered by the goods in course of transit. This was decided in a case concerning the importation of timber from Sweden.[77] The plaintiff, a timber merchant in Sweden, sold timber to a firm in London; the timber was duly shipped but damaged during the voyage. The buyers, who had the timber insured, stopped payment before the timber arrived in England. The seller gave notice of stoppage to the captain of the ship, and the question was whether he was entitled to the insurance money which had been paid for the damage to the timber. It was held that the claim was untenable; in the words of Lord Cairns L.C.:

'The right to stop in transiu is a right to stop the goods in whatever state they arrive. If they arrived injured or damaged in bulk or quality the right to stop in transiu is so far impaired; there is no contract or agreement which entitles the vendor to go beyond those goods in the state in which they arrive.'[78]

5.1.5. Insurable Interest in Expected Profits from Cargo

It is a general rule that an assured is entitled to insure on the expected profit he would earned from the goods he sold to a buyer[79] in valued or unvalued policies[80] according to Lawrence J's clear and admirable forceful judgement in *Barclay v Cousins*[81]which

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[76] *Clay v Harrison* (1829) 10 B 7 C 99. Where Lord Tenterden CJ held that the buyer lost his insurable interest because the effect on seller's exercise of right was to rescind the contract and to revest the property in the original owners. The buyer accordingly was deprived of his property on the goods.

[77] *Berndtson v Strang* (1868) L.R. 3 Ch. App. 588. But is was held in New York that, where the carrier has sold the goods to meet his freight charges, the unpaid seller's right of stoppage can attach to the balance of the proceeds of the sale. *Northern Grain Co. v Wiffler* (1918) 223 N.Y. 169.

[78] *Ibid* at p.591.

[79] 'A seller of goods expects to make a profit on the sale and the price due to him from the consignee will include this profit. If the goods fail to arrive the seller loses his profit, so he has an insurable interest in the anticipated profit'. R.H.Brown, Marine Insurance Vol.1 The Principles 4th ed., at p.48.

[80] *Eyre v Glover* (1812) 3 Camp. 275; 16 East 218.

[81] (1802) 2 East 544.

constitutes the principles of insurance on expected profits.[82] Then, what constitute a valid insurable interest in profit? Radically, it is regarded as 'an expectancy coupled with a present existing title'.[83] Accordingly, it includes firstly the assured's property in the goods from which the profit is expected to arise and the proof that profits would have been made if the goods had arrived. In another words, as long as the assured can prove that without the intervention of the perils insured against, some profit would in fact have been realised by the sale of his goods on arrival. Accordingly, in *Eyre v Glover*,[84] the profit insured was upon sale of a homeward cargo of flax shipping at Riga for Hull. The goods were captured by enemy in the voyage. Lord Ellenbrough C.J. held that the claimant has valid insurable interest on profits because the plaintiff would definitely gain them if the flax onboard had arrived at Hull. Conversely, a vague possibility of realising profits, which may or may not be made, will not suffice. In *Hodgson v Glover*,[85] where the policy was on 'profits' upon an adventure from Liverpool to the African coast, the outward cargo to be bartered for slaves, and the salves to be carried on in the ship to the West Indies for sale, the court non suited the claimant, because he did not show that, if no loss had intervened and the salves had all got to a market any profit would have been produced.

Nevertheless, it is also regarded that the assured may have an insurable interest in profit on goods as long as a binding contract for the purchase is entered, although he does not have the ownership on the goods at the time of the loss, furthermore, the cargo must be shipped onboard if no contra requirement in the insurance contract. Thus In *Stockdale v Dunlop*,[86] the claimant assured was held not to have an insurable interest on the goods

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[82] 'As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect against the assured would not suffer; and in every maritime adventure the adventurer is liable to be deprived, not only of the things immediately subject to the perils insured against, but also of the advantages to be derived from the arrival of those things at their destined port. If they do not arrive, his loss is not merely that of his goods..., but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain without more risk than the capital itself would be liable to: and if when the capital is subject to the risks of maritime commerce it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that that principal should not, in consequence of such bad fortune, be totally unproductive; and that en of small fortunes should be encouraged to engage in commerce by their having to means of preserving their capitals entire.'—*ibid* p.546-547.

[83] Arnould, 16th ed., para.370.

[84] (1802) 2 East 544.

[85] (1805) 6 East 316.

[86] (1840) 6 M.& W. 224.

and profit insured because the sales contract they entered was a mere verbal contract and incapable of being enforced. Where a buyer who had bought 6,000 bags of rice 'to arrive' sold them before shipment on the same terms, but at a higher price, the Exchequer Chamber had no doubt that he had an insurable interest in his profit on the 1,200 bags on board although the property right had not been transferred to him.[87] On the other hand, the court also held that the losses insured against were only losses by perils of the sea directly affecting the goods and consequently the profits on the goods. Therefore, even if the 4,800 bags of rice on shore had been covered by the policy, the loss of profit on such rice was not caused by a peril of the seas within the meaning of the policy.[88] In another case *Halhead v Young*,[89] in the learned judge Lord Campbell C.J.'s' *obiter dictum*, he admitted that by a properly framed policy the assured might be indemnified for a loss of profits caused by a particular ship being lost before she reached the loading port on the condition that the profits of a buyer of goods depended on the contingency of the ship carrying them on this voyage. This doctrine is clearly fallen into group (3) of Waller J's classification in *Feasey* and should be taken in place of the former strict principle which was adhered to the insured's property right on the cargo in *Eyre v Glover*.[90]

5.2. Insurable interest of Secured Creditor

5.2.1. Pledgee

It is quite common in international trade practice that in the practice of international trade that a holder of a bill of lading is allowed to have his bills pledged for grant a loan for currency of finance. There are several precedents in the common law system

[87] *McSwiney v Corporation of the Royal Exchange Assurance* (1850) 14 QB 634, 646.
[88] As the court said: 'We have no doubt that the plaintiff might have recovered, in the events which have happened, a total loss, if he had been insured by a policy properly adapted to the case, and so drawn as to cover his special interest from the time that the rice was appropriated by the vendors and ready to be shipped at madras and also to assured him against losses of the expected profits, not merely by the loss of all the rice by perils of the sea, but by the loss of any part of it, or the loss of the ship, or delay of the voyage beyond the month of May; in any of which contingencies this special interest in profits would have been entirely defeated.' *Ibid.* at p.660.
[89] (1856) 6 E. & B. 312. However, in this case, the claimant assured was held not have insurable interest on profit of the cargo ready in the port but the arranged carrying ship was lost in the voyage in ballast because the policy had not attached .
[90] (1802) 2 East 544.

confirmed that bills of lading could be pledged to the bank by way of security.[91] The bank accordingly becomes a sufficient secured lender based on 'given the possessory title on which they relied.'[92] From a legal point of view, after the bill of lading has been pledged, accordingly, the pledgor's titles incur restriction in a proportioned degree. The rights which are produced from a bill of lading turn into maximum security of subject matter pledged. The pledgee has proportioned rights to dispose against the document of title to the goods.[93] As a result of the fulfilment of a pledgee's credit, the rights of bills of lading may be relied on, depending on the size of the cargo. In reality, the pledge will be achieved if the cargo arrives without defect; in contrast, the pledge might cease in case of cargo loss. For this reason, having the legal admitted benefits, the pledgee of a bill of lading who has a lien over the insured subject matter may insure for the amount owing to him[94] and he may assert a claim against the pledgor's insurance money because the pledgor[95] had constituted himself a trustee of those moneys. This was held in *Sutherland v Pratt*,[96] goods in transit from Bombay to London were pledged to the claimant as security for an advance. To protect his position the claimant required the consignee to effect a marine policy on the goods for his benefit and deposited with him as an additional security, the court held that the pledgee has an insurable interest and may sue in his own name. However, the pledge will also face the same defence which the insurer brings to the pledgor. In *Bank of New South Wales v South British Insurance Co.*,[97] where an action was brought on a policy on goods by a bank claiming as pledge from an alien enemy, the Court of Appeal, while agreeing that the claimant as pledge had an insurable interest, held that under the circumstances they could not recover either as original assured, for want of proof that the policy had ever been intended to cover their interest, or as assignees, because they were affected by the infirmity of the title of the pledgors, under s.50(2) MIA 1906.

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[91] *Motis Exports Ltd v Damskibsselskabet* [2000] 1 Lloyd's Rep. 211

[92] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep. 439; further, see *Future Express, The* [1993] 2 Lloyd's Rep. 542; *Ishag v Allied Bank International, Fuhs and Kotalimbora* [1981] 1 Lloyd's rep. 92.

[93] *Kwei Tek Chao (t/a Zung Fu Co.) v British Traders & Shippers Ltd* [1954] 1 Lloyd's Rep.16, held: 'it would seem that in so dealing with the documents the plaintiffs were not purporting to do anything more than pledge the conditional property which they had and they were not doing anything which was inconsistent with the defendants.'

[94] The pledgee is also able to insure the goods to the full extent of their value, holding the balance of the proceeds in trust for the pledgor. S.14(2), MIA 1906, also *cf* Arnould 16th ed, para250, para 380.

[95] The pledgor has also an insurable interest because his property right in the goods does not pass to the pledge as was held in *Sewell v Burdick* (1884-85) L.R. 10 App. Cas. 74. *cf Alston v Campbell* (1779) 4 Bro Parl Cas 476, where the assured was held to have insurable interest on the lost insured ship which was assigned to his debtor because this transaction was no more than a pledge or security for the debt due.

[96] (1843) 12 M & W 16.

[97] (1920) 4 Ll.L.R.266.

5.2.2. Carrier

The carrier's insurable interest in the goods carried by him is originated not only from his liability as bailee to the cargo owner as bailor in the event of the goods coming to harm,[98] but also from his own contractual entitlement to earned profits for the performance of his service. In international sales, a carrier may issue a 'freight collect' bill of lading. In this circumstance, a consignee is liable to charge for freight. Some precedents have referred to this matter already. *Atomic Transfer v Alberta Horse Meat Packers*[99] demonstrated that according to the 'freight collect' bill of lading, the carrier was entitled to exercise his lien on condition that the consignee had not paid for freight charges. Likewise, *The Constanza M*[100] also implied that the carrier was entitled to recover unpaid freight by means of exercising a lien on the cargo. From the above two precedents' point of view, obviously, as far as freight expenses have not been paid, the carrier is endowed with a right to dispose of the cargo which he is carrying; evidently, this right is lien which is authorised by law. The carrier's lien on the cargo can be carried out on condition of the cargo is in existence; accordingly, the lien is not able to be accomplished if the cargo is lost completely. In order to secure the carrier's right to collect freight, legally, it should be acknowledged that the carrier is insurable with regard to the unpaid freight. In other words, the carrier has insurable interest in respect of his lien on the cargo in his custody but only for the sum of unpaid freight at the time when the lien is created.[101]

More than that, because a shipowner who has entered into recognizance in the Admiralty Court to pay the salvors of ship and cargo has a lien on the cargo on board, he therefore also has an insurable interest in the cargo for the average contribution due to him from its owners. This was held by Lord Denman C. J. in *Briggs v Merchant*

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[98] Please see below, Chapter 6: Insurable Interest in Marine Liability Insurance.

[99] (1962) 32 D.L.R. (2d) 398.

[100] *Compania Commercial v Naviera San Martin SA v China National Foreign Trade Transportation Corp.(The Constanza M)* [1980] 1 Lloyd's Rep.505.

[101] *Corwley v Cohen* (1832) 3 B & Ad 478; *Briggs v Merchant Traders' Association* (1849) 13 QB 167; *Dixon v Whitworth* (1880) 4 CPD 37; *Scott v Globe marine Insurance Co. Ltd* (1896) 1 Com. Cas.370; *Kuehne and Nagel Inc v Baiden* [1977] 1 Lloyd's Rep 90 (NY Ct. App). If any salvage occurred during the transit, the carrier or owner also has an insurable interest on the cargo onboard for that share of the claim which was due from the cargo to the extent to which he may be liable to contribute in satisfy the claims of the salvors. *Cf Briggs v Merchant Traders' Association* (1849) 13 QB 167; *Dixon v Whitworth* (1880) 4 CPD 37.

Traders' Association.[102] A vessel sailed with cargo onboard was stuck by another vessel, and was rescued by salvors. The shipowner recognised the salvage in court on the security of the ship and cargo. He then effected an insurance to cover his salvage proportion and claim the benefit after they were totally lost. By making analogy to general average, the learned judge held that the shipowner as claimant had an insurable interest in the cargo onboard because after the payment of the salvage, the shipowner had a claim against the cargo owner for contribution, thus he was entitled to a lien on the goods and consequently had an insurable interest in respect of such lien.[103]

5.3. Insurable Interest of Third Parties Involved in Sale

It is quite common in commercial transactions, different sorts of third parties like agent, commission agent, consignee,[104] factor or distributor are involved to ensure the cargo owner's goods reach the intended market to effect sales. Some of those third parties have powers to sell, manage, and dispose of the property, subject only to the rights of the consignor; some have a mere naked right to take possession; some though not entrusted to sell, are yet interested in the property, as having a lien or claim upon it for their advances; some can take commission or charges from the cargo sold. It is obvious that the existence of valid or void insurable interest of these different kinds of third parties have on the goods insured must vary with the various relations in which they stand to the property and to the cargo owner.

5.3.1. Agent or 'Naked Consignee'

If an agent's only relationship to the goods is that he effects sale himself on behalf of his principal as agent expressly with or without naming the principal; he definitely has

[102] (1849) 13 Q.B. 167.
[103] The learned judge also held that the description of the subject matter as 'average expenses' in the policy was sufficient to cover the cargo on which a lien was made.
[104] 'The enterprise delivers the goods to the consignee to hold in the first instance as bailee but on terms that the consignee is to buy the goods if he notices his intention to do so and that he is deemed to have elected to buy them if he fails to return the goods within a given time or otherwise adopts the prospective purchase transaction, typically by selling them.' Roy Goode, Commercial Law, Chapter 9, Risk and Frustration, Penguin Books, 2004, at p.162.

no insurable interest and can not insure the goods except as the agent on behalf of the assured.[105]

If a consignee has only a mere naked right to take possession, he has no insurable interest so as to effect the policy in his own name, and on his own account, and to recover upon it averring the interest to be in themselves. He has no property in the insured goods; he has not beneficially interest in it; and he can therefore only effect the insurance on account of that who is interested and entitled as agent under s.23(1) MIA 1906, and must aver the interest to be in those on whose account the insurance is made.[106] Thus, in *Seagrave v Union Marine Insurance Co*,[107] the claimant sold as consignee on a cargo of goods, and the bill of lading was made out to his order or assigns, and he held the bill of lading until the buyer had given an acceptance for the amount of the goods. It was held that he could not recover on a policy which he had effected in respect of the goods, as he had no interest in the cargo, and, being a 'naked consignee', incurred no liability and suffered no damage through the loss. Clearly this insurable interest is void even if group (4) of Waller LJ's classification in *Feasey* is applied.

5.3.2. The Third Party is Entrusted to Sell or Have a Lien or Claim

It is a general and widely accepted principle that when consignee of the goods who have a lien or claim on the property in respect of advances, or factor, commission agent or distributor is entrusted for the purposes of sale with the endorsement of bill of lading to whom a general balance is due, can effect an insurance on their own account and recover to the amount of their lien or claim or balance. Thus, in *Ebsworth v Alliance Marine Insurance Co*,[108] where consignees gave acceptances against consignments of cotton and insured the consignments and their advances by open cover on which they declared from time to time, it was held that they had an insurable interest for the amount of an advance on a particular consignment which was lost by perils insured against.

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[105] See general discussion on the insurable interest relating to agent in above S.3.1., Chapter III.
[106] See Lawrence J's remarkable judgement in *Lucena v Craufurd* (1806) 2 B.& P. N.R. at p.307.
[107] (1866) LR 1 CP 305; also see *Wolff v Horncastle* (1798) 1 Bos & P 316; *Conway v Gray* (1809) 10 East 536 at 547; *Carruthers v Sheddon* (1815) 6 Taunt 14.
[108] (1873) LR 8 CP.596, also *cf Godin v London Assurance Co.*(1758) 1 Burr.489; 1 W.B. l. 103.

An agent resident in this country, to whom goods and freight have been mortgaged by his foreign principal for advances, may, upon consignment to himself of the goods, with the bill of lading endorsed, insure the legal interest in the property on his own account, and the equitable interest remaining in his principal on account of the latter.[109]

Also in *Wolff v Horncastle*[110] where the general agents of the consignor, on the refusal of the consignees to accept the goods, retained the bills of lading in their own hands, and accepted bills on account of the consignment to the amount of £300, they were held to have an insurable interest to the amount of their acceptances, on the ground, as stated by Buller J. that 'a debt which arises in consequence of the article insured, and which would have given a lien upon it, does give an insurable interest.'

Pursuant to s.14(2), MIA 1906, consignee of the goods being in advance to the consignors, or under acceptances for them, may insure, in their own name, to the full value of the goods, and apply the proceeds of the policies to their own benefit to the extent of their claims in respect of such advances or acceptances, holding the residue in trust for the consignors if they intended when effecting the policies to cover the interest of the latter. As in *Carruthers v Sheddon*,[111] a general insurance 'on coffee' had been effected by a Broker for a London mercantile firm, who were themselves beneficially interested in seven-sixteenths of the coffee, but who has also an insurable interest in the whole of it as consignees of the cargo, and as having a lien on the whole for advances. The court held that, under the general form of policy, the mercantile company might protect all these different species of interest and that the assured were not bound to elect on which they would proceed. If, however, there is not evidence that they intended to cover any interest but their own, they could not, recover more than the amount of their own interest. The evidence is primarily one of construction of the insurance contract effected by the consignee and does not fall to be decided by reference to the subjective intentions of one party.[112]

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[109] *Smith v Lascelles* (1788) 2 T.R. 187.
[110] (1798) 1 B.&P.316 at p.323. also see *Hill v Secretan* (1798) 1 B.& P. 315.
[111] (1815) 6 Taunt 14. also see *Robertson v Hamilton* (1811) 14 East 522. *Conway v Gray* (1809) 10 East 536.
[112] *Ramco (UK) Ltd v International Insurance Co. of Hannover Ltd* [2004] Lloyd's Rep.606.

5.3.3. Insurable Interest in Commission of Consignee and Factor

It is quite usual that the consignee, factor, broker or commission agent will earn commission reward from the cargo consigned to them for sale if the goods have not been destroyed. Then whether the commission is a part of the cargo insurance or it must be separated from insurance of the cargo? S.3(2)(b) MIA 1906 reveals that commission can be the subject of a contract of marine insurance; however, the goods which can be the subject matter insured is specially presented in s.3(2)(a). Thus both goods and commission may be the subject of a contract of marine insurance, but they are stipulated individually. Obviously, the value of commission cannot be incorporated into the value of the goods. Thus, this sort of interest should be additionally put down in writing on the policy.[113]

Although it was held in *Knox v Wood*[114] that the goods from the sale of which the commissions are to arise must also have been onboard at the time of the loss. However, as there is a close analogy between insurable interest in profits and commissions, it is submitted on the authority of the later cases relating to the insurance of profits, that on a property framed policy the assured may recover although the goods were not on board at the time of the loss provided that he had an insurable interest in the goods or there must be a legal and binding contract under which the commission are payable.[115] Nevertheless, a mere expectation that goods will be consigned to a person of course gives him no interest.[116]

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[113] This was resolved by all the judges in *Lucena v Craufurd* (1806) 2 B.& P.N.R. at p.135, with further explanation from Lord Ellenborough in *Routh v. Thompson* (1809)11 East, 428.at p.433, also was approved in *Anderson v Morice* (1875) L.R. 10 C.P. 609 at pp 622,624; *Maurice v Goldsbrough Mort & Co.* [1939] A.C. 452 at p.466. As the assured may include his expected commission or profit in the valuation in a valued policy on goods, this rule is not strongly binding now.

[114] (1808,1708, 1811) 1. Camp.543.

[115] Arnould, 16th ed, para.321.

[116] By analogy to insurable interest in brokerage per Bigham J's comments in *Buchanan v Faber* (1899) 4 Com. Cas. 223.

CHAPTER VI:
INSURABLE INTEREST IN FREIGHT AND FUTURE EARNING

6.1. Insurable Interest in Freight

6.1.1. The Meaning of Freight

In difference with the common view on the definition of freight in carriage of good that 'the reward payable to the carrier for the safe carriage and delivery of goods',[1] freight in marine insurance also includes the hire paid by the charterer to the shipowner for charter of ship under a charter party, voyage, time or demise, or other contract of affreightment,[2] and also the benefit which the shipowner expects to derive from the carriage of his own goods in his own ship, in the shape of their increased value to him at the port of delivery.[3] In conclusion, freight is defined 'a solid substantial interest ascertained by contract, and arising out of labour and capital employed for the purposes of commerce',[4] and 'as used in the policy of insurances the benefit derived from the employment of the ship'.[5] In MIA 1906, it is interpreted as 'includes the profit derivable by a shipowner from the employment of his ship to carry his own goods or movables, as well as freight payable by a third party, but does not include passage money'.[6] It is not regarded as 'property' but has been referred to as a 'chose in action'[7] and can be the subject matter in marine insurance within s.3 (2) (b), MIA1906.

To decide whether there is a valid insurable interest in freight insurance, the assured must prove that he is prejudiced by the incapability of earning the freight. This is in wider scope than the classic 'legal or equitable relation' and can be ascribed to Lawrence J's moral certainty which is reaffirmed in *Feasey v Sun Life Assurance*

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[1] *Kirchner v Venus* (1859) 12 Moo PC 361.
[2] Per Lord Tenterden in *Winter v Haldimand* (1831) 2 B.& Ad. 649; per Lord Ellenborough in *Forbes v Aspinall* (1811) 13 East 323 at p.325.
[3] *Flint v Flemyng* (1830) 1 B. & Ad. 45; *Devaus v J'anson* (1839) 5 Bing. N.C. 519.
[4] Per Chambre J. in *Lucena v Craufurd* (1802) 3 B. & P. 75 at p.105.
[5] Per Lord Tenterden in *Flint v Flemyng* (1830) 1 B. & Ad. 45.
[6] It is the same literal meaning in r.16, Sch.1 MIA 1906.
[7] *Potter v Rankin* (1873) L.R. 6 H.L. 83; *Owners of "Yero Carras" v London & Scottish Assurance Corporation, Ltd.*(1935) 53 Ll.L. Rep. 531.

Company of Canada.[8] Certainly, the assured who stand a legal or equitable relationship to the ship upon which freight will be earned is included on this list. Thus, shipowner is entitled to insure,[9] and in certain circumstances mortgagee, particularly those in possession of the vessel or the freight is contracted to be paid directly into the mortgagee's account for payment of loan. Charterer who acts as desponant owners under a time charter or a demise charter and relets the ship or puts her up as a general ship for the transport of other people's goods on freight or his own cargo may also apply a freight policy.[10] In addition, the cargo owner or voyage charterer who pay the freight in advance without recovery also have insurable interest on the advanced freight.[11] Consequently, whether the assured has pecuniary damage on the loss of freight is taken as the fundamental rule to decide the validity of insurable interest and is needed to make further analysis as different types of freights are applied in practice.[12]

6.1.2. The Shipowner's Insurable Interest in Freight

6.1.2.1. Ordinary Freight to be Collected

Traditionally, freight is divided into three types: ordinary freight 'to be collected', chartered freight and owner's trading freight. As in present time it is seldom in practice that the shipowner carries his own cargo in his own ship.[13] More emphasis should be focused on the ordinary freight and chartered freight. The ordinary freight 'to be collected' refers to the sum to be paid to the shipowner by the owner of the goods for transportation in his ship on their arrival.[14]

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[8] [2003] Lloyd's Rep. I.R. 637

[9] *Camden v Anderson* (1794) 5. TR. 709; *Marsh v Robinson* (1802) 4 Esp.98. *Moss v Smith* (1850) 9 CB 94; *Manchester Liners v British & Foreign Mar. Ins. Co.* (1908) 7 Com. Cas. 26.

[10] *U.S. Shipping Co. v Empress Assurance Co.* [1907] 1 .K.B. 259.

[11] S.12, MIA 1906.

[12] Like B/L freight, chartered freight, advance freight, etc. for discussion in details, please see Maurice E.V. Denny, Freight Insurance, A Commentary, at chapter 1, Witherby & Co. Ltd 1986.

[13] Even if the cargo owner like crude oil producer would occasionally come within the category, but, in practice, most of their owned or time chartered fleet is operated by a separate company and relevant contracts of affreightment are made to carry the goods with the trade company in the same group. If a shipowner wishes to insure as freight on the benefit he derives from the carriage of his own goods, as there is no possible equivalent of a binding contract for freight in order to determine insurable interest, the cases on this matter indicate that there is an insurable interest in this type of freight when the cargo is ready for ship to the reached vessel. *Flint v Flemyng* (1830) 1 B&Ad 45; *De vaux v J'Anson* (1839) 5 Bing NC 519. See Arnould 16th ed, para.361.

[14] As it is called 'freight proper (the price to be paid to the shipowner by the owner of goods on their arrival for their carriage in the ship)' in Arnould, 16th ed, para.350.

To prove his valid insurable interest in the subject matter insured, under ordinary freight, the shipowner is required to have a valid contract for freight, he also has taken real steps towards the earning of the freight,[15] this is supported by the decision of the Court of Queen's Bench in *Barber v Fleming.*[16] As Blackburn J commented 'When there is an insurance upon freight, so long as the matters remains merely contingent, so long as the shipowners have only a good hope of getting freight, no freight is in existence; and if the ship is lost there would be no loss of freight, in as much as the freight had never come into existence and all that the shipowners have lost is the hope of earning the freight. But on the other hand, the law seems perfectly settled by a variety of cases, as I find it laid down by Mr. Phillips, in his book on Insurance, at section 328, where he says: 'In regard to the commencement of this interest (in freight), it is a general rule that it commences, not only by the vessel sailing with the cargo on board, but also when the owner or hirer, having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses and taken steps towards earning the freight.' I think that is the accurate rule. When a shipowner has got a contract with another person under which he will earn freight, and has taken steps and incurred expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which if afterwards destroyed by one of the perils insured against is lost, and ought to be paid for by the underwriters.'[17]

This principle is evolved from the cases on freight insurance as early as 18th century. The most restricted rule was found in *Tonge v Watts,*[18] the earliest reported case, in which the assured was held not to have insurable interest on the freight because the goods ready to be shipped had not yet loaded on board at the time of loss. Nevertheless, a liberal rule was established by the late cases. In *Montgomery v*

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[15] See Arnould 16th edn. Para 318-320, 344-371. Arnould's doctrine in 2nd edition that first the assured must have a legal or equitable or legal title in the ship and have an inchoate right to the freight at the time of loss is regarded as 'very old' by the editors in 16th edition. See para.348, fn 68. *Potter v Rankin* (1873) L.R. 6. H.L. 83.

[16] (1869) L.R. 5 Q.B.59. Although this was a case of chartered freight, but the decision is thought by Arnould to be of general application because 'it did not depend on the question whether there had been an inception of the charter party contract.' See Arnould 16th ed. at para.355.

[17] *Ibid.* at p.73.

[18] (1746) 2 Str.1251

Eggington,[19] it was held that where part of the goods were actually on board at the time of the loss, and all were ready to be shipped, the policy attached on the whole freight.

In addition, it was held by the court that the proof of the existence of an actual binding contract for shipping the goods, no matter they are partly loaded or even none loaded, is the essential rule to decide the assured shipowner's valid insurable interest on the freight.[20] As in *Warre v Miller*,[21] the assured shipowner was held to have insurable interest although not any of cargo had been shipped on board with the only existence of freight contract. In *Flint v Flemyng*,[22] where insurable interests in freight proper and freight of owner's own goods are both involved, freight was insured on a homeward voyage 'at and from 'Madras to London', and the day after the ship had finished discharging her outward cargo at Madras she was totally lost by the perils of the sea, and no part of the homeward cargo was then shipped, but the captain had purchased for the ship a quantity of red wood to be laden on board, and a merchant at Madras had also engaged to ship a quantity of saltpetre, the court held that the plaintiff was entitled to his full freight for the red wood and saltpetre. However, on another 90 tons of light woods were also engaged verbally to ship onboard besides the red wood and the saltpetre, the court ordered a new trial in respect of these light woods because it was not clear whether there was any binding contract for shipping. Also in *Patrick v Eames*,[23] because no binding contract was made for goods supplying, Lord Ellenborough held that the assured can only recover the freight loss on the cargo onboard instead of the total cargo prepared for loading.

What is the meaning of 'steps taken towards the earning of freight'? There are different interpretations in ordinary freight 'to be collected' and chartered freight. In ordinary freight, it is supported by Arnould that the assured can not recover for a loss of freight unless the ship is at the time of the loss ready to receive goods and the cargo is ready to be shipped.[24] However, the editors in 16th edition seem do not quite agree with this

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[19] (1789) 3 T.R. 362.
[20] *Per* Lord Ellenborough in *Patrick v Eames* (1813) 3 Camp. 441.
[21] (1825) 4 B. & Cr. 538.
[22] (1830) 1 B. & Ad 45.
[23] (1813) 3 Camp.441.
[24] Arnould, 2nd, ed., Vol.1. at p.531, also See Maurice E.V. Denny, Freight Insurance, A Commentary, at p.23-24, Witherby & Co. Ltd 1986.

opinion[25] and even proposed that there is an insurable interest in freight as soon as the contract is made.[26] It is really unfair for the shipowner to bear the burden of cargo readiness as it is rested on the shoulder of shipper and beyond the shipowner's control. It is quite often in practice that after conclusion of a binding contract of affreightment and despatch of qualified ship to the port of loading, the shipowner will be notified that the cargo are not and will not be ready, his existing interest on the freight to be earned will obviously be lost. Besides, although the shipowner need not to get his ship ready as required in the carriage of goods by sea,[27] he must show evidences on preparation of employment or occurrence of expenses to earn the insured freight. Thus in *Parke v Hebson*,[28] when the ship with part cargo loaded was lost while on the voyage to another port to load contracted. She was certainly not ready to receive those goods, yet the shipowner recovered the freight on them as the ship had been employed to take the contracted good. In *Truscott v Christie*,[29] the ship was lost when she was in the course of alternation to accommodate passengers. The court held that the assured could recover on a policy on the passage money because the shipowner had started his steps under the contract to earn the passage money. Obviously the same principle can be applied to freight policy. Also in *Devaux v J'anson*,[30] a valid insurable interest was held to be existed in the freight policy on forthcoming contract of carriage although the vessel was still repaired in the dry dock because all the cargo holds were empty and ready to load as supported by the learned judge.

6.1.2.2. Charter Freight

Charter freight is the hire payable to the owner of a vessel by the charterer under a charter party.[31] To decide the existence of valid insurable interest in charter freight, the assured also has to prove a valid and binding charter party. As Hamilton J in *Scottish*

[25] See the comments in Arnould 16th ed, para.353 to 355.
[26] See Arnould 16th ed, at para.362.
[27] 'A ship to be ready to load must be completely ready in all her holds so as to afford the charterer complete control of every portion of the ship available for cargo'. Stewart C. Boyd, Scrutton On Charter Parties and Bills of Lading, S&M, 1996, 20th ed, at article 75. See also *Groves Maclean & Co. v Volkart* (1884) C & E 309.
[28] (circa 1820) cited 2 Brod. & B. 326
[29] (1820) 2 Brod. & B.320.
[30] (1839) 5 Bing. N.C. 519.
[31] In Arnould 16th ed., chartered freight is 'a fixed sum stipulated to be paid to the shipowner by the terms of a charter party for the use of his ship, or part of it, on an entire voyage therein described.' Obviously this definition does not include the hire paid under the time charter and demise charter.

Shire Line Ltd v London & Provincial Marine Insurance Co.,[32] held 'that the words 'freight, or chartered freight, or freight as if chartered' have ever been applied to the expectation, however well founded, that a ship's agent will procure a cargo for her, where there is no actual binding engagement to that effect' and held that freight insured 'chartered or as if chartered' means the freight must be insured on a valid charter party instead of a charter party 'as if contracted'. Lord Selborne also said in House of Lords in *Inman v Bischoff*[33] 'an insurance on freight must necessarily have reference to some contract of affreightment under which, during the time covered by that policy, it might be earned; and to ascertain what the freight was, in case of loss, the actual contract of affreightment must necessarily be regarded.'

In chartered freight, because under the charter party the ship may earn freight though no goods may ever be in existence, whether cargo is onboard, or partly onboard or ready to be shipped is not required. Thus, the insurable interest was held to be existed from the inception of the voyage described in the charter party if it was on the way to the loading port[34] even if the ship is not strictly required to sail directly to the loading port in the charter party;[35] or from a previous voyage incorporated into the charter party.[36] It can also exist from the first part of the voyage if the freight is paid on separate payment in a multi-voyages charter party.[37]

There is a point of view that 'the existence of a contract for freight in itself gives an insurable interest in the freight'.[38] *i.e.*, when a contract has been made by a shipowner to earn freight in the usual way, he should at once hold the valid insurable interest on the freight and make relevant insurance to protect himself against a loss of that freight by the maritime risks to which his ship is exposed.[39] Considering that freight is a

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[32] [1912] 3 K.B.51. at p.65.
[33] (1882) App.670. at p.672.
[34] *Thompson v Taylor* (1795) 6 T.R. 478; *Mackenzie v Shedden* (1810) 2 Camp. 431.
[35] *Barber v Fleming* (1869) L.R. 5 Q.B. 59.
[36] *Foley v United Fire and Mar. Ins. Co. of Sydney* (Ex. Ch.) (1870) L.R. 5 C.P. 155; *Potter v Rankin* (1873) L.R. 6 H.L. 83.
[37] *Horncastle v Suart* (1806) 7 East 400; *Atty v Lindo* (1805) 1 B. & P.N.R. 236; *Davidson v Willasey* (1813) 1 M. & S. 3123; *Ellis v Lafine* (1853) 8 Exch. 546
[38] See Arnould 16th ed. para.362.
[39] As Lord Esher M.R. commented: 'No doubt as soon as a shipowner has got a binding contract with somebody to put goods on board his ship, he has an insuable interest.' in *The Copernicus* [1896] P. 237 at p.239.

'chose in action', [40] the shipowner has to earn the benefit stated in the agreed binding contract of carriage by the employment of his ship and labour. Unlike profit insurance, freight insurance also covers the cost of performing the voyage to earn the freight, it 'has its underlying concept that part of the value of a vessel or of a voyage or other adventure as its capacity to earn freights'.[41] Thus, it is not sufficient to prove a valid insurable interest with the sole existence of a contract of affreightment as the shipowner has not employed his ship or incurred no expense for the purpose of earning the freight. This could only be regarded as 'an expectation upon expectation' instead of 'factual expectation', which is in breach of Lawrence J's principle of 'moral certainty' in *Lucena v Craufurd.*[42]

6.1.2.3. Anticipated Freight

Although it is difficult for shipowner to claim benefit in freight policies on loss of freight contracted for but over which no steps have been taken to implement the contract due to lack of insurable interest, he can rely on anticipated freight insurance to recover his loss. In this policy, the subject matter insured is described as 'on freight and/or chartered freight and/or anticipated freight' in *Papadimitriou v Henderson.*[43] In this case, the vessel was captured and was treated as constructive total loss during a voyage on which the vessel was already chartered for a further passage and would have, during the period of the insurance, had time to at least commence a third passage. Although, from the report, it does not appear very clear that the shipowner had taken steps to implement the next voyage. Goddard L.J. decided that the assured was entitled to recover as anticipated freight his full measure of indemnity fixed by the policy. By citing the terms of the policy on anticipated freight insurance,[44] the learned judge thought that the vessel would certainly have an opportunity of earning further freight and that constituted valid insurable interest.

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[40] *Potter v Rankin* (1873) L.R. 6 H.L. 83; *'Yero Carras' (Owners) v. London & Scottish Assurance Corporation, Ltd.*(1935) 53 Ll.L. Rep. 531.
[41] Per Hobhouse J in *The 'Wondrous'* [1991] 1 Lloyd's Rep. 400 at p.417.
[42] (1806) 2 Bos & Pul 269.
[43] (1939) 64 Ll. L. Rep. 345.
[44] 'I, the shipper, have a profit-earning ship, a ship with which I can earn profit, and I want to insure that if this ship is seized during the time the policy is current and effective, I shall recover a certain sum which is anticipated "anticipated freight" I think it means--because it is anticipated that I shall be able to earn at least that sum, if not more, during the period.' p.350, *ibid.*

6.1.3. Charterer or Cargo Owner's Insurable Interest in Advance freight

Advance freight refers to the money paid by charterers or cargo owners to the shipowners under their agreement as part[45] or whole payment of the freight.[46] According to s.12 MIA 1906, if the cargo owners or charterers who have advanced the freight can not recover back it in the event of the loss of cargo and ship, then they have an insurable interest in the advance freight because they will lose the benefit from the advance payment they have made. The advance freight can be insured as 'advances on account of freight', or 'advances against freight',[47] or even under the name of 'freight'.[48]

Where the advance freight is made by cargo owner to the shipowner, as it so frequently is in the liner trades, it is usually termed in the bill of lading as 'freight due on shipment, non returnable ship and/or cargo lost or not lost'.[49] Although the advance freight may be insured separately from a policy on the goods as such, if required and is permitted in s.12, MIA 1906, the owner of goods who has made an advance of freight usually insures the goods and the advance by the same cargo policy with clear statement of the insured amount of the advance freight. As in *Thames and Mersey Marine Insurance Co. v Pitts*,[50] the learned judges, Day and Collins JJ, held that the advance freight was included in the disputed policy upon valued goods as the freight 'is simply thrown in as the part of the value of the cargo'.[51]

When the charterer insures his partial or whole advance of the freight separately, his insurable interest will arise when the payment is due under the terms of the charter party. Because he is liable to pay the advance freight even if the loss of cargo or ship is happened before the payment is made. As Lord Esher commented in *Smith v Pyman*[52]: 'there are two peculiarities of the English law as regards freight; first, that if part of the freight is advanced and the ship is lost, or the goods are lost, the part so advanced,

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[45] *Allison v Bristol Marine Insurance Co.* (1876) 1 App. Cas. 229.
[46] *Wilson v Martin* (1856) 11 Ex. 684; *Williams v North China Ins. Co.* (1876) 1 C.P.D. 757.
[47] *Williams v North China Ins. Co.* (1876) 1 C.P.D. 757, at p.761.
[48] *Hall v Janson* (1855) 4 E. & B. 500; *Fryas v Worms* (1865) 19 C.B. (N.S.) 159 at p.177; *Robbins v New York Insurance Co.* (1828) 1 Hall 363; *Allison v Bristol Marine Insurance Co.* (1876) 1 App. Cas. 229.
[49] *Thames and Mersey Marine Insurance Co. v Pitts* [1893] 1 Q.B. 476.
[50] [1893] 1 Q.B. 476.
[51] Per Collin J at p.490, *ibid.*
[52] [1891] 1 Q.B. 742 at p.744.

although really not due under the terms of the contract unless there has been delivery of the goods, nevertheless cannot be recovered back by the charterer from the shipowner; and secondly, that if there is no stipulation to the contrary, but only a stipulation that there shall be advance freight, it is payable at the moment of starting, and even if not paid can be recovered by the shipowner from the charterer upon the loss of the ship. These rules of law are in favour of the shipowner, and they are well-known rules'. Thus in *Oriental v Taylor*,[53] according to the charter party, the freight was to be paid on signing bills of lading but the ship was lost by excepted perils after loading (at which time the bills of lading had been signed) but before the signature was appended. The freight was held to be due to the shipowner. If the charterer had effected an insurance cover in the advance freight, he could claim the benefit from the insurer. On the contrary, sometimes, the advance freight is not required to be paid by charterer if the loss of cargo or ship is happened before the payment is due. As in *Smith v Pyman*,[54] the charter party included the clause 'one third freight if required to be advanced...'. The vessel was lost on the voyage and the shipowner thereafter 'required' the advance. It was held that it was clear that the voyage could not be performed at the time of the 'requirement' and the advance was not payable.[55] Under these circumstances, the charterer can not be regarded to have a valid insurable interest in the advance freight.

To prove his valid insurable interest in the advance freight, the charterer must also prove it an advance in part payment of the freight, instead of a mere loan to the shipowner. If it is a mere loan, the charterer definitely has no insurable interest on the advance because it will be repaid by the shipowner in any event no matter the ship or cargo is damaged or lost or not. If it is an advance of freight, then it is not returnable and remains at the risk of the payer charterer.[56] It is thought that there is not a general rule to decide whether an advance is a part payment of freight or a mere loan, to answer this question, construction of the charter party is needed with reference to the documents and correspondence involved in. As Brett J. commented 'the construction of

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[53] [1893] 2 Q.B. 518.
[54] [1891] 1 Q.B. 742 at p.744.
[55] Also see *Weir v Girvin* (1900) 1. Q.B. 45, it was held that no payment should be made by way of freight on the part cargo burnt before the vessel sailed although the freight was required to be paid three days after sailing.
[56] It should be noticed that in Scottish law that 'advance freight' is also repayable and can not be retained by the shipowner in all cases, see *Watson v Shankland* (1870-75) L.R. 2 H.L. Sc.304; *Cantiere San Rocco SA v Clyde* [1924] A.C. 226.

it, as of any other mercantile document, should not be made to depend on its strict grammatical form, or on the apparent meaning of any one phrase in it taken by itself, but on the apparent expressed meaning, as to practical results, of the whole. It should be construed by considering the terms of it, and the decisions in former cases of terms similar, though perhaps not identical.'[57] Thus, in *De Silvale v Kendall*,[58] the words 'free from interest and commission' was held by the learned judges Lord Ellenborbough and Dampier J that the money advanced was on account of freight and the charterer therefore could not recover back upon the loss of the ship before any freight earned. A stipulation in the charter party that an advance is 'Cash for ship's disbursements to be advanced to the extent of £300 free of interest but subject to insurance',[59] or subject to a deduction on account of insurance[60] is sufficient to show that it is a payment on account of freight instead of a mere loan. Furthermore, an advance which is not stipulated for in a charter party will be treated as made on account of freight if it clearly appears, from the transaction between the parties, that this was their intention.[61] But in *Mansfield v Maitland*,[62] the words 'The captain to be supplied with cash for the ship's use' the amount paid was not construed as providing an insurable interest to the charters as it was not an advance of freight but a loan.

6.2. Shipowner's Insurable Interest in Loss of Earning (Hire) Policy

Without the existence of contract of affreightment, the shipowner can also apply the valued loss of earning (hire) time policy which 'covered the interest of the shipowner in the use of his ship, entirely independent of any particular contract for the payment of freight or hire'[63]to claim his expenditure occurred on his ship waiting for employment or seeking for cargo if the risk is covered by the policy.[64] In this kind of policy, the

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[57] *Allison v Bristol Marine Insurance Co.* (1876) 1 App.Cas. 209 at p.217.
[58] (1815) 4 M. & S. 37.
[59] *Hicks v Shield* (1857) 7 E. & B. 633.
[60] *The Karnak* (1869) L.R. 2 P.C. 505; *Allison v Bristol Marine Insurance Co.* (1876) 1 App.Cas. 209. It is relevant to note that 'subject to insurance' does not imply any liability on the shipowner to insure on behalf of the charterer, only that a sum has been allowed for this purpose. *Watson v Shankland* (1870-75) L.R. 2 H.L. Sc.304; *Rodocanachi v Milburn* (1886) 17 Q.B.D. 316.
[61] *Wilson v Martin* (1856) 11 Exch. 684; *The Karnak* (1869) L.R. 2 P.C. 505.
[62] (1821) 4 B. & Ald. 582. Also *cf Winter v Haldimand* (1831) 2 B. & Ad. 649.
[63] *Manchester Liners v British & Foreign Mar. Ins. Co.* (1908) 7 Com. Cas. 26 at p.33.
[64] It is suggested that anticipated freight should be the term to cover the risks of the owner of a seeking ship in anticipation of earning when the vessel sails in ballast not under charter. *cf* Maurice E.V. Denny,

subject matter insured is usually described as 'loss of earnings and/or expense and or hire',[65] thus the loss of earning or other trading income which the vessel could have made in trading will be indemnified in the policy although there is non existence of a binding contract of affreightment. Any loss of earning was not because of the damage but of the fact that the vessel which is a 'freight –earning instrument'[66]would have been out of the market anyway.[67]

The practical differences between a loss of earning policy and freight policy are discussed by Hobhouse J in *Ikerigi Compania Naviera S.A. v Palmer (The Wondrous)*[68] which involved claims under both these types of policies. Under the loss of earning (hire) policies, the relevant criterion was that the vessel was deprived of her earning capacity; once this was proved, an indemnity would be payable at an agreed daily rate. Under the freight policies, by contrast, an actual loss of freight or anticipated freight had to be proved. However, freight insurance is not concerned with the extra expenses occurred in the voyage to earn the freight or its delayed receipt or deductions made from freight by charterers pursuant to the terms of a governing charter party or by subsequent agreement and it is not a type of profit insurance.

What is the assured's insurable interest in the loss of earning policy? According to Walton J in *Manchester Liners v British and Foreign Marine Insurance Co.*,[69] the insurable interest originated from the shipowner's 'use of his ship'. Because no matter whether a binding contract of affreightment is existed, the shipowner would benefit from the employment his ship and suffer from unemployment.[70] This was further explained by Lord Wright in his *obiter* comments in the House of Lords in *Robertson v Petros M. Nomikos Ltd*[71]: 'The policy is a time policy and the intention may be to secure that even if the vessel at the time of the casualty has no cargo on board (that is, is

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Freight Insurance, A Commentary, at p.16, and 26, Witherby & Co. Ltd 1986. As the loss of earning policy is widely used in practice, this suggestion is somewhat outdated.

[65] *Manchester Liners v British & Foreign Mar. Ins. Co.* (1908) 7 Com. Cas. 26; *Robertson v Petros M. Nomikos Ltd* (1939) 64 Ll.L.Rep.45; *The 'Capricorn'*[1995] 1 Lloyd's Rep.622.

[66]Per Lord Wright in *Robertson v Petros M. Nomikos Ltd* (1939) 64 Ll.L.Rep.45 at p.49.

[67] *Cf* Mance J's judgement in *The 'Capricorn'*[1995] 1 Lloyd's Rep.622. p. 636-642.

[68] [1991] 1 Lloyd's Rep. 400 at p.415, 417-418.

[69] (1901) 7 Com. Cas. 26.

[70] As the learned judge said 'It seems to me clear that a shipowner has an interest in the use of his ship, and that he may insure himself against the loss which he may undoubtedly suffer from being deprived of this use by perils of the sea or other causes.' *Ibid.* at p.33.

[71] (1939) 64 Ll.L.Rep.45

in ballast) and has no charter, there shall be no question of insurable interest, though it is not likely that any underwriter would think of raising such a question in a case of this type. The intention may be to provide that the owner's interest in the profit-earning capacity of his ship, which is certainly a good interest in a business sense, should be deemed a sufficient insurable interest for purposes of this policy. I should see no legal obstacle why this agreement should not receive effect.'[72]

The above opinions were developed by Mance J in *Cepheus Shipping Corp. v Guardian Royal Exchange Assurance Plc (The Capricron)*,[73] the claimant shipowner claimed for loss of earning of capacity under a valued loss of hire policy as the damaged generator was under repaired while the vessel lay up. He argued that the subject matter insured was the vessel's physical earning capacity and he could be compensated for loss of such capacity no matter she had any actual or prospective deployment. After recognising that loss of earning capacity can be insured, Mance J. insisted on that whether the vessel was and would be deployed in the market as a 'seeking vessel' is the rule to decide a valid insurable interest in loss of earning policy. He rejected the opinion that a mere intention to trade under the sufficient improvement of market was an existing interest because it would lead the shipowner's intention to speculate on his vessel, which is in breach of the fundamental principle of indemnity in marine insurance. Applying the above to this case, the learned judge held an invalid insurable interest in this case as the vessel was in lay-up and would have been out of the market anyway in the period to which the claim related.

[72] *Ibid.* at p.51.
[73] [1995] 1 Lloyd's Rep. 622.

CHAPTER VII:
INSURABLE INTEREST IN MARINE LIABILTIY INSURANCE

7.1. In Ordinary Liability Insurance

A shipowner,[1] charterer,[2] manager or operator[3] may become liable to pay large sums to third parties in consequence of loss of life, injury to person, or damage to property stipulated in contract or in law or caused by the improper navigation of his vessel or by reason of maritime perils.[4] S.3(c) MIA 1906 expressly recognises the validity of insurances by shipowners against their liability to pay damages for such loss of life, injury or damages for such loss of life, injury or damage and this kind of policy is a contract of indemnity.[5]

Accordingly the assured's insurable interest in his liability policy arises from his potential liability, whether contractual or tortious, to third parties. According to s.6(1) MIA 1906, he must prove his insurable interest at the time when his liability accrues,[6] in liability insurance it is the date on which the assured's liability is established and quantified by judgment, arbitration award or binding settlement.[7] On the other hand, the assured must prove his genuine contractual or tortuous liability arising from the loss of life, injury to person or damage to property to third party concerned. Otherwise, the assured can not be regarded as having a valid insurable interest and cannot seek indemnification by the insurer. This can be seen from a non-marine case *Newbury International Ltd v Reliance National Insurance Co. (UK) Ltd*,[8] as the assured who insured his contractual liability for prize payment on the happening of sport event did not need to pay until he had received the benefit from the insurer, Hobhouse J. held that

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[1] *Liver Alkali Co. v. Johnson* (1873-74) L.R. 9 Ex.338
[2] *Polemis v. Furness, Withy & Co.* (1921) 7 LL. L. Rep.196.
[3] *Pillgrem v Cliff Richardson Boats Ltd and Richardson* [1977] 1 Lloyd's Rep. 297; (Supreme Court of Ontario).
[4] They may limit their liability in accordance with the rules of Convention on Limitation of liability for Maritime Claims 1976.
[5] Fletcher Moulton L.J. in *British Cash & Parcel Conveyors v Lamson Store Service* [1908] 1 K.B. 1006 at p.1014; also see *Goddard and Smith v Frew* [1939] 4 All E.R. 358.
[6] *Coggs v Bernard* (1703) 1 Smith's Leading cases (13th Ed.) 175; *Sidaways v Todd* (1818) 2 Stark. 400; *North British v London, Liverpool & Globe* (1877) 5 ChD. 569.
[7] *Lumberman's Mutual Casualty Co v Bovis Lend Lease Ltd* [2005] Lloyd's Rep IR 74. See now *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] EWHC 58 (Comm).
[8] [1994] 1 Lloyd's Rep. 83.

the assured was not under any genuine liability to make payments, but merely transferred insurance benefits received from the insurer on the happening of the event and the policy was lack of insurable interest and void.

In practice, the shipowner, charterer, manager or operator of a seagoing ship may be exposed to claims in tort or under statue law, or under contracts of employment or contracts of carriage as follows: the personal injury to or illness or loss of life of crew members, stevedores,[9] passengers and others like surveyors, Customs officials, pilots, etc and their personal belongings onboard the ship; diversion expenses[10] and life salvage; collision liability; cargo liabilities; loss or damage to property other than cargo like docks, wharves, locks caused by the ship contact with them; oil pollution and nuclear pollution; tonnage contract liability and wreck liabilities and etc. Except that the three-fourths collision liability is arranged under ordinary underwriting,[11] other kinds of liability insurance are usually arranged under mutual protection and indemnity association[12] and the common rule is 'pay to be paid', *ie*, the insurer has included in its insurance contract a provision whereby the assured is not entitled to be paid until the assured has first made payment to the third party.[13]

7.2. Liability Insured under Property Insurance

It is quite often the case in insurance practice that the assured insures his liability for the payments to third party for property damage under what is primarily first party insurance, such as a hull or cargo policy. Thus, as already commented, when the insured vessel comes into collision with another vessel, collision liability is covered by the Collision Liability Clause in the Institute Clauses (8) or Running Down Clause and paid by the hull underwriter. A carrier or wharfinger as bailee sometimes insures the

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[9] *De Los Santos v Scindia Steamship Navigation Co. Ltd* [1981] A.M.C.601.
[10] *Grand Union (Shipping), Ltd. v. London Steam-Ship Owners' Mutual Insurance Association, Ltd., (The "Bosworth" (No. 3))* [1962] 1 Lloyd's Rep. 483.
[11] Although this may be four-fourths under the International Hulls Clauses 2003 if the appropriate additional premium is paid.
[12] For cover provided by mutual insurance associations, please *cf* Hazelwood, P & I Clubs: Law & Practice, LLP, 3rd ed. 2000, Chapters. 8-9.
[13] This provision ousts the general rule that establishment and qualification of liability is sufficient to trigger the insurer's liability and precludes the operation of Third Parties(Rights Against Insurers) Act 1930 and was supported by the House of Lords in *Firma C-Trade S.A. v Newcastle Protection & Indemnity Association (The Fanti)* [1991] 2 A.C. 1, 39.

goods in his possession because he has an insurable interest in any liability under statutes, international conventions and contracts of carriage[14] or bailment to pay for any loss of or damage to the goods to the bailor in the event of the goods coming to harm.

When the carrier or wharfinger as bailee insures the goods in his possession to the full value, whether the assured can claim the full value of the insured goods depends upon the forms of wording in the relevant policies. If the subject matter in the policy is described as 'goods in trust or on commission therein' and 'property of the assured or held by them in trust or on commission'[15]or 'goods their own and in trust as carrier',[16] it is recognised that the assured can insure the full value of the property. This form of insurance covers the cargo owner's interest as well as that of the carrier or whalfinger so that the bailee is not limited in his claims against the insurers to goods in respect of which they owned liability to the cargo owners. Besides the valuation of his insurable interest upon his liability, he actually insures the remaining interest as agent for and on behalf of the owner, thus he is only entitled to retain only those sums representing his own interest in the goods originating from his liability and must hold the balance for the bailor.[17] On the other hand, if the policy covers goods 'the assured's own, in trust or commission, for which he is responsible'[18] or 'property of the Insured or held by the Insured in trust for which the Insured is responsible',[19] Waller L.J., in *Ramco (UK) Ltd v International Ins. Co. of Hannover Ltd*,[20] reluctantly upheld the decision in *Moffatt* that the use of the word 'responsible' precludes the assured from obtaining a sum in respect of the goods greater than his own liability for those goods.[21]

Another question is whether the policy taken by the bailee on the goods of which he is custodian is regarded as property or liability cover. The general rule is that such kind of policy is construed as a property instead of a liability,[22] no matter the goods is insured

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[14] *E.g.*, Owner's Responsibility Clause in Clause 2, Gencon Charter Party Standard Form 1994.
[15] *Waters v Monarch Fire and Life Assurance Co.* (1856) 5 E & B 870.
[16] *London & North-Western Ry v Glyn* (1859) 1 E. & E. 652.
[17] See Merkin's Insurance, para.A-0517.
[18] *North British and Mercantile Ins. Co. v Moffatt* (1871) LR 7 CP 25, *cf Engel v Lancashire and General Ins. Co.* (1925) 21 Ll. L.R. 327.
[19] *Ramco (UK) Ltd v International Ins. Co. of Hannover Ltd* [2003] EWHC 2360 (Comm).
[20] [2004] Lloyd's Rep. I.R. 606.
[21] See further analysis and discussion in Merkin's Insurance, para A-0515.
[22] *Waters v Monarch Fire and Life Ass. Co.* (1856) 5 E & B 870; *London & North-Western Rly v Glyn* (1859) 1 E. & E. 652; *North British and Mercantile Ins. Co. v Moffatt* (1871) LR 7 CP 25; and confirmed in *Tomlinson(Hauliers) v Hepburn* [1966] AC 451. See Merkin's Insurance, para.A-0516.

as 'in trust or on commission therein' or 'in trust or commission, for which he is responsible', although in some early cases, it was regarded as liability policy.[23] This was upheld in House of Lords in *Tomlinson (hauliers) v Hepburn*.[24] The learned law lords held that the policy made by carrier themselves on stolen cigarettes of a third party was a goods policy instead of a personal liability policy. Lord Reid commented that 'A bailee can if he chooses merely insured to cover his own loss or personal liability to the owner of the goods either at common law or under contract and if he does that of course he can recover no more under the policy than sufficient to make good his own personal loss. But equally he can if he chooses insure up to his full insurable interest up to the full value of the goods entrusted to him. And if he does that he can recover the value of the goods though he has suffered no personal loss at all.'[25] Waller J also observed in *Feasey*[26] that 'It may be more usual to cover liability with liability insurance. But there is no hard and fast rule and where the subject of insurance is intended to be and can be properly be construed as embracing the insurable interest in relation to liability, there is no reason not to so construe it.'

By applying the above mentioned authorities, the preference to property policy was reaffirmed in *Ramco (UK) Ltd v International Ins. Co. of Hannover Ltd.*,[27] on the insured subject matter as 'property of the Insured or held by the Insured in trust for which the Insured is responsible', Andrew Smith J held that the policy was a good policy instead of liability one with 'interpretation of the words of the policy in their ordinary and natural meaning'. Because firstly the insurer's obligation was to pay the damage of the insured property instead of the damages payable by the insured and his option to reinstate or replace property was not appropriate for liability policy; secondly the policy was subject to average; finally it was too complex and was the parties'

[23] *North British and Mercantile Insurance Co. v London, Liverpool & Globe Insurance Co.* (1876) 5 Ch. D 569; however, there was no support in the Court of Appeal. In *Hill v Scott* [1895] 2 QB 371, In the first trial, Lord Russell of Killowen C.J. held that the policy was only on carrier's liability instead of on goods insured by the defendant as agent for the cargo owner with four reasons: firstly, usually cargo owners would effect the cargo policy themselves instead of asking carriers; secondly in this case the insurance was totally arranged by the carrier without any knowledge of the cargo owner; thirdly there is no relation between the freight collected by the carrier and the premium paid for insurance; finally the shipowner should effects an insurance to protect himself against liability because in this case the carrier was not protected by a bill of lading with widely sweeping exceptions to protect himself from the liability to which he would be subject in the event of a loss, from p.377-379. Although this was upheld in the Court of Appeal [1895] 2 QB, it was based on the construction of the contract terms and the fact.

[24] [1966] AC 451.

[25] *Ibid*, at p.467.

[26] [2003] Llyod's Rep. I.R. 637, at para.96.

[27] [2003] EWHC 2360 (Comm).

intention to construe the cover as hybrid or composite policy even it covered the insured's own goods as well as third-party goods, furthermore there was no liability terms in common liability policy.[28] However, the learned judge's decision is a curious one, because it holds that the scope of the policy is liability but the amount recoverable is property[29] and was commented in the Court of Appeal as 'some inconsistency between those two views'. Since the appellant did not appeal on the second issue on the amount recovered, the Court of Appeal did not make exploration. Nevertheless, as Waller J commented '...if the judge is right on the first issue, we are not necessarily satisfied that his answer on the second issue would stand.'[30] If we revisit the policy terms, we can find that the defendants insurers' argument on a 'hybrid insurance'[31] is not totally unacceptable because this policy covered not only the insured's own property, but also the goods bailed to him with responsibility.[32] Thus the insured's recovery from this policy on his own property should be based on the value, while his recovery on the property held in trust for which he is responsible should be based on his contractual liability. Anyway, when the subject matter is insured as 'property of the Insured or held by the Insured in trust for which the Insured is responsible', the construction of the terms in policy on whether it covers the interest of the bailee only or additionally the interest of the owner of the goods is important on deciding whether the policy is property one or liability one or in both characters.

7.3. Liability Insured under Accident Insurance

Concurrently, the assured also insures his liability for the payment to third party of personal damage in the cover of an accident policy. Since there are not as many as reported cases like insuring liability under property insurance, *Feasey*, a marine re-insurance case, had a vivid illustration on this circumstance. Instead of reinsuring its liability to settle its members' liability in damages for death or personal injury of

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[28] *Ibid*, at para.34.
[29] *Ibid*, at para.39.
[30] [2004] Lloyd's Rep. I.R. 606, at para.5.
[31] It is not suitable to call it composite policy because there was only one assured to be protected in this policy. For further discussion of composite policy, please see Chapter VIII.
[32] The word 'responsible' is not a narrow concept of legal liability, but a rather broader concept, See Lloyd J 's *obiter* in *Petrofina (UK) Ltd v Magnaload Ltd* [1983] QB 127, concurred by Waller L.J. in *Ramco (UK) Ltd v International Ins. Co. of Hannover Ltd* [2004] Lloyd's Rep. I.R. 606.

employees and other person onboard members' vessels in usual liability reinsurance policy, the reinsured, a P&I club, insured in the form of valued personal accident policy designed by the reinsurer. This policy is recognised by the learned judges in QBD and Court of Appeal as a hybrid cover, part personal accident and part liability. It is liability cover because the benefit is only paid to bodily injury and/or illness sustained by Original Persons who engaged on an 'Entered Vessel' entered by a Member and to whom the P&I club has obligation under its rule in respect of the Bodily Injury suffered by an Original Person. Such obligation is confirmed as 'liability' by Langley J in the first trial[33] and 'members and thus Steamship would have to pay' by Waller LJ in Court of Appeal.[34] It is accident cover because the insured policy was titled 'Personal Accident and Ilness Master Lineslip Policy', the subject matter insured was 'bodily injury and/or illness sustained by Original Persons' and the payment was on a fixed benefit basis in the usual way of life and accident insurance instead of indemnifying the loss pursuant to that liability insurance is a contract of indemnity. It is 'hybrid' because 'Steamship would only be entitled to keep those sums paid as fixed sums where liability as between the member and the Original Person was in fact established'.[35] Thus, Steamship is decided to have valid insurable interest in the insured Original Person's lives and wellbeing because he had a 'legal obligation which might lead to substantial sums being payable' at the time the policy was made. Furthermore, in the both courts, LAA 1774, which is not applied to liability insurance[36] and marine insurance,[37] was applied by the learned judges to decide the existence of valid insurable interest or not. Accordingly, the third party marine liability insurance can be insured on a contract to pay an agreed certain fixed sum like health or personal accident insurance with proper construction and is governed by the LAA 1774 instead of MIA 1906. However, whether this can be applied as general rule to the life or accident policy against liability in damages for death or personal injury of the insured person without any specific construction in the policy? We have to wait for the answers from the Courts in later cases.

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[33] [2002] Llyod's Rep. I.R. 807, at para 182.
[34] [2003] Llyod's Rep. I.R. 637, at para.100.
[35] Per Waller LJ in *Feasey v Sunlife Assurance Co of Canada* [2003] Llyod's Rep. I.R. 637, at para.100.
[36] *Mark Rowlands Ltd v Berni Inns Ltd* [1985] 3 All E.R. 473; *Siu v Eastern Insurance Co. Ltd* [1994] 1 All E.R. 213.
[37] S.4, LAA 1774.

CHAPTER VIII:
INSURABLE INTEREST IN CO-INSURANCE

8.1. Introduction of Co-insurance Policy

8.1.1. Joint Policy and Composite policy

In contrast to cases in double insurance where the same person insures the same subject by several policies on the same interest and risk,[1] two or more persons can also insure their joint or distinct interest in the insured subject in one policy issued by the insurer, that is, co-insurance, a single policy which covers two or more assureds. It is usually regarded that co-insurance can be a joint policy or composite policy.[2] Under a joint policy, the assureds share a common or joint interest in the insured subject matter, like joint owners of property, as Sir Wilfrid Greene MR commented in *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd.* 'That there can be a joint insurance by persons having a joint interest is, of course, manifest. If A and B are joint owners of property--and I use that phrase in the strict sense--an undertaking to indemnify them jointly is a true contract of indemnity in respect of a joint loss which they have jointly suffered.'[3] According to this view, under the joint policy, the co-insureds' right to receive indemnity from the insurer is joint instead of separate, each assured must be joined in any proceedings.[4] Defences arising from the conduct of any of them are available against them all and payment to one joint assured operates as a good discharge under the policy.[5] The reason is because the co-insureds have a joint right of indemnity and the insurer's obligation to them is also joint.

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[1] Double insurance is not prohibited by the law, but the whole sums insured can not exceed the whole value of the interest at risk, otherwise it is over insurance and the assured can not receive any sum in excess of the value of the interest: S.32, 80 and 84 (3) (f) MIA 1906, *Union Marine Insurance Co. v Martin* (1866) 35 L.J.C.P. 181; also see Arnould 16th ed, para.406—408.

[2] Merkin's Insurance, para. A-0600; S & M 2002; Nicholson 'Conundrums for Co-insureds' (1990) 3 Ins. L.J. 218 and (1991) 4 Ins. L.J. 126, some scholars exclude the joint insurance from the scope of co-insurance, *cf* John Birds 'Insurable Interests', Ch.4 in N. Palmer and E. McKendrick (eds), Interest in Goods 2nd ed., LLP Ltd, 1998, p. 96. Brownie, Composite Insurance: It seemed a Good Idea at the Time, (1991) 4 Ins. L.J. 250. at p.250.

[3] [1940] 2 KB 388, at p.404-405. Lord Maugham also commented in Privy Council that 'joint insurance, a phrase which seems to be applied accurately only in a case where an insurance is effected as regards property jointly owned by the assured.' in *Central Bank of India v Guardian Assurance Co. Ltd* (1936) 54 Ll.L.Rep. 247, at p.260.

[4] R.S.C. 1965, Ord.15, r.4 (2).

[5] *Lombard Australia Ltd v N.R.M.A. Insurance Co. Ltd* [1969] 1 Lloyd's Rep. 575.

Composite policy is regarded as a policy which covers two or more assureds' several and different interests on the subject matter insured,[6] or 'combining in one insurance a number of persons having different interests in the subject matter of the insurance.'[7] The examples under composite policies would include mortgagor and mortgagee,[8] Contractor and subcontractor under a construction risk policy,[9] members of P&I Club who are insured under the P&I policy. Under the composite policy, the co-insureds have different interest, different amount of loss on damage or destruction of the subject matter and different right to receive indemnity from the insurer.[10] Furthermore, the co-insureds should not be affected by the mis-conduct of the other insureds. This is confirmed in a most recent case *Brit Syndicates Ltd and others v Italaudit SpA (formerly Grant Thornton SpA) and another.*[11] The co-insureds were insured under a professional indemnity composite policy. One of the co-insured (GTI)'s claim was refused by the insurer on the ground of other co-insured (GTIaly)'s non-disclosure. The learned judge Langley held that the words 'insured by the terms and conditions of this policy', under which GTI was insured, were descriptive, and not to be read as referable to liability to indemnify GTIaly. Thus GTI was not affected by the conduct of GTItaly who was insured separately in the composite policy.

To decide whether a policy is joint or composite, it is generally regarded in English law that it depends on the nature of co-insured's interest in the subject matter insured,[12] with the assistant help from intention of the contracting parties determined by the proper construction of the policy wording. Thus, if the co-insureds have different interests in the subject matter insured and there are clear words in the contract terms to insure the interests separately, the policy will be definitely a composite one. In *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd,*[13] a general accident policy covering the interests of a tenant, landlord and a mortgagee bank in respect of a

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[6] Arnould 16th ed, in para.341.
[7] Sir Wilfrid Greene MR's comment in *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd.* [1940] 2 KB 388, at p. 405.
[8] *Samuel v Dumas* [1924] A.C. 31. see above S. 4.2.2.,Chapter IV.
[9] *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1992] 2 Lloyd's Rep.578; *National Oilwell(UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582; *State of Netherlands v Youell* [1997] 2 Lloyd's Rep. 440.
[10] *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd.* [1940] 2 KB 388
[11] [2006] EWHC 341, (Comm).
[12] See Merkin's Insurance, para A-0600.
[13] [1940] 2 KB 388.

building and plant was held to be a composite one because of diverse interests held by the co-insureds on the building and plant, plus that the phrase 'the interest in the insurance by this policy is now vested in (the co-insureds) for their respective rights and interests'[14] was clearly inserted in the policy. The wrong payment to the tenant by the insurer can not be claimed back from the landlord and the bank. Also in *State of Netherlands v Youell*,[15] A builders risk policies was issued to insure two submarines under construction with the builder and owner as c-insureds. The owner's claim on the cracking paint on the submarines were objected by the insurer on the reason that it was the wilful misconduct of the builder and the owner's claim was defeated as the policy is a joint one. Rix J held that the policy should be construed as composite one as it covers 'the interests and liabilities of (the owner and builder) and also mutual liabilities', *ie*, separate interest of each co-insured and they have separate interest in the submarines.

If the intention of the contracting parties can not be clearly determined by the construction of the policy wording, the nature of the co-insureds' interest on the subject matter will decide their right of indemnity in the policy. if the co-insureds have separate interests on the subject matter insured, the policy should be construed as composite policy because each co-insured's amount of loss on the destruction of the subject matter is different with others, his right of indemnity is also operated to indemnify in respect of each individual different loss which the co-insured may suffer, which is in a better position than a joint right. Otherwise it would lead to 'curious a result'[16] because the co-insured will be in a position to receive the indemnity jointly with other insured, without the possibility to claim his own benefit, which is less advantageous. The same rationale can also apply to a joint interest co-insured. As his interest in the subject matter is joint, the policy should be a joint policy and his right to policy proceeds would be joint.

If the contracting parties in co-insurance policy agree to insure the different interests jointly with express wording, can the policy be regarded as a joint policy? In *New Hampshire Insurance Co. v MGN Ltd*,[17] although Potter J did not dissent from the

[14] This phrase was explained by Sir Wilfrid Greene MR as 'the persons whom the underwriters now undertake to indemnify by this document are those three named persons 'for their respective rights and interests'', *ibid* at p.403.
[15] [1997] 2 Lloyd's Rep. 440.
[16] Per Sir Wilfrid Greene MR in *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd.* [1940] 2 KB 388, at p. 407.
[17] [1997] L.R.L.R.24.

insurer's suggestion that it was not suggested in *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd*[18] that 'if the parties agree that separate insureds shall be treated as a single entity/joint assured for purposes of an insurance contract, that can not be achieved', the polices titled 'Joint Insured' was decided was not construed as a joint policy as the co-insureds had separate interests on the subject matter insured and the 'Joint Insured' title was held by the Court of appeal not to be enough evidence to prove the co-insured's joint interests. The negative opinion was made further in *State of Netherlands v Youell*,[19] in which Rix J made further opinion that even if the co-insured had a pervasive insurable interest on the subject matter insured, the co-insurance contract was still a composite policy instead of joint one.

On the question of whether the co-insured can insure his joint interest in a composite policy with the intention of the parties in express construction, it is still a question to be decided by the courts even there were confirmations in other common law jurisdictions.[20] It is approved by scholars that husband and wife insure their joint matrimonial property in a composite policy,[21] leaving the commercial insurance an open topic for free discussion.[22]

8.1.2. Creation of Co-insurance Policy

How the co-assureds become parties to the contract of co-insurance? The simplest and most obvious method is that all those parties insure their respective interests together in the co-insurance policy and the coverage for each co-assured is resolved on the proper construction of the policy.

On the other hand, it is quite often in practice that one co-insured make a co-insurance policy not only on behalf of him but also for the benefit of others. The others may be expressed named in the policy or described as a group in the policy. As the policy does

[18] [1940] 2 KB 388.
[19] [1997] 2 Lloyd's Rep. 440.
[20] *Eg*, it is approved in two New Zealand cases: *Maudler v National Insurance Co. of New Zealand* [1993] 2 N.Z.L.R.351; *Gate v Sun Alliance Insurance Ltd* (1995) 8 A.N.Z. Insurance Cases 61-251. It is approved by scholars that husband and wife insure their joint matrimonial property in a composite policy.
[21] See Merkin's Insurance, para A-0601.
[22] For further discussion in details, please see Ahmed Tolulope Olubajo, PhD thesis: The Law of Co-insurance Policies, Chapter III, Section 2 and 3, University of Southampton, 2003.

not automatically render the third party the right of enforcement by a mere statement that it covers the interests of both the principal assured and other named or identifiable third party, the question then arises on whether the third party can be regarded to be co-assured's in the policy. According to the relevant common law and statue, the third party may acquire his contractual rights by the operation of the rules of agency, or get the right of enforcement as the beneficiary to the contract if he satisfies the conditions set out in the Contracts (Rights of Third Parties) Act, 1999.[23] When the rules of agency are applied, the third party can become a contracting party to the insurance if the principal assured has insured on his behalf under the authorization,[24] and the principle assured has intention to take out the policy in accordance with his principle's instruction,[25] and the insurer does not refuse to accept the risk that they could be contracting with the third party as well as the principal assured by the proper construction of the policy that the third party's contractual position is compatible, even if he acts as undisclosed principal.[26] Even without the authorisation, the third party can make ratification if he has been full of capacity and legally competent at the date of contract, and he is expressly covered in the policy as co-assured, and the principal assured has intention to insure on his behalf.[27]

In recent case *Talbot Underwriting v Nausch Hogan & Murray, The Jascon 5*,[28] the decision of Cooke J clarifies the specification of third party's position in a described class of persons in the composite policy terms. This case is the claim on the negligence of insurance brokers NHM, who was instructed by CPL, owner of the damaged insured

[23] *Cf* Merkin's Insurance, para A-0612 to A-0613 in detail.

[24] Such authority shall be interpreted with the terms of the authorisation and relevant contracts. Thus, in construction composite policy, if the third party like subcontractor is clearly regulated to be personally liable for loss, he can not be treated as co-insured in the policy even if he has authorised the contractor to insure on his behalf. *Stone Vickers Ltd v Appledore Ferguson Ship builders Ltd.* [1991] 2 Lloyd's Rep. 288. *National Trust v Haden Young Ltd* (1994) B.L.R. 1. The third party's contractual right as co-insured is limited to the risks under the authorisation. *National Oiwells (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep.582.

[25] As it was held in *O'Kane v Jones, the Martine P* [2005] Lloyd's Rep. 174, that the managers of a vessel who had been instructed by the owner to take out hull and machinery policy had intended to procure a policy covering the interests of the owner as well as that of the managers themselves because the owner qualified as a 'affiliated and/or associated company' of the manager of its ship.

[26] *National Oiwells (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582. *Siu v Eastern Insurance Ltd.* [1994] 1 All E.R. 213. However, if there is express restriction to particular assured or to assureds falling within a specified class in the policy, the undisclosed principle can not operate. *Stone Vickers Ltd v Appledore Ferguson Ship builders Ltd.* [1991] 2 Lloyd's Rep. 288, *Hopewell Project management Ltd v Ewbank Preece Ltd* [1998] 1 Lloyd's Rep. 438.

[27] Furthermore, the third party can only make ratification before he became aware of the loss in non-marine cases. However, see Colman J's disapproval in *National Oil Wells (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582. For further discussion on ratification, please see Merkin's Insurance, para A-0610—A-0611.

[28] [2005] EWHC 2359 (Comm).

vessel under repairing in a shipyard, to place Builders All risk Insurance composite policy to cover the shipyard as co-insured for waiver of subrogation proceedings under the repairing contract, for not including the shipyard in such policy. The claimant was the insurer, who agreed the payment on CPL's breach of contractual obligation for insurance without any admission of liability, and was assigned the cause of action against NHM under an Assignment of Agreement.

On the defences from NHM that Shipyard was entitled to be indemnified in the policy, Cooke J's refusal was that the terms in the policy could not be construed to include Shipyard. The phrase 'Associated and Interralated companies and/or Joint Ventures' in the Assured Clause was impossible, because under a repairing contract, the relation between CPL and shipyard can not be regarded as 'associated and interrelated' like the similar meaning of 'affiliated and or associated' in *O'Kane v Jones, the Martine P*,[29] nor could they can treated as joint venture. The 'Additional Assured' in the Condition Clauses in the slip was also held not to include shipyard in the scope of co-assureds because it pointed at those companies who became an affiliate or associate of CPL after the inception of the risk. Thus, the shipyard fell out of the class meeting the description set out in the policy.

In addition, the shipyard could also not be treated as an undisclosed principal because the restricted definition of insured persons explained excluded the possibility to extend the policy to shipyard. Furthermore, the insurer would be unwillingly to include shipyard's interest under such policy as a possible subrogation right would have to be waived if loss happened. Thus, in composite policy, unless on the proper construction of the terms a third party's variant interest is expressly included, the doctrine of undisclosed principal could not be permitted to circumvent the definite meaning of the policy. The application of undisclosed principle doctrine in insurance contract is criticised severely by the learned judge, although once there were support in higher authorities. More than that, the final exiting space of the undisclosed principal doctrine was squeezed by the learned judge by the application of non-disclosure. It is established that the identity of the assured is a material fact and non-disclosure be an automatic breach of the duty of utmost good faith

[29] [2004] 1 Lloyd's Rep.381.

so that the policy becomes voidable.[30] Considering of the impact of the shipyard's identity as builder and the affection on subrogated rights, CPL was obliged to make relevant disclosure. The insurer also did not waive that information because the shipyard was not distinctly included in the scope of assured and the insurer neither received any notice nor expressed approval,[31] which was in different to the circumstance in the case of *Siu v Eastern Insurance Ltd.*[32] According to the learned judge's reasoning, unless the principal insured's identity as agent is known to the insurer, or it is clearly worded in the policy or is expressly agreed by the insurer, to place a third party as undisclosed principal a position in an insurance policy is not an accepted rule in English law of insurance contract.

8.2. Insurable Interest in Joint Policy

According to s.8 MIA 1906, assured who has a partial interest in the subject matter can insure up to the full value.[33] Thus, in joint policy, it is regarded that 'the insurable interests of the joint assureds are identical and extend to the entire subject matter insured, which means that either party can recover the full amount insured under the policy.'[34] So, a joint owner in the cargo insured who has a part interest in the insured property want to receive the full amount of the loss, but he must aver clearly in the policy that the interest is not to be in him only[35] and he intends to insure for other joint owners.[36]

Furthermore, as a joint owner, he must also prove that he has the authority or ratification from others part owners, the reason is stated by Lord Ellenborough in *Bell v Humphries*[37]: 'A share in the ship is the distinct property of each individual part owner, whose business it is to protect it by insurance, so that the insurance of another cannot be

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[30] Ss 17,18, MIA 1906.
[31] Although it can be waived on fair presentation of the risk, *Marc Rich v Portman* [1996] 1 Lloyd's Rep. 430 in QBD, upheld in Court of Appeal in [1997] 1 Lloyd's Rep. 225.
[32] [1994] 1 All E.R. 213.Where the assured was know to be an agent and the insurer waived disclosure. It was less obvious in *National Oil Wells (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582.
[33] *Inglis v Stock* (1885) 10 App. Cas. 263; *Ebsworth v Alliance marine Insurance Co.* (1873) LR 8 CP.
[34] Merkin's Insurance, para A-0603.
[35] *Bell v Ansley* (1812) 16 East, 143; *Cohen v Hannam* (1813) 5 Taunt 107; *Ebsworth v Alliance marine Insurance Co.* (1873) LR 8 CP.
[36] *French v Backhouse* (1771) 5 Burr. 2727.
[37] (1818) 2 Stark. 345.at 346.

binding on such proprietors without some evidence importing an authority by them.' Otherwise, he could not receive the full value of the insured property[38] and the other joint owner held no responsibilities to the policy underwritten.[39] This authority or ratification can be in clear written form. It can also be sufficient if the joint owners have full opportunity of learning without objection that one of him has made the insurance for their joint account and benefit. As in *Robinson v Gleadow*,[40] the amount of the premium of the policy in the assured joint managing owner's account book was seen and inspected by all other joint owners without objection. This was held to be a valid authority. Furthermore, the joint owner who was authorised to make insurance had the obligation to insure up to the full value of the joint owned property.[41]

8.3. Pervasive Insurable Interest in Composite Policy

8.3.1. Introduction

If pursuant to the co-assureds' different interest in the composite policy and the classic doctrine of insurable interest as a 'legal or equitable relation', the insurable interest of the co-assured in composite policy will be limited to property which he either owns or for which he has possession or responsibility. Consequently, each co-assured could recover the benefit from the insurer valued from his limited interest in the subject matter.[42]

More than that, in contractor's composite insurance, the co-insured subcontractor or supplier is held to have pervasive insurable interest in the whole property insured, and he is entitled to claim not only for himself but also for the benefit of his co-insureds in the full amount of the loss. The pervasive insurable interest doctrine was first applied by the Canadian Supreme Court in *Commonwealth Construction Co. Ltd v Imperial Oil*

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[38] *Bell v Ansley* (1812) 16 East,143; *Cohen v Hannam* (1813) 5 Taunt 107.
[39] As in *Roberts v Ogilby* (1821) 9 Price 269, the other joint owners were held not to be responsible to the premium.
[40] (1835) 2 Bing. N.C. 156.
[41] *Califatis v Olivier* (1919) 36 T.L.R.18. On the other hand, it was held in *Hooper v Lusby* (1814) 4 Camp. 66 by Lord Ellenborough that if the assureds who acted not only as part owner of the insured ships but also as partner of the shipping firm, could effect an policy on the ships without express authority from the other members of the firm.
[42] *Samuel v Dumas* [1924] A.C. 431.

Ltd.[43] and was later applied in English courts by Lloyd J in *Petrofina (U.K.) Ltd v Magnaload Ltd.*[44] Accordingly, the 'Petrofina principle'[45] was established to erect the subcontractor's pervasive insurable interest in the entire contract works insured under the name of a main contractor, owner or employer. In the following two cases *Stone Vickers Ltd v Appledore Ferguson Ship builders Ltd*[46] and *National Oil Wells (UK) Ltd v Davy Offshore Ltd*,[47] this doctrine was applied in marine insurance and a further expansion was made on the supplier of spare parts who was also held to have pervasive in the insured building facilities under the composite policy, although he was not at the construction site. The reasons behind the doctrine are for commercial convenience to prevent the parties with such interest from suing each other, actually it is to prevent the insurer's subrogation claim against the co-insured who is liable to the loss; and it is because the sub-contractor or supplier had the great possibility of suffering economic loss on the damage of the insured whole construction and his potential liability to all these properties, although he has not any proprietary or possessory right on them. The liability test was considered as not so important by Stuart-Smith LJ in Court of Appeal in *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals and Polymers Ltd.*,[48] in his opinion, the sub-contractor's possible economic loss on frustration of contract performance due to the damage to or destruction of the plant is the reason for a valid pervasive insurable interest instead of the liability for the damage.[49]

8.3.2. Subrogation Immunity

As it is known that the aim of pervasive insurable interest is to immunise the co-insured's liability, *i.e.*, the insurer can not bring a subrogated action in the name of other co-assureds even if the damage or destruction to the plant insured is caused by his negligence or he bears the contractual liability. The reason why pervasive insurable interest can uphold this effect was explained in *Petrofina* by Lloyd J on rule against

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[43] (1977) 69 D.L.R. (3rd) 558.
[44] [1984] Q.B. 127.
[45] Norma Hird, Insurable Interest-A Step Too Far? Insurance and Reinsurance law Briefing, 97 November, 2004, at p.2.
[46] [1991] 2 Lloyd's Rep. 288.
[47] [1993] 2 Lloyd's Rep. 582.
[48] [1999] 1 Lloyd's Rep.387.
[49] For discussion in details, please see Chapter II, Section 2.2.2.1.,2.2.2.2. Also *cf* the analysis in Ahmed Tolu Olubajo: Pervasive Insurable Interest: A Reappraisal Const. L.J. 2004, 20(2), 45-57, p.47-53.

circuit of action. With such operation, an implied term on subrogation immunity can be intended in the composite policy. Alternatively, in *Stone Vickers Ltd v Appledore Ferguson Ship builders Ltd*,[50] Coleman QC, as he then was, considered that to exercise the right of subrogation by the insurer to the co-assured would be completely inconsistent with the insurer's obligation to them under the policy because for business efficiency it is implied in the co-insurance policy that the insurer will not recollect his payment of benefit to the assured from another co-insured.[51] In *National Oilwells (UK) Ltd v Davy Offshore Ltd*,[52] Coleman J concluded that the reason why the insurer could not exercise right of subrogation was 'that to do so would be in breach of an implied term in the policy and to that extent the principles of circuity of action operate to exclude the claim'.[53] Thus if a subcontractor is entitled to insure the whole of the contract works because of his pervasive insurable interest instead of the mere part for which he has liability in negligence or in contract, the insurer's subrogation right in the name of another co-insured under the composite policy is accordingly ceased.

In addition, the subrogation immunity can also be achieved by a proper construction of the relationship between the working contract and the terms of the insurance policy, this was explained in a non co-insurance case *Mark Rowlands Ltd v Berni Inns Ltd*,[54] in which it was held that, based on the terms of the tenancy, a policy of insurance taken out by the landlord was also for the benefit of the tenant. This was applied by a later co-insurance case *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* in the House of Lords.[55] This case arose also on the sub-contractor's right of subrogation immunity. The claimant Co-operative Retail Services Ltd ("CRS") employed Wimpey,

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[50] [1991] 2 Lloyd's Rep. 288.
[51] *Ibid,* at p.302.
[52] [1993] 2 Lloyd's Rep. 582.
[53] *Ibid*, at p.615. To reach such conclusion, the learned judge said, 'The explanation for the insurers' inability to cause one co-assured to sue another is that in as much as the policy on goods covers all the assureds on an all-risks basis for loss and damage, even if caused by their own negligence, any attempt by an insurer after paying the claim of one assured to exercise rights of subrogation against another would in effect involve the insurer seeking to reimburse a loss caused by a peril ... against which he had insured for the benefit of the very party against whom he now sought to exercise rights of subrogation ... For the insurers who had paid the principal assured to assert that they are now free to exercise rights of subrogation and thereby sue the party at fault would be to subject the co-assured to a liability for loss and damage caused by a peril insured for his benefit ... it is necessary to imply a term into the policy of insurance to avoid this unsatisfactory possibility. The implication of such a term is needed to give effect to what must have been the mutual intention (on this hypothesis) of the principal assured and the insurers, as to the risks covered by the policy.' *ibid*, from p. 613 to p.614.
[54] [1985] Q.B. 211.
[55] [2002] Lloyds' Rep.I.R.555.

as contractors, to build an office block. Wimpey employed Hall Electrical as the electrical subcontractors. The above three parties were covered as co-assureds under a joint names policy. Wimpey also employed Taylor Young Partnership ("TYP") and Hoare Lea and Partners ("HLP") as architect and consulting engineers who were not covered under the co-insurance policy. During construction the office block was damaged by fire caused by negligence or breach of contract of Wimpey, TYP, HLP and Hall Electrical for the purposes of the litigation. CRS were paid by the insurers, who then exercised their right of subrogation and sued TYP and HLP for damages as CRS could not sue either Wimpey or Hall directly because they were joint assureds with CRS on the composite policy, which had been taken out by Wimpey in accordance with its contractual obligations. TYP and HLP then claimed contribution from Wimpey and Hall Electrical under the Civil Liability (Contribution) Act 1978. But Wimpey and Hall Electrical denied they were liable to make a contribution because they had released their liability to CRS according to the terms in the employment contract and the insurer would bear the risk of such loss. In the Court of Appeal,[56] Brooke L.J. upheld the judgement of HHJ Wilcox in Queen's Bench Division (Technology and Construction Court)[57] that the co-insureds (i.e. Wimpey and Hall) were not liable for the loss and therefore were not liable to make any contributions to the professional advisers. The learned judge agreed Lloyd's decision in *Petrofina* and Colman J's in *National Oilwells (UK) Ltd v Davy Offshore Ltd*[58] and the notion of pervasive insurable interest. He also relied on Kerr LJ's reasoning in *Mark Rowlands Ltd v Berni Inns Ltd*[59] that the landlord and tenant's intention that the risk of fire damage(whether or not caused by the negligence of either of them) should be covered by insurance in the agreed leasing contract prevented such right, and held that the insurer in this case can not exercise such right because according to clause 22.3.1.of the employment contract between Wimpey and CRS, the insurers under the Joint Names Policy will waive their rights of subrogation which they may have against any such nominated sub-contractor in respect of loss or damage by the specified perils to the insured works and site materials. Unfortunately, the notion of pervasive insurable interest was not referred by Lord Hope of Craighead to this point in his leading speech in the House of Lords.[60] The learned

[56] [2000] Lloyd's Rep. I.R. 122.
[57] [2000] 16 Const. L.J. 204.
[58] [1993] 2 Lloyd's Rep. 582.
[59] [1985] Q.B. 211.
[60] [2002] Lloyds' Rep.I.R. 555.

judge made a further approach that even if it was not clearly written in the working contract on the non-exercise the right of subrogation, if two parties entered into a contract which stipulated that one party had to obtain an insurance in the joint names for both, then one joint insured could not sue another joint insured for damages where the loss was covered by the insurance because there was an implied term in the contract preventing such action.

From the above analysis, we can find that as the courts have not clearly discarded the doctrine of pervasive insurable interest in their judgements, it is too subjective to say that the 'courts had abandoned the strategy of stretching the concept of insurable interest in property entirely in favour of the different strategy of looking at the contracts between the co-insureds to determine whether the parties intended to pass on the risk of loss to the insurer and thereby protect themselves against subrogated proceedings'.[61] What we can say is that the courts are more in favour on the clear wording or implied terms in the contract between the parties to be as a reason for denying subrogation.

8.3.3. Economic Loss in the Destruction of the Property or in Liability

From the introduction of the pervasive insurable interest, we can find there are disputes among the learned judges on what constituted a valid pervasive insurable interest, is it arising from the sub-contractors economic loss on benefit from the inability of contract performance as stated by Stuart-Smith LJ in *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals and Polymers Ltd*,[62] or from his liability or responsibility of negligence or contractual liability in *Stone Vickers Ltd v Appledore Ferguson Ship builders Ltd*[63] and *National Oil Wells (UK) Ltd v Davy Offshore Ltd.*[64] As the judgement in the Court of Appeal prevails over the decisions in lower courts, economic loss on benefit should be regarded as the origin of the pervasive insurable interest, thus the supplier would only have separate insurable interest in his contractual liability covered by the co-insurance policy on his supplement of spare parts to the property

[61] Held by Ahmed Tolu Olubajo: Pervasive Insurable Interest: A Reappraisal Const. L.J. 2004, 20(2), 45-57, from p.54.
[62] [1999] 1 Lloyd's Rep.387. For discussion in details, please see Chapter II, section 2.2.2.1.,2.2.2.2. Also *cf* the analysis in Ahmed Tolu Olubajo: Pervasive Insurable Interest: A Reappraisal Const. L.J. 2004, 20(2), 45-57, from p.47-53.
[63] [1991] 2 Lloyd's Rep. 288.
[64] [1993] 2 Lloyd's Rep. 582.

insured, instead of the pervasive insurable interest on the whole scope of the works because he is not like the sub-contractor who carries out physical works of construction on the 'site'.

Nevertheless, in a late case *Feasey v Sun Life Assurance Corporation of Canada*[65] also in the Court of Appeal, Waller LJ made a full analysis on the cases relating to pervasive insurable interest especially the '*Deepak*' with five points comments.[66] He firstly gave his support on Stuart-Smith LJ's dicta and commented 'an insurable interest even on property seems to go beyond a 'legal or equitable interest' in the property. A subcontractor's insurable interest on the judgements in Deepak flows from the pecuniary loss that he will suffer from the loss of the opportunity to do work if the plant was destroyed by fire'.[67] He further upheld that a sub-contractor also has an insurable interest in his own liability to do the work and whether that insurable interest can be regarded as pervasive insurable interest on the whole plant insured depends on the construction of the wordings in the policy.[68] However, the learned judge did not make further explanation on what kinds of words in the composite policy constitute valid pervasive insurable interest arising from the sub-contractor's liability or responsibility. If same analogy can be made from the relevant cases in bailee, can we say that if the subject matter insured in the policy is clearly marked as 'for which the insured is responsible' like the case *Ramco(UK) Ltd v International Insruance company of Hanover*,[69] also held by Waller J, the sub-contractor or supplier can be treated to have only separate insurable interest in his liability[70] under the composite policy instead of pervasive insurable interest if he can not prove his pecuniary loss on the non-performance of the contract due to the damage or destruction of the plant insured under construction? On the other hand, if the subject matter insured in the policy is 'held by them in trust' like the cases in *Waters v Monarch Fire and Life Ass. Co.*[71] and

[65] [2003] Llyod's Rep. I.R. 637.
[66] *Ibid*, para. 94 to para.96.
[67] *Ibid*, para.94,
[68] As the learned judges pointed: 'But there is no hard and fast rule and where the subject of insurance is intended to be an can properly be construed as embracing the insurable interest in relation to liability, there is no reason not to so construe it.' *Ibid*, para.95.
[69] [2004] Lloyd's Rep IR 606.
[70] See Professor Birds' comment on *Petrofina*: Subrogation rights under a contractors' all risks policy (1983) JBL 497.
[71] (1856) 5 E & B 870.

Tomlinson(Hauliers) v Hepburn,[72] can we say that the co-insured has a pervasive insurable interest on the whole works insured in the composite policy arising solely from his liability in negligence or contractual liability?

Although Dyson LJ agreed with Wall LJ's decision, Ward LJ, in the same case, delivered an opposing opinion which was also the opinions delivered by scholars every since the case of *Petrofina* with their further criticism in *Stone Vickers, National Oil Wells* and *Deepak*. The learned judge considered that 'the need for a legal relationship between the insured and the subject matter of the insurance remains an essential part of marine and property insurance,[73] such insurable interest 'wrongly ignores the need for a legal relationship between the insured and subject matter.'[74] 'Of course the insured may suffer a disadvantage from the loss of the thing assured, but that is not, as our law stands at the moment, enough,' although the learned judge also agreed that 'the economic interest element, where Lawrence J.'s dictum is so valuable, has gained ascendancy and sight has been lost of the need to satisfy the second part of *Lucena*, namely that there has to be some legal or equitable interest between the insured and the subject matter of the insurance, expectation of harm or benefit not being enough.'[75]

From the above illustration and analysis, we can find that from a practical view, pervasive insurable interest has lost its significant importance on subrogation immunity. Furthermore, the disputes among the doctrine of pervasive insurable interest is not only on its nature, but also on whether it can be a valid interest as it is not in consistent with the traditional 'legal or equitable relation'[76] as authority on insurable interest in English law. As long as the present 'legal or equitable relation' test is not discarded in the House of Lords, the validity of pervasive insurable interest will be continuously doubted by the learned judges and scholars.

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[72] [1966] AC 451
[73] Para. 181.
[74] Para.189.
[75] Para.188.
[76] S.5(2) MIA 1906, *Macaura v Northern Assurance Co. Ltd* [1925] A.C. 619.

CHAPTER IX:
INSURABLE INTEREST IN MARINE REINSURANCE

9.1. The Requirement of Insurable Interest in Marine Reinsurance

9.1.1. Brief Introduction of Marine Reinsurance

Like that marine insurance is one of the major origins of modern insurance, marine reinsurance is also the origin of reinsurance business. It could be traced back to the fourteenth century in Italy and was spread to other countries including England. However, in the middle of the eighteenth century, reinsurance was declared to be illegal in s.4 MIA 1745 unless the insurer was insolvent, bankrupt or dead. Until 1864, the Revenue No.2 Act[1] effectively rendered reinsurance lawful and reinsurance has flourished since then.

The definition of reinsurance is a continuing discussing question in a number of cases. Lord Mansfield's conclusion in *Delver v Barnes*[2] is regarded as the 'earliest and most influential English Decision on the legal definition of reinsurance'.[3] However, it is also far from perfectness, several forthcoming cases had made supplement accompanying with the development of reinsurance business.[4] It is regarded that reinsurance should be 'a contract between insurer and reinsurer whereby the insurer lays off some or all of its risk to the reinsurer for the payment of a premium in circumstances where the reinsurer has no contractual relationship directly with the ultimate insured.'[5] That is to say, the reinsurance contract covers reinsured's full or part obligations, *i.e.*, risk or risks under the original insurance contract or contracts,[6] it is an independent contract and can be

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[1] 27 & 28 Vict. c.56, s.1.
[2] (1807) 1 Taunt. 48. The learned judge said 'a new assurance, effected by a new policy, on the same risk which was before insured, in order to indemnify the underwriters from their previous subscription; and both policies are in existence at the same time.' p.50.
[3] Merkin's Reinsurance, para A-0140.
[4] For discussion in details, please see Merkin's Reinsurance, para A-0140 to para.A-0156; Colin Edelman, The Law of Reinsurance, OUP 2005, p.5-8.
[5] Colin Edelman, The Law of Reinsurance, OUP 2005, at p.8.
[6] *Tommey v Eagle Star Insurance Co. Ltd* [1994] 1 Lloyd's Rep.516; *Charter Reinsurance Co. Ltd v Fagan* [1996] 2 Lloyd's Rep. 113; *Skandia International Corp v NRG Victory Reinsurance Ltd* [1998] Lloyd's Rep. IR 439.

made before or after the establishment of the original contract.[7] This definition reveals the function of reinsurance, which was delivered by Mance J in *Charter Reinsurance Co. Ltd v Fagan.*[8] In the consideration of various kinds of reinsurance contracts, like facultative and treaty; proportional and non proportional; quota share and surplus; excess of loss, stop loss, excess of loss ratio and aggregate excess of loss; obligatory, facultative obligatory and non-obligatory treaties or open cover,[9] reinsurance is generally regarded as a contract of insurance.[10] On the other hand, it is also suggested that open cover[11] and surplus treaty[12] should be separately regarded as a contract for insurance instead of contract of insurance.

On whether the reinsurance is the insurance on the same subject matter as that of the original insurance contract[13] (or the reinsured's insurable interest in the subject matter[14]), or a reinsurance contract is a form of independent liability policy, there are several answers to this question among the learned judges and scholars[15] and it is not firmly confirmed.[16] It is suggested that it depends upon 'what is described as such by the parties in their agreement',[17] *i.e.*, it can be either reinsurances of the same subject matter in facultative agreements and proportional treaties, or liability policies in non-

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[7] *General Accident Fire and Life Assurance Corp. v Tanter, the Zephyr* [1984] 1 Lloyd's Rep.58; *Youell v Bland Welch (No.2)* [1990] 2 Lloyd's Rep. 431; *SA d'Intermediaires Luxemboourgeois v Farex Gie* [1995] L.R.L.R. 116; *Kingscroft Ins. Co. Ltd v Nissian Fire & marine Ins. Co.* [1999] Lloyd's Rep. I.R. 603.

[8] [1997] AC 313. 'In insurance, the matching of exposure and protection to assure both solvency and profitability is absolutely fundamental. Reinsurance--of whatever type—is a principal means to this end.' For the analysis of the objectives of reinsurance, please see Butler & Merkin's Reinsurance Law, para A-0001 to para A-0003.

[9] For introduction in details, please see Butler & Merkin's Reinsurance Law, para A-0015 to para A 0040. O'Neill, The Law of Reinsurance in England and Bermuda, 2nd ed, S&W 2004, para 1-08 to para 1-26.

[10] *Delver v Barnes* (1807) 1 Taunt. 48, *Australian Widows Fund Life Assurance society Ltd v National Mutual Life Association of Australia Ltd* [1914] A.C. 634, *Re London Country Commercial Reinsurance Office* [1922] 2 Ch.67. (facultative contracts); *Re Norwich Equitable Fire Assurance Society* (1887) 57 L.T. 241; (1887) 3 T.L.R. 781, *Glasgow Assurance Corporation v William Symondson & Co.* (1911) 104 L.T. 254, *Law Guarantee Trust and Accident Society v Munich Reinsurance Co.* [1912] 1 Ch. 138, *First Russian Insruance Co. v London and Lancashire Insurance Co.* [1928] 1 Ch. 922; *Attorney General v Foriskringsaktieselskabet national of Copenhagen* [1925] A.C. 639. (Treaties)

[11] *SA d'Intermediaires Luxemboourgeois v Farex Gie* [1995] L.R.L.R. 116; *HIH Casualty and General Insurance v Chase Manhattan Bank* [2001] Lloyd's Rep. I.R. 19.

[12] *Trans-Pacific Insurance Co. (Australia) Ltd v Grand Union Insurance Co. Ltd* (1990) 6 A.N.Z. Insurance Case 60-949. See Merkin's Reinsurance, para A-0183 to para. A-0191.

[13] *Attorney Generalv Forsikringsaktieselskabet National of Copenhagen* [1925] A.C. 639.

[14] *Toomey v Eagle Star Insurance Co. Ltd* [1994] 1 Lloyd's Rep. 516 per LJ Hobhouse at p.523.

[15] For discussion in details, please see Merkin's Reinsurance, para A-0210—A-0233.

[16] As Lord Mustill commented it was 'perhaps not yet finally resolved, whether there can be cases where a contract of reinsurance is an insurance of the reinsurer's liability under the inward policy or whether it is always an insurance on the original subject-matter.' *Charter Reinsurance Co. Ltd v Fagan* [1996] 2 Lloyd's Rep. 113 at p.117.

[17] Merkin's Reinsurance, para A-0352.

proportional treaties. It is also suggested that 'reinsurance should be construed loosely to mean any contract of insurance placed by or for the benefit of a party carrying on insurance business and covering risks underwritten in the course of that business,'[18] or a 'transaction involving the transfer of risk acquired through providing insurance to another or others',[19] or 'a contract between insurer and reinsurer whereby the insurer lays off some or all of its risk to the reinsurer for the payment of a premium in circumstances where the reinsurer has no contractual relationship directly with the ultimate insured.[20] The answer, but maybe not the final one, can be found in the most recent case *CGU International Insurance Plc and others v Astrazeneca Insurance Co Ltd*,[21] in the general principles of law on reinsurance laid by Crosswell J, the learned judge followed Hobhouse LJ's Judgement in *Toomey v Eagle Star Insurance Co. Ltd*[22] and regarded reinsurance is the insurance of an insuable interest in the subject matter of an original insurance instead of 'an insurance of the primary insurer's potential liabilities.'

9.1.2. Marine reinsurance is a Contract of Indemnity

No matter a marine reinsurance is issued under what kind of policy as listed above, insurable interest is required for the validity of the policy. This is because like that of marine insurance which is a contract of indemnity, marine reinsurance is also a contract of indemnity. This is first commented by Mansfield C.J. in *Delver v Barnes*: 'to indemnify the underwriters from their previous subscription',[23] and explicitly affirmed by Buckley LJ in *British Dominion General Insurance Co. v Duder*[24] with reference to the insurance cases like *Castellain v Preston*[25] and *Burnand v Rodocanachi*.[26] The learned judge said: 'upon a contract of re-insurance there can be no recovered more

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[18] Per Lord Millett pointed 'in *Agnew v Länsförsäkringsbolagens AB*[2001] 1 AC 223; at at p.261.
[19] O'Neill, The Law of Reinsurance in England and Bermuda, S&W, 2004, 2nd ed, para 1-35.
[20] Colin Edelman, The Law of Reinsurance, OUP 2005 at p.8.
[21] [2005] EWHC 2755 (Comm), from para 92-98.
[22] [1993] 1 Lloyd's Rep. 516
[23] (1807) 1 Taunt. 48, at p.51.
[24] [1915] 2 KB 394.
[25] 11 Q.B.D. 380 Reinsurance is prima facie a contract of indemnity, as the many examples in the plaintiff/respondent's printed case effectively illustrate, under which the reinsurer indemnifies the original insurer against the whole or against a specified amount or proportion (in this case 90 per cent.) of the risk which the latter has himself insured. This, my Lords, is the situation one expects to find on turning to look at the reinsurance contract.
[26] 7 App.Cas. 333.

than an indemnity',[27] thus 'as a matter of legal right the plaintiffs can not ... make a profit out of the reinsurance.'[28] This case effectively clarified the ambiguous decisions in *Uzielli & Co. v Boston Marine Insurance Co*[29] and overthrew Mathew LJ's decision that reinsurance was not a contract of indemnity in *Nelson v Empress Assurance Corp. Ltd.*[30] Lord Lowry stated in the House of Lords: 'Reinsurance is prima facie a contract of indemnity, ... under which the reinsurer indemnifies the original insurer against the whole or against a specified amount or proportion ... of the risk which the latter has himself insured. This, my Lords, is the situation one expects to find on turning to look at the reinsurance contract.'[31] Lord Hoffmann also recognised that reinsurance is a contract of indemnity in *Charter Re v Fagan*[32] in House of Lords. Thus, like the assured in marine insurance, the reinsured in marine reinsurance can only recover his loss falling within the cover of the policy reinsured and within the cover created by the reinsurance.[33] Furthermore, the reinsured can also be indemnified from the reinsurer even if the reinsurance policy was made before the original insurance was placed.[34]

The contract of reinsurance is to indemnify the reinsured's legal liability[35] to pay the insured in the original insurance policy, which is ascertained and quantified by agreement or settlement, arbitration award or judgement, instead of indemnifying the actual payment of the reinsured. As Maugham L.J. expressed in *Versicherungs und Transport Aktiengesellschaft Daugava v Henderson*[36]:'A policy of reinsurance is an agreement by way of complete or partial indemnity to the insurer. That has long been

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[27] *British dominion General Insurance Co. v Duder* [1915] 2 KB 394, at p.401.
[28] *Ibid*, at p.403.
[29] [1884] 25 KB 11.
[30] [1905] 2 KB 281.
[31] *Forsikringsakieselskapet Vesta v JNE Butcher* [1989] 1 Lloyd's Rep. 331, at 345.
[32] [1996] 2 Lloyd's Rep. 113 at 122.
[33] *British Dominion General Insurance Co. v Duder*[1915] 2 KB 394, at p.401; *Chippendale v Holt* (1895) 1 Com. Cas.157; *Insurance Co. of African v Scor (UK) Reinsurance Co. Ltd* [1985] 1 Lloyd's Rep 312; *Charman v Guardian Royal Exchange Assurance Plc* [1992] 2 Lloyd's Rep. 607; *Hill v Mercantile & General Reinsurance Co. Plc* [1996] LRLR 341; *Gan Insurance Co. Ltd v Tai Ping Insurance Co. Ltd* (No.2) [2001] Lloyd's Rep. IR 667. For discussion in details on reinsurer's obligation to indemnify the reinsured, please see O'Neill The Law of Reinsurance in England and Bermuda, Chapter 5, S&M 2004, 2nd ed.
[34] *General Accident Fire and Life Assurance Corporation v Tanter, the Zaphyr* [1984] 1 Lloyd's Rep. 58; *Youell v Bland Welch (No.2)* [1990] 1 Lloyd's Rep. 431; *SA d'Intermediaires Luxembooургeois v Farex Gie* [1995] L.R.L.R. 116; *Kingscroft Insurance Co. Ltd v Nissan Fire & Marine Insurance Co. (No.2)* [1999] Lloyd's Rep. I.R. 603.
[35] *Commercial Union Assurance Co. v NRG Victory reinsurance Ltd* [1998] 2 Lloyd's Rep. 600.
[36] (1934) 49 LL.L. Rep. 252, at p.254, also agreed by Scrutton L.J. at p.253, followed by Cresswell J in *CGU International Insurance plc and others v Astrazeneca Insurance Co Ltd* [2005] EWHC 2755 (Comm).

established, and has been stated in more that one case. Like every contract of indemnity, it can only operate if the liability contingent on that liability is being established. It follows that the insurer has no cause of action against the reinsurer until the loss for which the former is liable (if any) has been ascertained.' In addition, the parties involved can agree in the contract to cover actual payment by the reinsured, so that until the reinsured pays over to the original assured the sums owed by it, the reinsurer is under no liability.[37] The reinsurer can also indemnify the reinsured on the happening of the event under which the original assured had been covered by the insurance policy on the form of insurance policy instead of reinsurance.[38]

Because the marine reinsurance is a contract of indemnity, insurable interest is accordingly required to be held by the reinsured to let the reinsurer reimburse him only in case of an anticipated damage from the original insurance contract. Otherwise the reinsured would be happy to see the damage or destruction of the subject matter insured in the original insurance contract or even make such damage or destruction intentionally. An insurable interest in the subject matter insured is of very essence of the right to recover upon the reinsurance contract. In the absence of such an interest the reinsured can not be indemnified, even if there may have been a total loss of the subject matter insured, because the reinsured can not show evidence to prove his damage. This is not a question in marine reinsurance, as we all know that according to s.6 MIA 1906, the existence of insurable interest is only required at the time of the loss to the subject matter insured, which can be applied to all sorts of marine reinsurance agreements as they must be described as contracts of reinsurance when losses happen.[39]

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[37] *E.g.* the insertion of clauses like 'to pay as may be paid thereon', for discussion in detail, please see Merkin's Reinsurance, para C-0027—C-0034.

[38] *Feasey v Sun life Assurance Co. of Canada* [2003] Llyod's Rep. I.R. 637.

[39] Although Gaming Act 2005 has repealed the Gaming 1845 to declare all wager policies are valid, which leads to the doubt of the validity of s.4 MIA 1906, See Chapter I. Insurable interest in marine reinsurance shall still be upheld in consideration of it is a contract of indemnity.

9.2. Valid Insurable Interest in Marine Reinsurance

9.2.1. Loss on Contractual Liability

Although it is not crystal clear in English law on the nature of subject matter in reinsurance contract, it is clear that insurable interest is required in all kinds of reinsurance policies.[40] Then what kind of relation between the reinsured and the subject matter is regarded as valid insurable interest? It is provided in s.9 (1) MIA 1906 that the insured has an insurable interest in his risk and may arrange reinsurance. But what is the nature of this risk, as the term 'risk' has several meanings and should be construed in the lights of its context?[41] Is it the reinsured's liability to pay the benefit under the original insurance contract, or the loss of the subject matter insured in the original insurance policy? To answer this question, we have to analyse the relevant cases from the beginning.

As Mansfield C.J. only termed it 'a new policy on the same risk' without a clear answer in *Delver v Barnes*,[42] Blackburn J commented in Court of Appeal in *Mackenzie v Whitworth*[43]: 'The assured here had a direct interest in the safe arrival of the cotton: not in any way a collateral interest in something else after the cotton arrived. It was, though not a property in the cotton, an interest in the cotton created and evidenced by a binding legal contract between them and the owners of that cotton.' From the above citation, we can find that the learned judge regarded the reinsured's insurable interest was his contractual relationship with the subject matter insured under the original insurance policy as he would have loss on its damage or destruction.

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[40] The effect of the less clear nature of subject matter in reinsurance contract is on the application of relevant statues. If the subject matter of reinsurance is the same as that of the original insurance like a marine policy, then the insurable interest requirement applicable to the original insurance will be relevant, like MIA 1906 to marine insurance. If the reinsurance is regarded as a liability policy, then LAA 1774 can not be applied to reinsurance. However, there is different interpretation in the case of *Feasey v Sun Life Assurance Co. of Canada* [2003] Lloyd's Rep. I.R.637. See Merkin's Reinsurance, para A-0355, A-0358.

[41] *Cf* Ivamy, Chalmers' Marine Insurance Act 1906, Butterworths, 1993, 10th ed, at p.1-2. *Vincentelli & Co. v John Rowlett & Co.* (1910) 16 Com.Cas. 310; *Bradford v Symondson* (1880-81) LR 7 QBD 456.

[42] (1807) 1 Taunt. 48, at p.51.

[43] (1875) 1 Ex. D. 36 at p.46.

The above explanation was further expanded by the learned judges in Court of Appeal in *Bradford v Symondson*,[44] the defendant as agent of reinsured who effected a facultative reinsurance policy with the claimant on a 'lost or not lost' cargo policy, but the cargo and vessel had arrived safely at the port of destination without the knowledge of both parties when the reinsurance policy was effected. The reinsured refused to pay the premium on one count that he had no insurable interest on the subject matter reinsured. Brett LJ rejected this and held: 'Now what was the insurable interest of the assured under this policy? The insurable interest was the risk which he ran under the former policy. If this policy therefore attached, it attached in respect of the voyage insured under that first policy, and during the whole of that policy the risk of the (reinsured) under it did exist, and, therefore, it seems to me that the question of insurable interest in this case comes to be the same question precisely as the question whether the risk ever attached. If the risk attached, and as long as it attached under the first policy, or under this second policy, the defendant's interest attached for the same time and during the whole of the same period. Therefore there was an insurable interest.'[45] In Bramwell LJ's supplement, he clearly pointed out that the risk means 'the voyage commenced with necessary conditions to make the underwriters liable' instead of 'the chance of loss during its performance'.[46] This was also agreed by Lord Brett M.R. in *Uzielli & Co. v Boston Marine Insurance Co.*[47] In this case the learned judge commented:'They were not owners, and they therefore had none as owners. But they have an insurable interest of some kind, and that insurable interest is the loss which they might or would suffer under the policy, upon which they themselves were liable.' From the above two cases, the valid insurable interest of the reinsured was regarded by the learned judges as his loss originated from his contractual liability under the original insurance policy. This opinion was approved by Buckley L.J. in *British Dominions General Co. Ltd v Duder* with his words 'the reinsured has an insurable interest in the ship by virtue of his original contract of insurance.'[48]

[44] (1880-81) LR 7 QBD 456.
[45] *Ibid*, at p.463.
[46] *Ibid*, at p.464.
[47] (1884) 15 Q.B.D. 11.
[48] [1915] 2 K.B. 394 at p.400.

The above opinion was adopted by Scrutton L.J. in a fire reinsurance treaty dispute, *Attorney General v Forsikringsaktieselskabet National of Copenhagen.*[49] In his judgement, the learned judge first commented: '...it was well settled by English authorities what the exact position of a contract of re-insurance was. It is an insurance of the original subject-matter, house or life or whatever it may be, in favour of a person whose insurable interest is that he will be liable under contract to pay a sum if the subject-matter is damaged by the peril insured against fire'.[50] Then he concluded: 'That is the state of the English law. A re-insurance is an insurance of the subject-matter against loss by or incidental to fire, the insurable interest of the company which re-insures being that it will lose under its policy if that subject-matter is destroyed by fire.'[51] This was also confirmed by Viscount Cave L.C. in the House of Lords: 'the insurable interest of the original insuring party being constituted by its policy given to the original assured.'[52]

Support on the above opinion can also be found in recent cases. In *Toomey v Eagle Star Insurance Co.Ltd,*[53] Hobhouse LJ reviewed comprehensively on the nature of reinsurance, upheld that reinsurance is a further insurance on the original subject matter instead of a form of liability and commented 'the extent of the reinsured's insurable interest has to be identified by reference to the terms of the original policy'.[54] This means that the reinsured's valid insurable interest is based on the content of the original insurance contract to determine his liability of payment on the damage or destruction of subject matter insured.

The approach of Hobhouse LJ was largely echoed by Lord Hoffmann in House of Lords in *Charter Reinsurance Co. Ltd v Fagan*[55] who suggested: 'Contracts of reinsurance ... is not an insurance of the primary insurer's potential liability or disbursement. It is an independent contract between reinsured and reinsurer in which the subject matter of the insurance is the same as that of the primary insurance, that is to say, the risk, the ship,

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[49] (1924) 19 Ll. L.Rep.32.
[50] *Ibid*, at p.34.
[51] *Ibid*, at p.34.
[52] *Attorney General v Forsikringsaktieselskabet National of Copenhagen* [1925] A.C. 639 at p.642.
[53] [1994] 1 Lloyd's Rep. 516.
[54] *Ibid*, at p.522.
[55] [1996] 2 Lloyd's Rep. 113. followed by Cresswell J in *CGU International Insurance plc and others v Astrazeneca In-surance Co Ltd* [2005] EWHC 2755 (Comm).

the goods or whatever might be insured. The difference lies in the nature of the insurable interest, which in the case of the primary insurer arises from his liability under the original policy.'[56] This was also applied by Potter L.J. in Court of Appeal on an excess of loss contract case in *Commercial Union Assurance Company Plc v NRG Victory Reinsurance Ltd*[57] with his conclusion: 'The broad purpose of reinsurance,... is for the reinsured to be covered (within the limits stated in the reinsurance) in respect, and to the extent, of his liability under the original policy, pursuant to which the original insured is entitled to recover from him.'[58]

From the above analysis, we can find that whether the reinsurance policy is construed to be on the same subject matter in the original insurance policy, or an independent liability policy, the existence of valid insurable interest held by the reinsured is his liability under the original insurance policy, or more specific, it is his contractual liability originated from the original insurance policy on his obligation to pay the benefit to the assured on his loss upon the destruction or damage to the subject matter caused by the peril insured. This insurable interest coheres with the statutory requirement in s.5 (2) MIA 1906 and the common law rule in *Macaura v Northern Assurance Co.Ltd*[59] and is valid in marine reinsurance.[60]

9.2.2. Pecuniary Interest Originated from Obligation in Feasey

The above mentioned established rule of 'contractual liability' on the insurable interest in marine reinsurance has been expanded to 'pecuniary interest originated from liability' in the recent case *Feasey v Sun Life Assurance Co. of Canada,*[61] a case has been cited many times in this thesis due to its importance on the recent expansion of the meaning of insurable interest in English insurance law.

In Court of Appeal, Waller LJ and Dyson LJ agreed that Steamship Mutual, a P&I Club had insurable interest in the lives of its members' employees and other injured persons

[56] *Ibid*, at p.122. Buckley LJ's judgement in *British Dominion General Insurance Company v Duder* [1915] 2 KB 394 was fully agreed by the learned judge.
[57] [1998] 2 Lloyd's Rep. 600.
[58] *Ibid*, at p.610.
[59] [1925] A.C. 619.
[60] See Arnould 16th ed. para 399 and Vol 3 at p.282.
[61] [2002] Lloyd's Rep. I.R.807, affirmed in [2003] Llyod's Rep. I.R. 637.

onboard its members' entry vessels or offshore rigs and thus can reinsure their health or lives to reinsurer. The reason is that Steamship has pecuniary loss on the death or injury of the insured person because it has contractual obligation on the payment of certain sum of money to the members to settle their established legal liabilities with the persons insured for their death or injuries. This decision did not rely on the traditional strict rule on the meaning of insurable interest as 'legal or equitable' interest, but based on a loose 'pecuniary' interest on a valid insurable interest which was applied by the courts continuously in recent cases.

Nevertheless, this view was set up made by the learned judges on their finding of the special and careful wordings in the specific reinsurance contract. From Dyson LJ's judgement, we can find that instead of regarding it a traditional reinsurance contract as a contract of indemnity in the strict sense, the learned treated it as a hybrid contingent liability policy as the subject matter insured was 'the contingency of bodily injury/illness of an Original Person tout court',[62] whereas the payment was based on Steamship's liability. Furthermore, the relevant applicable statue relied by the learned judges is LAA 1774 which was decided not to be applied to liability insurance[63] and marine insurance or marine reinsurance.[64] Also in consideration of Ward LJ's powerful dissent on it, whether it was only an exception applied to specific situation like this case, or can be applied as a general rule, is still waiting for the review of the House of Lords. In spite of that, if we consider the insurance practice when the reinsurer after receives a great quantity of premium, then refuses to pay any claims simply on the excuse of lacking of insurable interest with the interpretation of the careful worded contract for their own advantage, it rather becomes a technical objection in the words of Brett MR in *Stock v Inglis*,[65] especially in the reinsurance contract as it is considered to be a business deal for buying and selling 'as deliberately accepting business known to produce losses in excess of the premium charged on the backs of reinsurers who would be expected to pay the losses for even less premium'.[66] Thus the limit on insurable interest in reinsurance should be lifted as high as possible as long as the

[62] Para.112, per Dyson LJ.
[63] *Mark Rowlands Ltd v Berni Inns Ltd* [1985] 3 All E.R. 473; *Siu v Eastern Insurance Co. Ltd* [1994] 1 All E.R. 213.
[64] S.4 LAA 1774.
[65] [1884] 12 QBD 564.
[66] Per Thomas J. in *Sphere Drake Insurance Ltd, Odyssey Re v Euro International Underwriting Ltd and others* [2003] Lloyd's Rep. I.R. 525 at p. 530.

reinsured can prove his real pecuniary loss on the subject matter insured and the payment is in consistent with the rule that reinsurance is a contract of indemnity.

9.3. The Original Insured's Claim in the Reinsurance Contract

9.3.1. The Principle of Privity

In accordance with s.9 (2) MIA 1906,[67] it is a general view that the contract of reinsurance has no connection with the original insurance and the original insured can not bring any direct action to the reinsurer against any moneys paid by the reinsurer to the reinsured.[68] This is supported by the common law doctrine of privity of contract which allows only a party to the contract to be able to enforce the terms of the contracts.[69] Simultaneously, criticism also arose in the courts against this concept with a number of judicial or statutory exceptions under which a person who is not a party to an agreement may enforce on the parts expressed for his benefit.[70] Relevant cases and statues can also be found in insurance law.[71] With the passing of the Contracts (Rights of third Parties) Act 1999, the intention of the contracting parties is an important role on whether the third party has privity of contract. A third party is thus allowed to enforce contracts that expressly provide for enforcement by a third party, or the contract terms purport to confer a benefit upon a third party. This is also applied to insurance and

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[67] 'Unless the policy otherwise provides, the original assured has no right or interest in respect of such reinsurance' s.9 (2), MIA 1906.

[68] *Nelson v Empress Assurance Corporation* (1905) 10 Com. Cas.237; *Johnston v Salvage Assurance* (1887) 19 Q.B.D. 458; *Clover, Clayton & Co. v Hessler & Co.* [1925] 1 K.B. 1; *Meadows Indmenity Co. v Insurance Corp. of Ireland PLC* [1989] 2 Lloyd's Rep. 298. *Charter Reinsurance Co. v Fagan* [1996] 2 Lloyd's Rep. 113, *Grecoair Inc v Till* [2005] Lloyd's Rep.I.R. 151.

[69] *Tweddle v Atkinson* (1861) 1 B&S. 393. *Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd* [1915] AC 847. For the introduction and analysis in detail on this principle, please see Rob Merkin, editor, Privity of Contract, Rob Merkin. The Impact of the Contracts (Rights of Third Parties) Act 1999, Chapter 1, Historical Introduction to the Law of Privity, LLP 2000.

[70] *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446. *Leo Steamship Co. Ltd Corderoy* (1896) 1 Com.Cas. 300. *Coulls v Bagot's Executor and Trustee Co. Ltd* (1967) 40 ALJR 471. For the introduction and analysis in detail, please see Rob Merkin, editor, Privity of Contract, The Impact of the Contracts (Rights of Third Parties) Act 1999, Rob Merkin, Chapter 2, The Enforcement of Promises Made for the Benefit of A Third Party, LLP 2000.

[71] The general exceptions to the doctrine of privity of contract like bailee holds any sum in excess of his own interests for others interested in the property, the capacity of agency rules, trusts of promises, assignment of policy or the application of estoppel are widely applied in English law but with uncertainty, see Merkin's Reinsurance Law para D-0146—D0150. For the application of relevant statues like Third Parties (Rights against Insurers) Act 1930, The Road Traffic Act 1988, see Merkin's Reinsurance Law para D-0178—D0183.

reinsurance law.[72] There are some disputes on whether the principle of privity is abolished by this statue[73] or it only creates 'a new statutory exception'.[74] In fact, the principle is still not void in the common law, however, the prohibition on the third party right's to claim his express or implied benefit in a contract was abolished, that is to say, the third party's right to enforce contract has been set up as a rule, while the unenforceability has become exception.[75]

9.3.2. Cut-Through Clause

In insurance and reinsurance practice, if the business is conducting in a normal and healthy way, the original insured usually contacts with the insurer who issues the insurance policy, and rarely directly encounters the reinsurer. However, to avoid the loss of benefit in the event of insurer's insolvency, the diligent insured will sometimes insert a 'cut-through' clause, or cut-through endorsement, to be included in either the insurance policy or the related reinsurance contract to stipulate that the reinsurance proceeds should be paid directly from the reinsurer to the original insured when the insurer as reinsured is in liquidation. The reinsurer's obligation to the reinsured in relation to the insured's loss is accordingly discharged and further action by the liquidator is avoided.[76] This clause is presumed to be originated from American practice, where first applied by mortgage lenders as a means to secure themselves against unknown or unsatisfactory property insurers of the mortgagor as borrower.[77]

The validity of cut-through clause is generally recognised in the contract law in American Federal and States courts.[78] In *Bruckner-Mitchell Inc. v Sun Indemnity Co. of*

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[72] For discussion in detail, see Rob Merkin, editor, Privity of Contract, Rob Merkin The Impact of the Contracts (Rights of Third Parties) Act 1999, Rob Merkin Chapter 5, Contracts (Rights of third Parties) Act 1999; Christopher Henley, Chapter 9, Insurance, LLP 2000.

[73] Per Lord Goff's statement in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at p.544, and *Johnson v Gore Wood & Co.* [2002] A.C. 1 at p.40.

[74] Chitty on Contract 29th ed. at para.18-002, also see Lord Bingham in *Heaton v Axa Equity & Law Life Assurance plc* [2002] 2 A.C. 392 at para.9; Lord Clyde in *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at p.535, and Lord Browne-Wilkinson at p.575.

[75] S.6, C(RTP)A 1999. For discussion in detail, see Rob Merkin, editor, Privity of Contract, Rob Merkin The Impact of the Contracts (Rights of Third Parties) Act 1999, Rob Merkin Chapter 5, Contracts (Rights of third Parties) Act 1999, p133-142. LLP 2000.

[76] For illustration of the details of this clause, please see Merkin's Reinsurance, para.D-0151.

[77] James E. Rudnik, Reinsurance as a Source of Recovery for Insured Losses, p.33, 15-Jan. Construction Law. 31.

[78] *Gillespie v Federal Compress & Warehouse Co. 37* Tenn App 476, 265 SW 2d 21 (1953). *Gerling International Insurance Co. v. Commissioner of Internal Revenue*, 839 F.2d 131, 140 (3d Cir. 1988)

New York,[79] the learned judges[80] in the Court of Appeals for the District of Columbia unanimously held that cut-through clause[81] in reinsurance agreement was valid and the reinsurer was liable to pay directly to the insured when the insurer as reinsured became insolvent. The Associate Justice Stephens commented: 'It is true that typical reinsurance agreements do not operate in favor of the original insured. They are merely contracts of indemnity of the insurer and there is no privity between the original insured and the reinsurer. But nothing in the law forbids drafting reinsurance agreements in special terms so that they will operate in favor of the original insured.'[82] The Supreme Court also supported the learned judges' decision but without further comments.[83]

Considering of the strict doctrine of privity in English common law, cut-through clause's enforcement is doubted in English law of contract. Nevertheless, with the enactment of Contracts (Rights of third Parties) Act 1999, the cut-through clause can be enforced independently and the insured can make a claim against reinsurer on the reinsurance contract as it is enacted clearly in this act that a person who is not a party to a contract may enforce a term of the contract in his own right if the contract clear provides that he may.[84] Thus, the insured can effectively claim the benefit from the reinsurer upon the cut-through clause when the insurer is in insolvency. The insured can be expressly named in the clause, or he can be specified by membership of class or by virtue of 'answering a particular description but need not be in existence when the contract is entered into',[85] 'at the date of the occurrence of the insured peril', or at the time of determination of the relevant direct policy to be covered by a treaty reinsurance contract.[86]

In addition, as the C(RTP)A 1999 does not applies to all contracts made on or before May 11th, 2000 unless the parties have agreed for the application, in consideration of the

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[79] 82 Fed. 2d. 434, App. D.C.
[80] Martin Chief Justice, and Robb, Van Orsdel, Groner, and Stephens, Associate Justices.
[81] '13. If, under any law, this reinsurance agreement is required to be in such form as to enable the oblige or beneficiary of the bond to maintain an action hereon against the Reinsured jointly with the Reinsurer, and upon recovering judgment against the Reinsured to have recovery against the Reinsurer for payment to the extent in which it may be liable under this reinsurance and in discharge thereof, then this agreement shall be deemed to be a compliance with such law.' 82 Fed. 2d. 434, App. D.C. at .p.439.
[82] *Ibid*, at p.444.
[83] 298 U.S. 677, 56 S.Ct. 941, 80 L.Ed. 1398
[84] S.1(1)(a), C(RTA)A 1999.
[85] S.1(3), C(RTA)A 1999.
[86] Merkin's Reinsurance, para.D-0165.

long period of a reinsurance contract, whether the cut-through clause can be enforced without the application of this act is still a question to be answered. In accordance with the third ground which stated that the contracting party as promisee could sue the promisor for the third-party beneficiary by Lord Denning M.R. and Danckwerts and Salmon L.JJ in *Beswick v Beswick*,[87] which was affirmed by the House of Lords,[88] the reinsured is presumed to be able to claim on behalf of the insured to oblige the reinsurer as promisor to perform the cut-through clause and pay the benefit to the insured directly to fulfil his contractual obligation and to exempt the reinsured's liability.

It is also suggested that a properly worded cut-through clause could create a declaration of trust by the reinsured as trustee of the assured and thus the assured may claim to the reinsurer directly in the event of the reinsured's liquidation like a ship's broker's commission case in House of Lords.[89] However, as professor Merkin pointed out that this closely depends upon the contracting parties' intention with interpretation of the language envisaged in the clause, a usual cut-through clause does not certainly create a trust in favour of the original insured.[90]

9.3.3. Claim without Cut-through Clause

If the cut-through is not endorsed or inserted in the reinsurance policy, can the insured seek similar protection to enforce the reinsurer's direct payment to him when the reinsured is insolvent? According to s.1(1)(b) C(RTP)A 1999 the insured may directly enforce his right in the reinsurance contract as a third party if the 'contract term purports to confer a benefit on him'. Such term can be a right on the insured to be paid by reinsurers, or the right to rely on an exclusion clause like subrogation waiver. However, this is subject to the qualification in s.1(2) C(RTP) A 1999 which states that 'subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforced by the third party.' Thus, the reinsurer can refuse the enforcement proceedings to a direct insured by demonstrating that the reinsurance contract is not intended to confer enforceable benefits on the assured. To

[87] [1966] Ch. 538.
[88] [1968] A.C. 58.
[89] *Les Affrteurs Runis SA v Leopold Walford (London) Ltd* [1919] A.C. 801.
[90] See Merkin's Reinsurance, para.D-0155.

prove this intention, it is needed to properly construct the whole terms in the policy, not only on the term which purportedly confers the benefit, but also the terms which is inconsistent with it but reflects the whole contract's intention; the principle of 'factual matrix'[91] is also suggested to be applied for further proof.[92]

If there is not a contract term which purports to confer benefit on the insured in reinsurance policy, it is a general rule that the insured can not bring a direct action on the reinsurance contract when the ceding company is insolvent. The general exceptions to the doctrine of privity of contract like that the reinsured contracting with the reinsurer as agent for the assured, or the insurance contract between the reinsured and assured amounting to a trust instrument, or the assignment of the reinsured's benefits under the reinsurance policy to the insured, or a creation of an implied contract between reinsurer and insured on the direct payment, or some forms of estoppel like promissory estoppel or estoppel by convention established on the direct payment are discussed to be inconsistent with the legal or equitable principles by the deep analysis of their application to the reinsurance practice.[93] Even if the reinsurance contract is called a 'Reinsurance and Run-Off contract' like the Lloyd's practice of 'reinsurance to close',[94] the reinsured still retain his responsibility to the original insured and the policyholder has no direct cause of action against the reinsurer by reason of the reinsurance contract.[95]

On the other hand, it is suggested that the reinsured may act as the agent of the reinsurer to underwrite the original insurance policy with the insured and thus there is privity of

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[91] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98.
[92] See Rob Merkin, editor, Privity of Contract, Rob Merkin, The Impact of the Contracts (Rights of Third Parties) Act 1999, Rob Merkin Chapter 5, Contracts (Rights of third Parties) Act 1999, from p.101 to 102.
[93] For analysis in details, please see Merkin's Reinsurance, para D-0146—D0150.
[94] As Cresswell J. explained in *Henderson v. Merrett Syndicate Ltd.,* [1997] LRLR 247. 'Reinsurance to close" (RITC) means an agreement under which underwriting members who are members of a syndicate for a year of account agree with underwriting members who comprise that or another syndicate for a later year of account that the reinsuring members will indemnify the reinsured members against all known and unknown liabilities of the reinsured members arising out of insurance business underwritten through that syndicate and allocated to the closed year, in consideration of a premium and the assignment to the reinsuring members of all the rights of the reinsured members arising out of or in connection with that insurance business.', at p. 277.
[95] See the several cases on Equitas companies relating to the large loss of Lloyd's underwriters or 'Names' in connection with their underwriting of policies in complex environmental and mass tort liabilities: *Re Yorke (deceased) Stone v Chataway* [1997] 4 All ER 907, *Society of Lloyd's v Leighs* [1997] Lloyd's Rep. 156, *Society of Lloyd's v Fraser* [1999] Lloyd's Rep. 156, *Price & Price v Society of Lloyd's* [2000] Lloyd's Rep. 453, *Amerada Hess v CW Rome* (2000) 97(10) L.S.G. 36. See John B. Haarlow, Hugh C. Griffin, Equitas under English Law, 38 Tort Trial & Ins. Prac. L.J. 1.

contract between insured and reinsurer.[96] The common practice of fronting arrangement in reinsurance market can be an example on this. Fronting is well described by Evans J., as he then was: 'The meaning of 'fronting' is clear. When one insurer is willing to take a risk but either is unable to do so, not being licensed to do business in the territory in question, or is not acceptable to the assured, for part or all of the risk, either for commercial (security) reasons or perhaps on political grounds, then another insurer may be able to 'front' for him, by underwriting the insurance in full and then reinsuring part or all of the risk with him. There may be standing arrangements to this effect when a number of insurers belong to a group or pool and for whatever reason the insurance is accepted by one or more insurers but the risk is shared by them with others under built-in reinsurance agreements.'[97] From the above illustration, we can find that under a fronting arrangement, the insurer is actually act as agent on behalf of the reinsurer or reinsurers in a pool to develop business for licensing or financial rating issues, the reinsurer or reinsurers are actually undisclosed principal in the original insurance policy because the fronting company has ceded back the majority or all of the risk he assumed from the insured and the real risk-taker is the reinsurer or reinsurers, the insurer receives only an 'overriding commission'.[98]

Although it is decided that the insurer still remains liable in the original policy as the party to the contract and must be responsive to claims and defence obligation even he receives only an 'overriding commission',[99] it is quite common in practice for the fronting insurer to have financial difficulty when he is unable to collect from reinsurer or reinsurers who are reinsuring him. Comparing his limited overriding commission with the additional risk he has assumed, the insurer as fronting company will declare insolvency to avoid further liability. Under this situation, the original insured will seek direct claim on the reinsurer for the recovery of his benefit. As between the front insurer and the reinsurer, the reinsurer is the company truly responsible for the risk underwritten, he should bear the liability if the privity of contract between insured and reinsurer is concluded by the courts.

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[96] Merkin's Reinsurance, para D-0146.
[97] *Sedgwick Tomenson Inc. v P.T. Reasuransi Umum Indonesia* [1990] 2 Lloyd's Rep. 334, at p.341.
[98] Per Evan J in *Sedgwick Tomenson Inc. v P.T. Reasuransi Umum Indonesia* [1990] 2 Lloyd's Rep. 334.
[99] *Ibid.*

9.3.4 Actual Recovery from the Reinsurer

Even if the assured is entitled to claim the benefit from the reinsurer on the reinsured's winding up or insolvency, there is still a remaining question on how much he can actually recover from the reinsurance policy.

If a cut-through clause is existed, then a review of the language of the cut-through clause and the terms of the applicable reinsurance agreement is required. Usually, the cut-through clause specifically provides that: '...the reinsurer in lieu of payment to the company shall pay to the assured the reinsurer's share of any loss or losses incurred by the ceding company which are within the limit, terms and conditions of this policy.'[100] Because of this language, the insured should not expect to recover its full loss from the reinsurance policy. The recovery is limited to the amount agreed in the reinsurance policy, which will be different from the amount of the actual loss and the amount payable in the original policy.

If the 'contract term purports to confer a benefit on him', then according to s.1(5) C(RTP)A 1999 which states that 'For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly)', the insured can receive the same remedy as the reinsurer would pay to the reinsured, if there is not contrary term in the reinsurance policy.

Thus, what the insured can recover is what the reinsurer agrees in the reinsurance policy to pay the reinsured instead of what the reinsured agrees to pay the insured in the original insurance policy. Furthermore, as a beneficiary third party, the insured has also to face any defences relied upon by reinsurers against the reinsured himself, and plus the defences against the insured if he has infringed the rights of the reinsurer like non-disclosure or misrepresentation.[101] If the assured successfully claims back the benefit from the reinsurer, then the reinsured can not bring action against the reinsurer as the

[100] Merkin's Reinsurance, para D-0151.
[101] S.3, C(RTP)A 1999, see Merkin's Reinsurance, para D-0170.

reinsurer has fulfilled their contractual obligation and the reinsured has nothing to be indemnified.[102] On the other hand, if the reinsured has recovered from the reinsurer for either the loss of insured or expenses for the reinsured to make good to the insured, then the insured can not claim to the reinsurer, what he can do now is to seek indemnification from the reinsured or his liquidator.[103]

If the reinsured can be treated as the agent of the reinsurer in fronting arrangement, then the original policy between the insured and reinsured should be construed as binding contract between the insured and reinsurer who acts as undisclosed principal, because the reinsurance policy can be regarded as the agency agreement between the reinsured and reinsurer. Thus, the insured can relied on the original insurance policy to claim the benefit or expenses from the reinsurer who can also make defences against the insured agreed in the original policy. Any infringement of the reinsured as agent in the original policy or reinsurance policy should be covered by the reinsurer and he can bring action on the reinsured's professional negligence separately.

Another difficulty on the insured's direct recovery from the reinsurer on the condition of reinsured's winding-up or insolvency is the claim by the ceding company's liquidator for recovery of those sums to be collected into all the reinsured's assets for distribution to all creditors. The suggestion that the insured holds the benefit under a resulting trust for the reinsured was rejected by the court[104] and the insured can not be regarded as agent of reinsured to receive the benefit. It is also very difficult for the insured to obtain the payment as it is in breach of the important principle of *pari passu* in English insolvency law unless the benefit can be held by the reinsured as trustee for the insured or it can be constituted as a charge on sums due under the reinsurance policy as in a cut-through clause.[105]

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[102] Although s.4, C(RTP)A 1999 preserves the reinsured's cause of action.

[103] 'Protection of promisor from double liability.
Where under section 1 a term of a contract is enforceable by a third party, and the promisee has recovered from the promisor a sum in respect of--
(a) the third party's loss in respect of the term, or
(b) the expense to the promisee of making good to the third party the default of the promisor,
then, in any proceedings brought in reliance on that section by the third party, the court or arbitral tribunal shall reduce any award to the third party to such extent as it things appropriate to take account of the sum recovered by the promisee.' s.5, C(RTP) A 1999. See Merkin's Reinsurance, para D-0173.

[104] *Re Schebsman* [1944] Ch. 83.

[105] Even if it can be regarded a charge on book debt, it has to be registered within 21 days after the date of its creation, otherwise it is void against the liquidator, see s.395 to 398, Company act 1985. However,

The principle of *Pari Passu* is described as 'the most fundamental principle of insolvency law'.[106] It demands equal treatment of unsecured creditors in winding up or bankruptcy[107] and may not be excluded by contract.[108] More importantly, as 'certain large payments which were due to the (now–insolvent) company should be available for distribution pro rata amongst its creditors',[109] the direct payment from the reinsurer to the insured would be requested by the liquidator to the whole collective system for the winding-up of insolvent estates. Even the insurance debts due to the insured will be paid off in advance of all other debts,[110] instead of the basic rule that any sum available for unsecured creditors after the satisfaction of secured and preferred creditors is to be divided in 'equal proportions between themselves',[111] the insured will definitely do not wish the full return of the benefit from the pool administered by the liquidator chased from the reinsurer, as insurance creditors with unsettled paid claims, insurance creditors with outstanding losses, and insurance creditors who had suffered losses not yet reported to the insurers all formed part of a single class of unsecured creditors.[112] On the other hand, it is well suggested by the learned scholar Professor Merkin that actual payment to the insured from the reinsurer on the condition of reinsured's winding-up or insolvency like under a cut-through clause does not offend the *pari passu* principle because such payment is to offset the insovlent reinsured's service to the insured, *i.e.* it is the sum due to the insured instead of the insovlent reinsured, instead of the sum due to the insolvent company.[113] Furthermore, because the intention of such direct payment is to secure the insured's receipt of the acknowledged benefit if the reinsured is solvent

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professor Merkin argues that even if the cut-through clause constitutes a book debt, registration is unnecessary because the direct payment from the reinsurer to the insured is a windfall for other unsecured creditors and should be excluded from the reinsured's assets for distribution. Merkin's Reinsurance, para D-0158.

[106] Roy Goode, Principles of Corporate Insolvency Law, S&M, 2005, 3rd ed. at p.175.

[107] 'Subject to the provisions of this Act as to preferential payments, the company's property in a voluntary winding up shall on the winding up be applied in satisfaction of the company's liabilities pari passu and, subject to that application, shall (unless the articles otherwise provide) be distributed among the members according to their rights and interests in the company.' s.107, Insolvency Act 1986. *Ex parte Barter; Ex parte Black* (1884) 26 Ch.D. 510; *British International Air Lines Lid v Compagnie Nationale Air France* [1975] 1 WLR 758. Also see Oliver J's stress in *Re Dynamics Corporation of America* [1976] 2 All ER 669 at pp.675 to 676.

[108] *Ex parte Mackay* (1873) 8 Ch App. 643.

[109] *National Westminster Bank ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, at p.792.

[110] Insurers (Reorganisation and Winding Up) Regulations 2004, part IV, Priority of payment of Insurance Claims in winding-up etc.

[111] R.4.181, Insolvency Rules 1986.

[112] *Re Hawk Insurance Co. Ltd* [2002] B.C.C. 300.

[113] Merkin's Reinsurance, para D-0160.

and is operated in the same way like the operation of the the Third parties (Rights against Insurers) Act 1930 at the direct insurance level, it does not amount to a transaction to defraud the reinsured's creditor.[114] Such payment also has no side effect on the protection of the insolvent reinsured's asset because to other unsecured creditors, it is no more than a windfall as if the insured who requests for the insurance money had not suffered a loss, the reinsurer would not have the obligation to make payment. Thus, 'the reinsured's liquidator cannot prevent such payment as any payent removes the reinsurance claim and deprives the liquidator of anay asset which might be claimed for the company'.[115] The question remains whether the Courts or Parliament is prepared to make such acknowledgement.

[114] Ss 423 to 425, Insovlency Act 1986.
[115] Merkin's Reinsurance, para D-0158.

PART TWO:
INSURABLE INTEREST IN CHINESE LAW OF MARINE INSURANCE

CHAPTER X:
GENERAL DESCRIPTION OF INSURABLE INTEREST IN CHINESE LAW OF MARINE INSURANCE

10.1. The History of Marine Insurance Practice and Law in China

Marine insurance in China was first carried by Canton Insurance Society, established in the year 1805 by Eastern India Company, on cargo insurance business relating to English traders. In the year 1865, the first Chinese insurance company, namely Yi He company Insurance Society, was set up in Shanghai. Then in the year 1875, the first state owned Merchant Insurance Bureau was set up by the Merchants Steam Navigation Bureau (the state-owned company built in the year 1872 by then Qing government, now China Merchants Group). It was renamed Ji He insurance Co. in 1877, and was renamed Renjihe Fire and Marine Insurance Company in the year 1886 after companies merge with Ji He Fire and Marine Insurance Company in 1876. The first life insurance company Hua An Life Insurance Company was established in 1907. Tai Ping Insurance (Group) Company set up in 1929 was the largest insurance company at that time. Until the late 1940s, foreign insurance companies especially the British companies largely dominated the business and their commercial customs were accordingly accepted and practised by the Chinese assureds and insurers. The insurance business of the People's Republic of China took off in October 1949 (the same month as the founding of the People's Republic of China) with the establishment of the People's Insurance Company of China (PICC). At the end of the 1950s, apart from limited international underwriting on cargo, the major insurance service was largely suspended till the end of the 1970s. In 1979, the government decided to resume the terminated domestic insurance business and expand international insurance business. Since then, insurance companies and insurance services have developed rapidly, especially within the 1990's.

The first Chinese merchant law 'Merchant Code by Imperial Order of Great Qing Dynasty' with content on insurance was proclaimed in 1904.[1] In the Draft Merchant Code of Qing Dynasty in the year 1908, indemnity insurance and life insurance was regulated in Chapter VII and VIII, Volume II (Merchant Behaviour), where it was regulated that the subject matter of indemnity insurance was restricted to property interest and if the insured value was over the real value of the subject matter, the over-insured was void. Marine insurance was regulated in Chapter X, Volume V, Maritime Act in this Draft.[2] Although never been come into force due to the collapse of Qing Dynasty in 1911, these two drafts greatly influenced the insurance law in the forthcoming governments of China. In 1929, the first Insurance Code[3] and Maritime Code were issued by then government. The law relating to marine insurance was regulated in Chapter VIII, Maritime Code 1929. Because the Insurance Code 1929 had reference from German insurance law, while the Maritime Code which included marine insurance was in favour of English law, there were differences between the enactment of marine insurance and terrestrial insurance, for example, the concept of applicant in terrestrial insurance was not applied in marine insurance. Their basic structures and influence can also be found in present Insurance Law of China and Maritime Code of China.[4]

The legal resources of insurance in P.R.China till 1980's are from the government's regulations and the practices of the People's Insurance Company. On September 1st, 1983, the Chinese State Council issued the Regulations of the People's Republic of China on Property Insurance Contract firstly provided detailed rules about insurance contract. This regulation includes 5 chapters, 23 articles, and is still valid now. In art.3, it is regulated that 'the applicant of property insurance (called insured in the policy or

[1] P.20, Wang Peng-nan: Law of Marine Insurance Contract, Dalian Maritime University Publishing House, 1996. This code was duplicated from English law because it was codified by Mr. Wu Ting-fang, who studied in Lincoln's inn in 1874 and was the first Chinese barrister.
[2] P.43, Li Yu-quan, Insurance Law, Legal Publishing House, 1997. This code was codified mainly by three Japanese scholars and was duplicated from German and Japanese merchant law.
[3] The definition of insurable interest was regulated from article 14 to article 20 in Insurance Code 1929.
[4] The articles in China Insurance Law are mainly in two parts: insurance contract law and insurance company law, and the law relating to marine insurance is mainly enacted in maritime Code 1993, which are the same structures with the above mentioned two codes in 1929.

cover), should be any person who is entitled to manage or operate the insured property, or who has an insurable interest in the insured subject.'[5]

In July 1st, 1993, the Maritime Code of the People's Republic of China came into force, the law relating to marine insurance is regulated in Chapter XII, but there are no specific articles which define the insurable interest and its applicable scope. Thus, art.3, the Regulations of the People's Republic of China on Property Insurance Contract, is also applicable to marine insurance. [6]

On June 30th, 1995, the first Insurance Law of the People's Republic of China was adopted at the 14th Meeting of the Standing Committee of the Eighth National People's Congress, promulgated by Order No.51 of the President of the People's Republic of China and effected on October 1st, 1995[7] with the new amendment on October 20th, 2002, being adopted at the 30th Meeting of the Standing Committee of the Ninth National People's Congress.[8] There are total eight chapters and one hundred fifty-eight articles in this law, on insurance contracts, insurance company, rules governing business, supervision and control of insurance industry, insurance agents and insurance brokers and legal liability. It is a combination of law on insurance contract and insurance industry.

Compared with CIL 1995, there are not any words amendments on insurable interest in CIL 2002 except article number change. The enactments relating to insurable interest was regulated in art.12, CIL 2002.[9] According to article 153, CIL 2002,[10] this article is also applicable to marine insurance. Based on that, the current law regarding insurable

[5] Art.3 the Regulations of the People's Republic of China on Property Insurance Contract, free translation.
[6] Art. 22, the Regulations of the People's Republic of China on Property Insurance Contract.
[7] Herein after CIL 1995.
[8] Herein after CIL 2002.
[9] 'An applicant shall have an insurable interest in the subject matter of the insurance.
An insurance contract is null and void if the applicant has no insurable interest in the subject matter of the insurance.
Insurable interest is meant the legally recognised interest which the applicant has in the subject matter of the insurance.
The subject matter of the insurance refers, as regards the object of the insurance, either to the property of the insured and related interests associated therewith, or to the life and the person of the insured.'
[10] 'The Maritime Code of the People's Republic of China shall be applicable to marine insurance. For matters where the Maritime Code does not specify, this Code shall apply.' (Art. 153, CIL 2002)

interest in marine insurance of China are article 3, Regulations of the People's Republic of China on Property Insurance Contract, 1983, and article 12, CIL 2002.

From the above illustration, we can find that the requirement of insurable interest is constantly required and enacted in Chinese law of insurance without any ignorance like that in English law in 17th and 18th century. There are two reasons. Firstly, the insurance business and law of China were all duplicated from foreign countries especially Britain and Germany in later 19th and early 20th century when insurable interest was accepted popularly in their business and was enacted clearly in the law, unlike the early popularity of wager policy in 17th and 18th century. Thus, from the very beginning, insurable interest was thoroughly adopted in Chinese marine insurance law. Although there have been several regimes alternation in China since 1900, the basic structures (the fundamental principals like indemnity contract, insurable interest and utmost good faith etc) of Insurance Laws and Maritime Codes are preserved. Secondly, in Chinese civil and contract laws from the very beginning till today, wager contract is deemed to be against the public interest and is invalid.[11] According to article 70 in the newly effected Peace and Security Administration Punishment Law of Peoples Republic of China,[12] the person who provide facilities for wager for the purpose of benefit, or make wager in large sum, shall be liable to custody not more than 5 days or to a fine RMB 500; in case of gross violation, he shall be liable to custody not less than 5 days and not more than 15 days, and to a fine of not less than RMB 500 and not more than RMB 3,000. Furthermore, if the person as organiser makes wager for the purpose of profit, assembles a crowd to engage in gambling, opens a gambling house or makes gambling his profession, he then committed an offence and shall be sentenced to fixed-term

[11] 'Civil activities shall have respect for social ethics and shall not harm the public interest, undermine state economic plans or disrupt social economic order.'
--Article 7, General Principles of the Civil Law of the People's Republic of China, 1982.
'A contract is invalid in any of the following circumstances:
(4) The contract harms public interests;'
--Article 52 (4), Contract Code of the People's Republic of China, 1999.

[12] This law was adopted at the 15th Session of the Tenth National People's Congress, promulgated by Order No.38 of the President of the People's Republic of China on August 28th, 2005, and effective as of March 1st, 2006. This administrative punishment is less severe than the abolished article 32, the Security Administration Punishment Regulation of the People's Republic of China (modified in 1994), 1987, in which it was regulated that the person who make wager or provide facilities for wager shall be liable to custody not exceeding fifteen days, or to a fine concurrently or separately imposed not exceeding RMB 3,000, or to indoctrination through labour.

imprisonment of not more than three years, criminal detention or public surveillance and may concurrently be sentenced to a fine.[13]

Insurable interest has been regulated in Chinese marine insurance law for more than 80 years, but if we compare this with the relevant sections in MIA 1906, the definition of insurable interest in art.12, CIL 2002 is still not detailed and is unclear. This has caused misunderstanding as to the time at which insurable interest is required to attach, and the absence of illustrations of specific insurable interest has led to what appear to be erroneous court judgments. The above questions urge us to make further improvement on the insurable interest in Chinese law of marine insurance through deep research on its English counterpart. In the following contents, the writer would study in details and tender advice on the amendment of insurable interest in marine insurance law of China.

10.2. The Definition of Insurable Interest in Chinese Law

The definition of insurable interest was enacted in paragraph 3, article 12, Section 1 (General Stipulations), Chapter II (Insurance Contract), CIL 2002:

'Insurable interest is meant the legally recognised interest which the applicant has in the subject matter of the insurance.'

This definition is applied as a general definition of insurable interest on all types of insurance, property insurance and life insurance, also to marine insurance. In the legislator's opinion, as applied to property insurance,[14] this means the applicant or insured's direct legal relation to the subject-matter insured, which include the property owner, holder and operating manager,[15] or the bailee, mortgagee, lessee, carrier or tenant.[16] In specific to marine insurance, according to the judicial interpretation[17] made

[13] Article 303, the Criminal Code of People's Republic of China, 1982 (modified in 1998).
[14] Marine insurance is considered to be included in property insurance in China's insurance law.
[15] The manager here especially refers to the managing company of state-owned enterprises.
[16] P.61, Dong Kai-jun, Expatiation of Insurance Law, China Planning Publishing House, 1995.
[17] The judicial interpretation in China means the Supreme People's Court's interpretations on questions concerns specific application of laws and decrees in judicial proceedings. *cf* article 33, The Organic Law of People's Courts of the People's Republic of China. It has legal force and includes three forms: explanation, rule and reply. Explanation is the rules on the application of specific law or the implementation of law to specific kind of cases or questions. Rule is the norms and opinions on judicial proceedings. Reply is the answers to specific questions on the implementation of laws and regulations in

by the Supreme People's Court, the 4th Civil Division, Explanations to the Questions in Foreign Related Commercial and Maritime Trial (No.1), the insurable interest is interpreted[18] as the insured's legal economic relation with the subject matter insured, which include the ship owner, ship mortgagee, ship's insurer, cargo buyer, seller, carrier, cargo insurer and bill of lading pawnee. In accordance with this interpretation, it is commonly considered that to constitute a valid insurable interest, three conditions must be followed, firstly, it must be legitimate interest, which can be advocated and recognized in tribunal; in contrast, the insured has no insurable interest when he has not legal title to the subject matter or has illicit income. Secondly, it must be the insured's present interest on the insured subject matter or contingent or defeasible interest originated form it, instead of the interest speculated or deduced from the subjective point of view. The value of the subject matter must be able to be confirmed before or when the loss happened, otherwise it is difficult to fix the exact figure indemnified by the insurer. Thirdly, the subject matter must be a kind of economic interest which the insured will benefit from its safety or occur loss from its damage. This definition is called 'legal interest' by the scholars and is thought to be in consistent with the 'legal or equitable relation' in s.5(2)MIA 1906. It is also applied by the judges in judicial practice. In *China Light Industry Imp & Exp Co. v China Pin An Insurance Co.*[19], the defendant refused to pay the claimant's part damage of his 21,150 tons imported fertilizer in discharging port on the count of non existence of insurable interest because the claimant had delivered the B/L to the receiver in discharging port to arrange port despatch, custom clearance and delivery of cargo from the warehouse. The judges in the Tianjin Maritime Court held that the delivery of B/L for arrangement of the above issues did not constitute the assignment of B/L and cargo ownership. The claimant still held ownership to the cargo insured thus he had insurable interest. In the following case comments, the writer confirmed that the insured's ownership of the subject matter insured constituted valid insurable interest. On the other hand, it is not necessary to require the insured to complete all examination, approval and registry procedures from

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judicial proceedings raised from the High People's Courts and Court of Marshall. *Cf* Explanations by the Supreme People's Court on Certain Rules Regarding Judicial Interpretation, article 2, article 9. In theory, these interpretations are only binding over the judicial branches, but in practice they have a wider range of application in all kinds of dispute resolutions throughout the country, such as administrative proceedings and arbitration. Judicial decisions are not legally binding over later cases, but the decisions published or approved by the Supreme People's Court has de facto influence over the thinking of all judges.

[18] Question No.157.

[19] The Selected Cases in People's Courts, Vol. 9, People's Court Publishing House, 1994, at p.151.

administrative authorities on the change of ownership if the transferring contract has been signed or the subject matter has already been in insured's custody. For example, a shipowner was held to have insurable interest on his purchase of a vessel before the ships' registration.[20]

There are some deficiencies on this definition. Firstly, it is a general definition applicable to both life and property insurance and for that reason causes confusion and misunderstanding on its separate meaning to different types of insurance. 'Legally recognised' has different meanings in property and life insurance. In property insurance, it is regarded as the applicant or insured's direct legal relation to the subject-matter, while in life insurance, 'legally recognised' is interpreted as meaning the applicant's lawful and pecuniary relationship to the subject matter of the insurance or with the permission from the insured,[21] Some scholars interpret this definition in marine insurance also as 'lawful interest', so that such interest is valid on legal recognition without the necessity of any relation clearly confirmed in statues or regulations like the relationship in contract, ownership etc.[22] Considering the different characteristics of the property insurance and life insurance, it is impossible to give a general definition to be applied as general rule both on property and life insurance and separate categories of definitions on insurable interest should be provided for different types of insurance.[23]

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[20] See Wang Da-rong, Principle of Economic Interest Should be Applied in Marine Insurance in China, China Maritime Law Annual vol.12, 2001, p.42, Dalian Maritime Publishing House. For further discussion on owner's insurable interest, see S.11.1.3., Chapter XI.

[21] See Xu Chong-miao, Principles and Practice of the Insurance Contracts Law, p.100, Legal Publishing House, 2002.

There is a listing of specific insurable interest in life insurance in the later article of China :

' the applicant has insurable interest in the following persons:

(1) the applicant himself;

(2) The applicant's spouse, children and parents; or

(3) Apart from the above-mentioned, other family members and close relatives bearing foster or support or maintenance relationship with the applicant.

The stipulations in the preceding paragraph apart, the applicant shall be deemed as having an insurable interest in the insured, if the insured consents to the applicant concluding the contract for him. (Art.53, CIL 2002)

'Applicant' means 'the party who enters into an insurance contract with an insurer and is obligated to pay the premiums under the insurance contract.' – Art. 10, CIL 2002

'Insured' means 'one whose property of person is protected by the insurance contract and who is entitled to claim for the insured amount. The applicant may also be the insured.'—Art.22, CIL 2002.

[22] *Cf* Zhao De-ming International Maritime Law, Beijing University Publishing House, 1999, p.653.

[23] See Waller LJ's comments in *Feasey v Sun life Assurance of Canada* [2003] Lloyd's Rep. I.R. 637, para 71- para 114.

Secondly, compared with its counterpart in MIA 1906, this definition is thought to be less comprehensive. Unlike the further interpretation on insurable interest in life insurance in the same code,[24] there was no further explanation on the meaning of 'legally recognised interest' or list of specific interest in property insurance or marine insurance in this law. Thus, it is far from being a general binding rule to be applicable to all individual cases in complicated judicial practices. The judges have to apply authorities from other enactments or regulations to decide the validity of insurable interest in individual cases and thus have had to develop principles themselves. In *Nanjing Material Enterprise (Group) Co. v Tian An Insurance Co. Ltd, Nanjing Branch*,[25] the claimant's claim of benefit from cargo loss was refused by the defendant on lack of insurable interest due to termination of sale contract. This opinion was also accepted by judges in the dictum in *Metrich International Trading Co. Ltd. v PICC (Property) Guangzhou Branch*.[26]

Because China is a civil law system nation, the judgments delivered by the judges can not be regarded as precedent to be applied by analogy to similar cases. The above judgments act only as reference to other cases and can only be binding after the principles are enacted in the statues or regulations. There are demands to amend relevant enactments in marine insurance law of China to improve the present definition more definitely and comprehensively. But before that, we should first see whether the rule of 'legal interest' should not be followed and be substituted by 'economic interest.'

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[24] ' the applicant has insurable interest in the following persons:
(4) the applicant himself;
(5) The applicant's spouse, children and parents; or
(6) Apart from the above-mentioned, other family members and close relatives bearing foster or support or maintenance relationship with the applicant.
The stipulations in the preceding paragraph apart, the applicant shall be deemed as having an insurable interest in the insured, if the insured consents to the applicant concluding the contract for him. (Art.54, CIL 2002)
'Applicant' means 'the party who enters into an insurance contract with an insurer and is obligated to pay the premiums under the insurance contract.' – Art. 10, CIL 2002
'Insured' means 'one whose property of person is protected by the insurance contract and who is entitled to claim for the insured amount. The applicant may also be the insured.'—Art.22, CIL 2002.

[25] From the website of China Foreign Related Commercial and Maritime Trial htttp: /www.ccmt.org.cn/cn//hs/writ/judgementDetail.php?sId=861

[26] Wan Er-xiang, The Selected Foreign Related Commercial and Maritime Law Reports of National Courts, People's Court Publishing House, 2002, at p.188. However, there is dissidence on this opinion. See below, s.

From the analysis in chapter II on the nature of insurable interest, we can see that the existence of two definitions on insurable interest was proposed in English law as early as two centuries ago in the famous case *Lucena v Craufurd*,[27] that is Lawrence's dictum of 'moral certainty' and Lord Eldon's 'property right'. Lord Eldon's 'property right' was adopted by Sir Mackenzie Chalmers and codified in Marine Insurance Act 1906. This issue was also upheld by the House of Lords in *Macaura v Northern Assurance Co. Ltd.*[28] Thus the legal interest is regarded as the major rule on deciding the validity of insurable interest at that time except on some individual cases which is in favour of Lawrence J's opinion.[29]

Unlike the rule in English law, the lawyers in other common law system countries like America, Canada and Australia are in favour of Lawrence J's rule of 'moral certainty' in deciding the validity of insurable interest. One of the reasons is that 'Procurement of a policy of insurance is an investment prompted by commercial foresight. This foresight involves a recognition of a desirable economic relationship to a thing capable of destruction or damage, and the prudence of allocating certain monetary sums to ensure financial protection in the event of a catastrophic occurrence...Based on economic analysis...there is only one true concept of insurable interest, and that is the factual expectation of damage. Restated, this conception is that insurable interest exists if the insured, independently of the policy of insurance, will gain economic advantage on damage from the continued existence of the insured property or will suffer economic disadvantage or damage to the property. The property right conception is analytically not separate from the factual expectation of damage but...while the physical owner is the most probable loser, others may similarly suffer pecuniary setback upon the destruction of the insured property, and often to a greater extent than a nominal owner.'[30] The above mentioned rule of 'factual expectation of damage' was adopted as economic interest in statues[31] and cases[32] of several American States.

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[27] (1806) 2 Bos & Pul 269.
[28] [1925] AC 619.
[29] *Lloyd v Fleming* (1872) 7 LR QB 299; *Wilson v Jones* (1867) LR 2 Ex 139; *Moran, Galloway & co. v Uzielli* [1905] 2 KB 555.
[30] Harnett and Thornton, 'Insurable Interest in Property: A Social-economic Re-evaluation of a Legal Concept' (1948) 48 Col LR 1162, 1184-85.
[31] For example, para 3401, art 34, of the New York Insurance Law, defines insurable interest in property insurance as including 'any lawful or substantial economic interest in the safety or preservation of property free from loss, destruction or pecuniary damage.' the California Insurance Code, s.281 provides that '[E]very interest in property, or any interest in relation thereto, or liability in respect thereof, of such

In Canada the courts also have accepted factual expectation of damage as the doctrine.[33] In Australia, economic interest is codified in Australian Insurance Contract 1984 s.17.[34] Because this section is not applied to marine insurance, the same content was recommended by ALRC in its Discussion Paper No.63, Review of the Marine Insurance Act 1909 (2000), Chapter 7 on amendment of the insurable interest in marine insurance.[35] With the analysis in chapter II, we can find the rule of 'economic interest'or 'moral certainty' has also been accepted in English courts in the most recent judgments and reviewed by the scholars and judges but has not yet been widely accepted as a general rule to replace the 'legal interest'.

However, there are also some different opinions, like the California Insurance Code, 283: 'A mere contingent or expectant interest in anything, not founded on an actual right to the thing, nor upon any valid contract for it, is not insurable.'[36] In ALRC's Discussion Paper No.63, Review of the Marine Insurance Act 1909 (2000), Ch.7. the proposal also receives the opposition which is thought to bring confusion for all parties because the marine insurance contract follows moving goods through many changes of

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a nature that a contemplated peril might directly damnify the insured, is an insurable interest.' The Alaska Statue 21.42.030(a) defines insurable interest as 'an actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.'—cited from John Lowry and Philip Rawlings, Re-thinking Insurable Interest, at p.351 foot note 86, p.335-371, Sarah Worthington, Commercial Law & Commercial Practice, Hart Publishing, 2003. Virginia Insurance Code said 'the term ''insurable interest''...means any lawful and substantial economic interest in the safety or preservation of the subject of insurance free from loss, destruction or pecuniary damage.'--cited from B.Z.H., Insurable Interest in Property in Virginia 44 Va.L.Rev.278 (1958), at p280. However, this rule is not found favour in all US statues and cases: *Splish Splash waterslides, Inc v Cherokee Insurance Co.* 307 SE 2d 107 (1983).

[32] *Riggs v Commercial Mutual Insurance Co.* 125 NY 7(1890); *Harrison v Fortlage* 161 US 57 (1896); National Filtering Oil Co. v. Citizens' Insurance Co. 106 NY 535 (1887); *Castle Cats Inc. v United sates Fire Insurance Co.* 273 SE 2d 793 (1981).

[33] Wilson J's views in *Constitution Insurance Company of Canada v Kosmopoulos* (1987) 34 DLR (4^{th}) 208.

[34] 'Where the insured under a contract of general insurance has suffered a pecuniary or economic loss by reason that property the subject-matter of the contract has been damaged or destroyed, the insurer is not relieved of liability under the contract by reason only that, at the time of the loss, the insured did not have an interest at law or in equity in the property.'s.17, Australian Insurance Contract Act, 1984. *cf* Australian Law Reform Commission (ALRC) Report No.20 (1982) ch5 on their recommendation to discard the 'legal interest'. http://www.austlii.edu.au/au/other/alrc/publications/reports/20/

[35] *cf* http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch11.html#Heading21.

[36] http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ins&group=00001-01000&file=280-287 Also not in favour in some cases: *Farmers' Mutual Insurance Co v New Holland Turnpike Co.* 122 Pa 37(1888); *Splish Splash waterslides, Inc v Cherokee Insurance Co.* 307 SE 2d 107 (1983).

ownership and two alternative amendments on retaining of insurable interest are also recommended.[37]

From the above analysis, we can find it becomes a trend to amend the legal interest to economic interest in the common law system countries. The alternation should also be made in marine insurance law of China. As we all know, from its start of business, development and resumption, the marine insurance industry in China is greatly influenced by the English counterpart, same does the marine insurance law. With the expansion of subject matter insured in insurance market, the purpose is not only to shift the risk of loss to the insurer on the property or benefit originated from this property which the insured has a legal or equitable relationship, where consequently the insured can avoid and mitigate the loss brought by the natural disaster and accident to minimum degree by the insurer's indemnification, but also to secure and assure the insured's obtainable and lawful benefit from the existence of insured property or success of insured event with which the insured has not legal or equitable relation. After excluding the intention to use the insurance as a guise to wager on their destruction or failure, that is, the insured can only take advantage from the insurance contract itself or the policy is valued at extraordinary sum, the only economic relationship between the insured and the insured subject mater is valid and can be accepted in marine insurance law of China to develop the marine insurance industry and to be in consistent with the international usages rules.

Relevant statue amendment has been recommended to add one article on insurable interest in Chapter XII Contract of Marine Insurance in the review of Maritime Code of China by the scholars in one of the advisor committees. Under this amendment, insurable interest is defined as 'the insured's lawful economic interest with the subject matter insured.'[38] This is also reflected in the newly regulated judicial interpretation from the Supreme People's Court, Rules regarding the Relevant Questions on Trial of Marine Insurance Cases (3rd draft), the definition of insurable interest is defined in article 15 as following:

[37] See: http://www.austlii.edu.au/au/other/alrc/publications/reports/91/ch11.html#Heading21
[38] See Si Yu-zhuo, The Recommended Amending Draft, Statutes Reference and Description of Maritime Code of the People's Republic of China, at p.592, Dalian Maritime Publishing House, 2003.

'Insurable interest in marine insurance refers to the insured's legally recognised interest in the subject matter insured. Any person who has economic loss on the subject matter caused by the peril insured against may have insurable interest.'

The same proposal can also be found in the Judicial Explanations on the Questions of Disputes in Insurance Cases by the Supreme People's Court (Circulation for Advice) in 2003. The definition of insurable interest is as following:

'Article 1 Insurable interest referred in article 12, China Insurance Code should be recognised economic interest.
Beside the enactment in article 53, the applicant has insurable interest in the economic interest created from following events:

(1) *Jus in re*;[39]

(2) Contract;

(3) Civil indemnity liability according to law.'

From the above legal recommendations, we can find that the relevant development of insurable interest in common law system is continuing to be the important research and legislation sources in its Chinese counterpart. But the two recommended definitions do not illustrate the meaning of economic interest clearly and comprehensively. The following points should be considered for revision.

Firstly, the definition in article 1, Judicial Explanations on the Questions of Disputes in Insurance Cases by the Supreme People's Court (Circulation for Advice) acts as general principle to be adapted to all types of insurance. This article actually should only be applicable only to property insurance, excluding of life insurance.

Secondly, the general definition in these two recommendations is not definitive. Some further explanation should be added to the concept of 'economic interest'. According to Lawrence J's 'moral certainty', 'economic interest' means 'The insured's lawful, pecuniary, actual and direct economic relation with the property or adventure insured.

[39] This is a concept in civil law system countries especially in German law. It is generally regarded include property ownership, and related property rights like joint ownership, mortgage, pledge, possess and *vadium*. At present time, the new *Jus in re* Law is in its final reading progress in the National People's Congress of China.

He will benefit upon its safety or successful fulfilment and suffer a loss or incur liability upon its destruction or failure, whether he has or has not any legal or equitable relation to the property or adventure'. With the above restriction, the interest in *Buchanan v Faber*[40] will be regarded as 'nothing more than a hope'[41] or 'expectation upon expectation' and invalid, because it would not be a direct and actual loss. If we re-visit Lord Eldon's example, the Western India dock company could insure on the ships and goods which would come to their docks on a fixed arrangement to do operation works, dock-master, warehouse-keeper and the porter could insure on the ships and goods if their salaries were paid on the numbers of ship's berthing, quantities of cargo loading, discharging and house-keeping instead of in pre-agreed figures. Furthermore, the interest should be a lawful interest. Thus the thief can not insure his stolen ship or goods.

Thirdly, if economic interest is applied in Chinese law, a person with bare legal title (a trustee or bailee) to the subject matter insured will be regarded as have no insurable interest in the subject matter because he incurs no loss on the destruction of subject matter even if there is a clear exception stated in the policy like those the cases of *Waters v Monarch Fire & Life Assurance Co*[42] and *Hepburn v Thomlinson*[43] because this clause violates the mandatory provision of insurance law.[44] If the legislators want to uphold this exception, a proviso should be added in the enactment to state that the insured as trustee or bailee can recover the full extent of value of the subject matter under his custody and there is a clear words stated in the policy.

Finally, the question relating to the enforceability of these interpretations is that as they are actually the Supreme People's Court's interpretations on the questions concerns specific application of law and decrees in judicial proceedings. Without changing the definition of insurable interest in Insurance Law of China, the efficiency of these interpretations can be doubted as it is not in conformity with the definition in law. To solve this problem, the fundamental way is to make the relevant amendment in the insurance law or maritime law.

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[40] (1899) 4 Com.Cas.223
[41] *Ibid*, at p.226, per Bigham J.
[42] (1856) 5 E.&B. 870
[43] [1966] A.C. 451.
[44] Article 52 (5), Contract Law of China 1999.

10.3 The Parties Who Must Have the Insurable Interest

10.3.1. Insured (Applicant)

In the insurance law of China, it is the applicant who is the contracting party with the insurer in the insurance contract[45] and he is required to have insurable interest,[46] unlike the 'insured' or 'assured' in English law. The 'insured' is a person whose interest is insured by the policy and he can claim the benefit when a loss occurs. He also can be the applicant when he insures his own interest.[47] Thus, pursuant to insurance law of China, three parties as applicant, insured and insurer are involved in insurance contract.[48] The concept of 'applicant' has different meanings under different situations. Firstly, when the applicant insures his own interest and claims the benefit upon the loss occurring, he is regarded as the 'insured' simultaneously and must have insurable interest to validate the policy. Secondly, the applicant enters the insurance contract to insure the other's (insured's) interest. Who should have insurable interest? Strictly pursuant to the law, it should be the applicant. But the fact is that it is the insured who has the relation with the subject matter and will suffer loss upon its destruction. The applicant only acts as the insurance broker, named, unnamed or undisclosed,[49] on behalf

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[45] 'An insurance contract is an agreement whereby the rights and obligations pertaining to insurance are specified and agreed by the applicant and the insurer.
The applicant is the party who enters into an insurance contract with an insurer and is obliged to pay the premiums under the insurance contract.
The insurer is meant the insurance company which enters into an insurance contract with an applicant and is obligated to make indemnity or pay insurance benefits'—article 10, CIL 2002.

[46] Article 12, CIL 2002.

[47] 'The insured refers to one whose property or life is protected by the insurance contract and who is entitled to claim for the insured amount. The applicant may also be the insured.' --article 22, *ibid.*

[48] According to some Chinese scholars' analysis, the present co-existence of applicant and insured is one of the marks which showed the joint influence of English and civil law on Chinese insurance law. In insurance law from civil law system country like Germany and Japan, 'insured' refers to the person who is entitled to receive the insurance benefit and he is required to have insurable interest in property insurance and means the insured life which will be damaged by the peril in life insurance. Because insured has different meaning in property and life insurance, 'applicant' is used as the party who signs the insurance contract (both in property and life) with the insurer. The concept of applicant was applied by Chinese insurance law legislators in the first insurance code in 1929 and be kept till today. However, considering that in Chinese insurance law, the 'insured' means the person whose interest is insured and can claim the benefit without different meanings in property and life insurance in civil law, it actually has the same meaning with that in English law, it is advised that the concepts of applicant and insured should be unified as insured in Chinese insurance law, or to redefine 'insured' to be in the consistent with the meaning in civil law system and keep the applicant in the law. See Zhou Yu-hua, Insurance Contract Law, p123-128, the Prosecution Publishing House 2001.

[49] The concept of unnamed principal and undisclosed principal in English agency law is also adopted in Chinese agency law although China is usually regarded as civil law system country.

of the insured to conclude a contract with the insurer. It should be for the insured to prove his valid insurable interest. Thirdly, when the applicant insures for both his and others' interest, like the circumstance under joint insurance, he acts as both the applicant and insured and should have interest on the subject matter together with other insured. From the above analysis, we can find that relevant amendment should be made in insurance law to establish that it is the insured who should have insurable interest in the subject matter insured because it is he who will face risk and recover benefit from the insurer.

Because Chinese marine insurance law is greatly influenced by English law, it is constantly regarded as a special branch in insurance law system and is enacted in the Maritime Code. In Chapter XII, Contract of Marine Insurance, Maritime Code of China, only the concepts of insured and insurer are enacted. In contrast, the insured and insurer are regarded as contracting parties in the marine insurance contract instead of applicant with the insured to insurer in terrestrial insurance. Here the insured can also be regarded as the applicant in insurance law and he should have insurable interest. Besides that, the insured must be a natural person or a legal person[50] who has capacity for civil rights and

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'Article 402 Where the agent, acting within the scope of authority granted by the principal, enter into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party, except where there is conclusive evidence establishing that the contract is only binding upon the agent and such third party.
Article 403 Where the agent enter into a contract in its own name with a third party who is not aware of the agency relationship between the agent and the principal, if the agent fails to perform its obligation toward the principal due to any reason attributable to such third party, the agent shall disclose the third party to the principal, allowing it to exercise the agent's rights against such third party, except where the third party will not enter into the contract with the agent if he knows the identity of the principal at the time of entering into the contract.
Where the agent fails to perform its obligation toward the third party due to any reason attributable to the principal, the agent shall disclose the principal to the third party, allowing the third party to select in alternative either the principal or the agent as the other contract party against whom to make a claim, provided that the third party may not subsequently change its selection of the contract party.
Where the principal exercises the rights of the agent against the third party, the third party may avail itself of any defence it has against the agent. Where the third party selects the principal as the other party to the contract, the principal may avail itself of any defence it has against the agent as well as any defence the agent has against the third party.
---Contract Law of People's Republic of China 1999.
However, the question on the inconsistence of the doctrine of undisclosed agent and the principle of utmost good faith and disclosure in English law of marine insurance can also be found in Chinese law, as disclosure of material fact is also required. '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.'—para.1, article 2, CMC 1993.

[50] 'A legal person shall be an organization that has capacity for civil rights and capacity for civil conduct and independently enjoys civil rights and assumes civil obligations in accordance with the law. A legal

full capacity for civil conduct[51] to enter into the policy independently. A natural person's capacity of civil rights is started from birth and ended at his death.[52] A natural person who has full capacity for civil conduct refers to an adult aged 18 or over or a citizen who has reached the age of 16 but not the age of 18 and whose main source of income is his own labour.[53] The insured can also conclude the contract through his entrusted agent or agent *ad litem.*[54] Thus, a person with limited capacity for civil conductor with no capacity for civil conduct can conclude a policy through his guardian as agent *ad litem.*[55]

10.3.2. Broker

The broker is also permitted in Chinese law and encouraged in the writing of insurance business. However, compared with English marine insurance practice, the broker[56] does not play such important role in China. Usually it is the insured or applicant who signs the policy directly with the insurer. When the broker is required by the insured or applicant to provide service for insurance business, with his professional knowledge, he acts as consultant to help the applicant or insured to find suitable insurance product, proper premium, appropriate contract clauses and to claim benefit after loss occurred. Usually the broker does not sign the insurance contract on behalf of the applicant or insured and does not have the obligation to pay the premium.[57]

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person's capacity for civil rights and capacity for civil conduct shall begin when the legal person is established and shall end when the legal person terminates.'

--article 36, the General Principles of the Civil law of the People's Republic of China.

[51] 'In concluding a contract, the parties shall have appropriate civil capacity of right and civil capacity of conduct'.—para.1, article 9, Contract Law of China.

[52] Article 9, the General Principles of the Civil law of the People's Republic of China.

[53] Article 11, the General Principles of the Civil law of the People's Republic of China.

[54] 'The parties may conclude a contract through an agent in accordance with the law.'

--para.2, article 9, Contract Law of China.

[55] A minor aged 10 or over and a mentally ill person who is unable to fully account for his own conduct is a person with limited capacity for civil conduct. A minor under the age of 10 and a mentally ill person who is unable to account for his own conduct is a person having no capacity for civil conduct. *Cf* articles 12,13 and 14, the General Principles of the Civil law of the People's Republic of China.

[56] The insurance 'broker' acts only as intermediate in Chinese insurance law. ' An insurance broker is an entity that, in the interest of the applicant or insured, provides intermediary services between the applicant and the insurer for the conclusion of an insurance contract and receives a commission therefore in accordance with law.' art. 126, CIL 2002.

[57] This is in different with the broker's position in England under s 53, MIA 1906, in which the broker is directly responsible to the insurer for the premium and he has a lien upon the policy for the premium and other charges. *Universo Insurance Co. of Milan v Merchants' Marine Insurance Co* [1897] 2 QB 93; *Mildred, Goyeneche & Co. v Maspons* (1883) 8 App Cas 874.

10.3.3. Assignor and Assignee

The assignment of insured's right under the insurance policy to a third party is also quite common in China. The relevant enactments can be found in relevant legislations on three types of assignments. In article 34, Insurance law of China 2002: 'Insurer must be notified of the assignment of the subject matter of insurance and with the consent of the insurer to continue the insurance, the original insurance may be amended according to law. However, cargo insurance contracts and those contracts having otherwise agreed terms are excepted.'

The above article is applicable to all property insurance including marine insurance except cargo policies[58] and hull policies[59] which are enacted in Maritime Code of China, 1993. According to this enactment, when the insured wants to assign the subject matter insured to the assignee together with the policy, except under a cargo policy and other agreed policies which can be assigned by endorsement or other agreed manner, the assignment will only be valid with the insurer's consent. Otherwise the contract will be null and void. There is judgement that a motor policy was void because the assured had sold his insured car to a third party but did not request the insurer to make the relevant amendment on the motor policy, so the assignee could not claim the benefit from the original motor policy.[60] This is consistent with English law which regards an insurance agreement as a 'personal' contract not capable of assignment,[61] marine and life policies being exceptional in this regard.

However, if we read this article literally, we can find that it mixes the assignment of subject matter alone and the assignment of subject matter together with the policy. Clearly the assignor can assign the subject matter with or without the assignment of policy to a third party. If he only wants to assign the subject matter, that is the assignment of the insured's entire interest or right in the insured property to a third party

[58] '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.' art. 229, CMC 1993.
[59] '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.' art.230, CMC 1993.
[60] http://www.picc.com.cn/cn/bxkt/jrzs/3505.shtml
[61] *Lynch v. Datzell* (1729) 4 Bro. 431; *Sadlers' Co. v. Badcock* (1743)2 Atk.554.

by sale or gift, and this does not mean the automatic assignment of the policy to this third party,[62] the position being the same in this regard under English law.[63] The assignment of subject matter of the policy does not need the consent of the insurer and does not mean that assignee will be responsible for the original policy automatically without his express or implied agreement. It will terminate the original insurance contract. The assignor can not claim benefit from the original policy because he has lost his interest after assignment, except that he takes mortgage or retains risk after assignment. The assignee also can not claim benefit because he is not the contracting party to the policy unless the assignor has assigned the policy to him simultaneously. Only if the insured want to assign the subject matter insured together with the policy to the assignee, some necessary procedures are needed. This should be clearly stated in the enactment.

On the assignment of marine policy, we can find that only the assignment of cargo policy or hull policy is separately enacted in Maritime Code of China 1993. As we all know, marine insurance includes not only hull and cargo insurance but also other sorts like freight, liability which can also be assigned. Although these assignments can apply to article 34, CIL 2002, considering of the individuality of marine insurance law in the general insurance law of China, it is better to include all sorts of marine insurance products in maritime code. More important, there are some questions arising in relation to the principle of insurable interest.

Firstly, according to the literal meaning of these two clauses, the assignment of policy only requires the endorsement or insurer's consent. It does not make any further clear requirement on the assignment of insurable interest. Under s.51 MIA 1906 and relevant cases, the assignment of policy is invalid unless the assignor's interest in the subject matter is also assigned to the assignee at the same time. Only after that interest has been passed to the assignee can the assignee claim the benefit. Thus the assignment of policy must include the assignment of the interest of subject-matter, otherwise the assignment

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[62] As the case of *Yangtsze Insurance Association Limited v. Lukmanjee* [1918] AC 585. The respondent *Lukmanjee* bought teak logs to be shipped at a price 'ex ship, payment against documents.' The seller shipped him 144 logs among total 382 logs and insured the whole 382 logs with the appellants for the voyage and to cover craft and raft risk. The respondent paid the price and took the delivery of the logs ex ship, but many logs were loss when they floated in rafts. The Privy Council held that *Lukmanjee* can not claim from the insurer because the policy was not effected on his behalf and was not assigned to him when the logs were in delivery.

[63] MIA 1906, s 14.

will be unenforceable because the assignee can not prove his valid insurable interest. A valid assignment of policy before loss requires the assignor to have insurable interest on the subject matter before and during the assignment and have assigned this interest to the assignee. This rule is in fact impliedly applied as supplement by the scholars in their books and articles,[64] judges in the cases.[65] As such opinion is also reflected in the newly regulated judicial interpretation from the Supreme People's Court, Rules regarding the Relevant Questions on Trial of Marine Insurance Cases (3rd draft),[66] this question can be solved after this interpretation is in force.

Secondly, the enactments do not clearly say whether policy can be assigned after loss or not. In English law, it is clearly stated that marine policy can be assigned either before or after loss.[67] As we know, in international trade, a sale of goods at least in CIF form is in reality although not in law the sale of documents. The buyer is regarded as having title to the goods and must make payment after receiving the documents (B/L, invoice) together with the marine policy without information on the physical condition of the goods whether it is damaged or not. Sometimes, the cargo documents will be still sold after the cargo is lost or damaged. Thus the concurrently assigned policy will help the buyer to recover the damage from the insurer. If assignment of the marine policy was possible only before loss, the assignee would have to check whether any loss or damage had happened before assignment, consequently his confidence and reliability on the documents would decrease, which would greatly harm the present international trade system. Because this system is also widely accepted and applied by the exporter and importer in China, we should clearly permit the assignment of policy after loss in our relevant legislation.

There are no relevant enactments on the assignee's title to sue upon his own name in the assigned policy in the Insurance Law of China 2002 and Maritime Code 1993. If we apply the relevant articles in Contract Law of P.R. China 1999, when the assignor

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[64] See Wang Pen-nan, The Law of Marine Insurance, p.85, Dalian Maritime University Publishing House, 1996.

[65] *Metrich International Trading Co. Ltd. v PICC (Property) Guangzhou Branch* p.188, Wan Er-xiang, The Selected Foreign Related Commercial and Maritime Law Reports of National Courts, People's Court Publishing House.2002.

[66] 'The insured shall have insurable interest on the subject matter insured in assignment of the policy. If the insured assigns the policy after the loss of insurable interest, such assignment is unenforceable.'-- article 13.

[67] S.50 (1), MIA 1906, *Lloyd v Fleming* (1872) L.R. 7 Q.B. 299.

assigns his right and/or obligation under the contract, he also assigns the relating collateral right and/or obligation to the assignee.[68] The collateral right and obligation are commonly regarded to include the assignor's right to claim indemnity or to be claimed for indemnity.[69] Thus, if pursuant to this enactment, after the assignment of policy together with the beneficial interest, the assignee is also entitled to sue in his own name and the insurer as defendant can make defence to the assignee like that he can make to the insured assignor. Furthermore, the assignee's own title to sue is also based on the assignment of entire benefit interest in the policy. If only part interest is assigned, the assignee has no independent title to sue. This is because the assignment of right is divided into entire assignment or partial assignment.[70] Under the entire assignment, the assignee as the new obligee takes the whole right under the contract. Under the part assignment, the assignee is regarded to be a party to the contract and to have joint contractual right with the assignor.[71] Accordingly, the assignee who has the entire interest assigned to him becomes the main party in the contract in place of the assignor and has his own right to sue: this is accepted by the courts.[72] The assignee who has assigned to him only a part interest can only act as co-claimant with the insured assignor to claim the benefit.

The assignment of proceeds of the policy is not enacted in insurance law and maritime law. According to the General Principles of the Civil Law of the People's Republic of

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[68] 'If the obligee assigns his rights, the assignee shall acquire the collateral rights relating to the principal right, except that the collateral rights exclusively belong to the obligee.' -- article 81, Contract Law of China, 1999.
'If the obligor assigns its obligations to a third party, the new obligor shall assume the collateral obligations relating to the principal obligations, except that the obligations exclusively belong to the original obligor.' -- article 86, Contract Law of China, 1999.

[69] See Xie Huai-shi, The Principle of Contract, p.225, p.234, Legal Publishing House, 2000; Jiang Ping, The Intensive Interpretation on the Contract Law of People's Republic of China, p.68, p.70 ,China Politics and Law University Publishing House, 1999.

[70] 'The obligee may assign, wholly or in part, its rights under the contract to a third party, except for the following circumstances:
(1) The rights under the contract may not be assigned according to the character of the contract;
(2) The rights under the contract may not be assigned according to the agreement between the parties;
(3) The rights under the contract may not be assigned according to the provisions of the laws.'
---article 79, Contract Law of China 1999

[71] See Xie Huai-shi, The Principle of Contract, p.224, Legal Publishing House, 2000; Jiang Ping The Intensive Interpretation on the Contract Law of People's Republic of China, p.66, China Politics and Law University Publishing House, 1999.

[72] *Metrich International Trading Co. Ltd. v. PICC (Property) Guangzhou Branch* P.188, Wan Er-xiang, The Selected Foreign Related Commercial and Maritime Law Reports of National Courts, People's Court Publishing House.2002.

China 1986[73] and the relevant enactments in Contract Law of P.R. China 1999,[74] the assignment of proceeds can be regarded as the assignment of contractual right which is assignable after notice to the insurer. We must distinguish it from the assignment of policy.[75] The assignment of proceeds is only the assignment of the assignor's right to recover under the policy. The assignment of policy is not only the assignment of the claim, but also the subject matter insured and the insured assignor's obligation under the policy. For example, the assignee has joint liability for the payment of premium in cargo policy.[76] It is the assignment of both the rights and obligations under the policy.[77] After notification to insurer, the assignment of the proceeds of policy is valid. The assignment of policy needs the insurer's consent or endorsement on the cargo policy. The assignment of proceeds does not include the assignment of insurable interest, thus the assignee is not entitled to sue on the policy. He can only act as joint-claimant with the insured assignee. The assignee is entitled to sue the insurer if he is assigned all the beneficial interest in the policy. The above illustration draws a line between these two assignments and should be considered to apply in the judicial practice.

10.4. When Insurable Interest must Attach

10.4.1. General Description

There is no definite enactment on the attachment time for insurable interest in insurance law and maritime law. It is generally regarded that the insured should have insurable

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[73] 'If a party to a contract assigns all or part of his contractual rights or obligations to a third party, he shall obtain the other party's consent and may not seek profits therefrom. Contracts which according to legal provisions are subject to state approval, such as transfers, must be approved by the authority that originally approved the contract, unless the law or the original contract stipulates otherwise'. –article 91, General Principles of the Civil Law of the People's Republic of China, 1986.

[74] Article 79. The obligee may assign, wholly or in part, its rights under the contract to a third party, except for the following circumstances:

(1) The rights under the contract may not be assigned according to the character of the contract;

(2) The rights under the contract may not be assigned according to the agreement between the parties;

(3) The rights under the contract may not be assigned according to the provisions of the laws.

Article 80. An obligee assigning its rights shall notify the obligor. Without notifying the obligor, the assignment shall not become effective to the obligor.

The notice of assignment of rights may not be revoked, unless the assignee agrees thereupon.

--Contract Law of People's Republic of China, 1999

[75] Some scholars regard the assignment of policy to mortgagee as the same with the 'Loss payable Clause' which is actually the assignment of proceeds. See Wang Pen-nan, The Law of Marine Insurance, p.85, Dalian Maritime University Publishing House, 1996.

[76] Art. 229, CMC 1993.

[77] One party to a contract may assign its rights and obligations under the contract together to a third party with the consent of the other party. ---article 88, Contract Law of People's Republic of China, 1999.

interest from the time of entering into the policy. This conclusion is deduced from the relevant enactments from insurance law, contract law and civil law. According to these enactments, a legally established contract becomes effective concurrently.[78] As its effectiveness is based on the condition of qualified parties, a true intention to effect the contract and a legal contract,[79] the contract becomes void from its establishment if it is in breach of the compulsory enactments in codes and administrative ordinances.[80] It is clearly enacted in the Insurance law of China that insured should have insurable interest in the subject matter, otherwise the policy is void.[81] If the insured has insurable interest at the time of establishment, the policy is established pursuant to law and is effective concurrently. Otherwise, the policy is established against the law and is void simultaneously. Thus, the possession of insurable interest should be started from the date of the making of the contract.

However, the above rule is only applicable to terrestrial insurance. Considering marine insurance, it is usually thought that the insured should prove the existence of the insurable interest at the time of loss instead of at the time of contract's establishment. The reason is because marine insurance is a contract of indemnity and takes into account the assignability of marine policies especially cargo policies. If the insured has insurable interest at the time of concluding the policy but waives the interest before loss, *e.g.*, the title on the subject matter insured has been transferred to a third party with or without the assignment of policy, or the insurable interest is only an expectation when entering into the policy and failed later, the insured can not be reimbursed because he sustained no damage from the loss of the subject matter, partial or full. Is it necessary to hold that the insured should have insurable interest from the time of contract

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[78] 'The contract established according to law becomes effective when it is established'. para.1, article 44, Contract law of People's Republic of China, 1999.

[79] 'A civil juristic act shall meet the following requirements:
(1) the actor has relevant capacity for civil conduct;
(2) the intention expressed is genuine; and
(3) the act does not violate the law or the public interest.'
--article 55, General Principles of the Civil Law of the people's Republic of China 1986

[80] A contract shall be null and void under any of the following circumstances:
(1) A contract is concluded through the use of fraud or coercion by one party to damage the interests of the State;
(2) Malicious collusion is conducted to damage the interests of the State. A collective or a third party;
(3) An illegitimate purpose is concealed under the guise of legitimate acts;
(4) Damaging the public interests;
(5) Violating the compulsory provisions of the laws and administrative regulations.
-- Article 52, Contract law of People's Republic of China, 1999.

[81] Article 12, CIL 2002.

establishment till the loss of subject matter? If it is applied, the insured who is buyer under the FOB or C&F contract term to buy insurance for importing cargo can only arrange the insurance after the title or risk of the cargo is transferred to him, which will bring disorder to the international trade. Also when the policy is assigned by the insured assignor to the assignee like the buyer of CIF contract, the assignee can not claim the benefit although his interest is covered by the policy and has sustained damage because he obviously do not have insurable interest at the time of effecting the contract and can only prove his possession at the time of loss. From the above analysis, we can find that requirement of insurable interest at the time of loss strictly comply with the principle of indemnity and diminish the insured's intention to gain any extra benefit on the policy.

This rule which is stated in s.6 (1) MIA 1906 is actually applied by the scholars in their papers[82] and judges in their cases.[83] Together with the relevant rules in s.6(2) and other cases, they should be enacted it into the legislations to make final confirmation.

10.4.2. 'Lost or not Lost' Clause

The 'lost or not lost' clause is not stipulated in relevant marine policies in China. The relevant enactment on the insured's insurable interest in such clause is also not clearly confirmed in Chinese law of marine insurance. There is opinion that article 224[84] in CMC 1993 can be regarded as the confirmation of validity of 'lost or not lost' clause if it is inserted in a policy.[85] In comparison with the relevant enactments on 'lost or not lost' clause in MIA 1906,[86] we can find this article is only concerning with the payment or return of premium without any connection with the insured's acquirement of the insurable interest after loss in the *proviso* in s. 6(1) MIA 1906, because it is only

[82] See Wang Pen-nan, The Law of Marine Insurance, p.86, Dalian Maritime University Publishing House, 1996.
[83] In *Metrich International Trading Co. Ltd. v. PICC (Property) Guangzhou Branch*, the judges in both first and second trial courts all agreed that the insured should have insurable interest at the time of loss.
[84] '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 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 224, CMC 1993.
[85] See Wang Peng-nan, The Law of Marine Insurance, p.86, Dalian Maritime University Publishing House, 1996.
[86] S.6(1) and s.84(3)(b), MIA 1906.

enacted that the insurer shall not pay benefit if the insured was aware or ought to be aware of[87] the loss without mentioning whether the insured can be indemnified if he was not aware or not ought to be aware of the loss. Although a further judicial interpretation is regulated in Answer 163 in the Explanations to the Questions in Foreign Related Commercial and Maritime Trial (No.1) that 'When the marine cargo insurance contract is concluded, if the insurer and insured both do not know the subject matter insured has suffered a loss due to the incidence of a peril insured against, or the occurrence of a loss to the subject matter insured due to a peril insured against was impossible, the validity of the insurance contract shall not be prejudiced.'[88] The insured's entitlement to recover the loss occurred before the conclusion of the contract from the insurer, whether under the 'lost or not lost' policy or not, under such policy when his insurable interest was acquired after the loss is still impossible because the defence of lack of insurable interest will easily prevent such recovery.[89] Thus, a further explicit interpretation from the Supreme People's Court is needed, like the *proviso* in s.6(1), MIA 1906.

10.5. The Consequence of Lack of Insurable Interest

A marine policy will be null and void if the insured does not have insurable interest in the subject matter insured.[90] A void policy, according to Contract Law of China,[91] means that a policy does not have binding effect from the establishment of the policy. Thus, the insured has no legal right to claim the benefit once the loss has occurred to the subject matter insured then the insurer has no legal obligation to pay the benefit as stipulated in the contact and he must not pay it even if he wishes to do so. Furthermore, not only can the insurer raise the defence on lack of insurable interest, but also the judges in the courts, arbitrators in arbitration and the administrators have the right to

[87] The supplement of 'ought to be aware of the loss' adds more burden on the insured.
[88] The application of this article to marine cargo policy is extend to all marine policy in the newly regulated judicial interpretation from the Supreme People's Court, article 17, Rules regarding the Relevant Questions on Trial of Marine Insurance Cases (3rd draft).
[89] Certainly, according to the new judicial interpretations in literal rule, the insured can recover the loss occurred before the conclusion of the contract from the insurer, whether under the 'lost or not lost' policy or not under such policy, if his insurable interest was acquired at the time of loss.
[90] para 2, article 12, Insurance Law of China 2002. This is also agreed by the judge in *Nanjing Material Enterprise (Group) Co. v Tian An Insurance Co. Ltd, Nanjing Branch.*
[91] 'A contract that is null and void or revoked shall have no legally binding force ever from the very beginning. If part of a contract is null and void without affecting the validity of the other parts, the other parts shall still be valid.' –article 56, Contract Law of China 1999.

decide the policy in dispute is void because of lack of insurable interest. This is because in the contract law of China, a void contract is 'absolutely void', which means it can be decided positively by the judicial authorities and administrative authorities and can not be performed by the relevant contracting parties even if they prefer to do.

There is no direct authority or legislation on return of premium when insurable interest has lapsed. In judicial practice, some judges cite article 58, Contract Law of China 1999[92] to decide that the premium is returnable to the insured.[93] According to this reasoning, the premium is regarded as the insurer's property acquired from the insured as the result of the insurance contract. By contrast, in English law, because the insurer never takes the burden of risk, the premium is returnable. It is obvious that the legislator should give a clear answer.

Unlike the relevant enactments in English law, marine policies which lack insurable interest are not in Chinese law treated as wagering or gaming contracts. In judicial practice, an insurance contract without insurable interest is usually void without any further comments on whether it is a wagering policy or not. A clear and definitive answer from the legislators or interpretation from the Supreme People's Court is needed. As we have noted above, according to the criminal law, if a person makes a wager for the purpose of profit, he then commits an offence and is to be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance and may concurrently be sentenced to a fine. Thus, if a policy without insurable interest can be regarded as wager policy, the sanction on the insured is much more severe than a void contract.

[92] 'The property acquired as a result of a contract shall be returned after the contract is confirmed to be null and void or has been revoked. Where the property can not be returned or the return is unnecessary, it shall be reimbursed at its estimated price. The party at fault shall compensate the other party for losses incurred as a result therefrom. If both parties are at fault, each party shall respectively be liable.' --- Article 58, Contract Law of China 1999.

[93] *Nanjing Material Enterprise (Group) Co.* v. *Tian An Insurance Co. Ltd, Nanjing Branch.*

CHAPTER XI:
THE ILLUSTRATION OF SPECIFIC INSURABLE INTEREST IN CHINESE LAW OF MARINE INSURANCE

To have a full idea of insurable interest in Chinese law of marine insurance, the further investigation and analysis under the specific policy is necessary. There are several kinds of subject matters to be insured. The inclusion of subject matter insured is catalogued in article 218, CMC 1993, including the listed subject matter like ship, cargo, operation income including freight, charter hire and passage money, profits on cargo, crew's wages and liability to third party, with a package enactment in item (7) para.(1) including any property which may sustain loss from a maritime peril and relevant liability and expenses.[1] Compared with s.3 MIA 1906, we can find that the scope of subject matter under Chinese marine insurance law is in similarity with that of English law. Under Chinese marine insurance market, the common subject matters insured are ship and cargo. The freight insurance (or in more wide scope, earnings from the employment of ship) which has been developed in London market for more than 200 years is nearly a blank in China because the shipowner seldom specially makes insurance on 'freight collect', neither does the charterer on 'advanced freight', which are sometimes covered under the hull policy. The co-insurance (composite insurance) is also not popular in practice. The relevant legal issues are accotdingly not emerged like that in English judicial practice. Thus in this chapter, insurable interest in ship, cargo liability and reinsurance policy and relevant questions will be discussed in details.

[1] '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) Liability to a third person;
(7) Other property which may sustain loss from a maritime peril and the liability and expenses arising there from.'—article 218, CMC 1993.

11.1 The Insurable Interest in Ship

11.1.1. Shipowner and Others

11.1.1.1. Registered Owner

Based on his ownership, the shipowner has insurable interest on the insured ship.[2] To ascertain that, a registered ownership at the registration authority definitely is valid. If it is not registered, can we say the shipowner still has valid insurable interest? According to articles 9, para.1, CMC 1993,[3] the effectiveness of ownership is not based its registry but on his acquisition of legal rights to lawfully possess, utilize, profit from and dispose of the ship,[4] like the delivery and acceptance of title from a sale of ship contract. Then he gets the insurable interest. In the case of '*The Chang Xin*',[5] the claimant as shipowner had signed a sale of ship contract, accepted the delivery of the ship and made payment. However, the ship was lost before the registry and the insurer refused to pay on lack of insurable interest. The court held that although the claimant had not made registry, he had received the legal title from the seller and had insurable interest.

As in shipping practice, especially in the costal or inland water transportation, it is not rare to find that the owner does not register the insured ship in his name. A registered owner acts on half on him to make the ownership registration. Under such circumstance, does the actual owner have insurable interest? This can be further divided into two circumstances. When the actual owner is Chinese citizen or enterprise fully owned by Chinese citizens or state, he has valid insurable interest on the ship. Because he has the full legal title and can possess, utilize, profit and dispose of the ship. This has been

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[2] The definition of ship in Chinese maritime law is termed as 'sea-going ships and other mobile units, but does not include ships or crafts to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage'. --Art.3, CMC 1993. Thus, Like the London marine insurance practice, the ship insured under the hull policy not only include hull, machinery and equipment, but also the apparels, stores, spare parts, fresh water and provisions or necessary dunnage and ballast for specific voyage. Bunkers, lubricating oil and engine store can also be included of they are owner's property. If they are time charterer's property, the owner has not insurable interest but can insure them as agent on behalf of charterers.

[3] 'The acquisition, transference or extinction of the ownership of a ship shall be registered at the ship registration authorities; no acquisition, transference or extinction of the ship's ownership shall act against a third party unless registered.' para. 1, art. 9, CMC 1993.

[4] Art. 7, CMC 1993.

[5] Jing Zheng-jia, general editor, The Annual of China Maritime Trial 1999. at.p.463, The People's Communication Publishing House, 2000.

approved by judges in relevant cases.[6] Another circumstance is that the actual owner is a foreign citizen or foreign-capital enterprise who has arranged self owned ship registered under Chinese flag. This can be reflected from the case *'The Fu Da'*,[7] the vessel flying Chinese flag is fully owned by a foreign enterprise who made relevant hull policy. On the ground of void insurable interest, the insurer denied liability on payment of the total loss of the vessel. According to the relevant ship registry regulation, the ship registered in China should be owned by a Chinese citizen or enterprise as legal person, any foreign capitals in this enterprise should not be exceeded 49%, a foreign citizen or enterprise thus can not register his fully owned ship in China. In the first instance, Tianjin Maritime Court held that the actual owner had no insurable interest because he was a foreign shipowner and could not register his ship in China even a registered owner was arranged. Nevertheless, in the appealing court Tianjin High People's Court, the insured was held to have insurable interest. The court did not give explanation in detail. Their views were that 'The illegal registry in Chinese flag and undertaking coastal shipping is not serious enough to exclude the insurance indemnity liability'. In fact, the prohibition on the foreign owner's ship to register in China is only enacted in relevant administrative regulations, which does not deprive the foreign owner's lawful ownership to the vessel, *i.e.*, the foreign owner is still the legitimate owner; in addition, according to Chinese maritime law, the ship's registry does not effect the validity of ownership, the owner can be indemnified even if he is not registered; so the foreign owner should be held to have valid insurable interest. Certainly, administrative sanction would be exercised on the wrongful registry, but any further civil sanction on him would infringe his right.

11.1.1.2. Charterers

Clearly the voyage charterer and time charterer[8] can make insurance on the profit or earning received from the chartered vessel as he has the legal right originated from the

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[6] See the case *Xuan Zhou Steamship Co. v Hua Tai Property Insurance Co.* in Comments on the Latest Commercial and Maritime Case p.489, The People's Court Publishing House, 2002.

[7] *The 'Fu Da'*(1994), Wang Peng-nan, The Theory and Practice of Modern Marine Insurance, p.400-401 Dalian Maritime Publishing House, 2004.

[8] There is no enactment in Chinese maritime law on whether the shipowner can insure the ship no matter it is charterered out and the charterer has agreed to indemnify him in case of loss. As the shipowner is still held legal title to the ship and will be prejudiced by its loss or damage and he has no obligation to fully believe the charterer's reputation, s.14(3) MIA 1906 should also be referred in Chinese law.

relevant charter party. Furthermore, he can also have insurable interest on the chartered ship if he is liable to fully or partly pay the owner the ship's value in case of loss according to the clauses in the relevant charter party.

As bareboat charterer has direct legal right to possess, employ, operate and receive profit from the chartered ship, and would be prejudiced by its damage or loss, he is regarded to have insurable interest on the bare-boat chartered ship. In fact, it is enacted in art.148, CMC 1993: 'During the bareboat charter period, the ship shall be insured, at the value agreed upon in the charter and in the way consented to by the shipowner, by the charterer at his expense'. Thus, if there is no different stipulation in the charter party, the bareboat charterer has legal obligation to make insurance on the ship chartered. This was also approved in the relevant cases. In *'The Wei Yang'*,[9] the vessel insured by her bareboat charterer was lost and the insurer refused to pay on lack of insurable interest. The courts in first trial and appellate trial both confirmed the valid insurable interest on the reasoning express above, not withstanding that the charterer has operated the ship to do international transportation instead of the coastal carriage within his operation permission. This insurable interest is still existed even if the bareboat charter was not registered in the register office according to relevant administrative regulations.[10]

11.1.1.3. Operator

Another question is on whether the ship's operator has insurable interest on the ship under his operation. In shipping practice, the valid insurable interest should be analysed separately because of the existence of two kinds of operators. The first kind is the enterprise operate the state-owned ship owned by the whole people. The enterprise owned by the whole people is actually now referred to the wholly state-owned company which means a limited liability company established through sole investment by a state authorized investment entity or state authorized department. Such enterprise or company is authorised by the state to operate the ships owned by the state. Their legal

[9] (1998) LJZZ No. 639, Wang Peng-nan, The Abstract and Comments on Marine Insurance Cases of China p.20, Dalian Maritime Publishing House, 2003.
[10] *'The Yu Hang'* (1998) DHFHSCZ No.123, Wang Peng-nan, The Abstract and Comments on Marine Insurance Cases of China p.20, Dalian Maritime Publishing House, 2003.

position is in the same condition of shipowner[11] and has full legal tile on the ship, thus his insurable interest is valid.

Another kind of operator is the operating company who has ship's operation agreement with the shipowner to have the right to directly possess and utilize the ship, to arrange the daily operation independently and share the earning with the owner. He can even have the right to dispose the ship. Under such condition, the operator also has valid insurable interest and is confirmed in relevant cases. In '*The Rong Sheng*',[12] the insured had an operation agreement with the register owner to have full liability and right as owner on the vessel and arranged hull insurance after bareboat chartered it out. On its total loss, the insurer refused payment on lack of insurable interest. Both the courts in first trial[13] and appellate trial[14] confirmed the valid insurable interest because of the insured's possession and use right on the insured vessel stipulated from the agreement, with his beneficial interest in the vessel's operation and risk suffering on vessel's damage. In *Shanghai Zhongfu Shipping Co. Ltd v PICC Property and Casualty (Shanghai) Co. Ltd*,[15] the claimant as insured and the operator of the lost insured vessel M.V. *Zhong Yu* was also held to have insurable interest.

From the above analysis, we can find that by applying principle of 'legally recognised interest' with specific substantial laws, shipowner, charterer and operator are all held to have valid insurable interest on the insured ship, this can also be applied to the lien holders who has exercised maritime lien or possessory lien on vessel to the extent of his lien as this is also his 'legally recognised interest'. The above listed valid insurable interests are also valid in English law of marine insurance.

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[11] 'With respect to a State-owned ship operated by an enterprise owned by the whole people having a legal person status granted by the State, the provisions if this Code regarding the shipowner shall apply to that legal person.' art.8, CMC 1993.
[12] Wang Peng-nan, The Abstract and Comments on Marine Insurance Cases of China, p.20, Dalian Maritime Publishing House, 2003.
[13] (1996) QHFHSCZ No.15.
[14] (1998) LJZZ No.553.
[15] (2003) HHFSCZ No.77. See K X Li in Chinese Maritime Law 2003-2004 [2005] LMCLQ 383 at p. 391.

11.1.1.4. Ship's Agent and Manager

Unlike that in English law of marine insurance, the ship's agent can not hold valid insurable interest on the ship with the application of the principle of 'legally recognised interest'. Obviously, the ship's agent has not any legal title or relation with the ship. The relation between them is the agent's economic interest to the ship on his agency fee in debt from the agent's entrusting party like ship's owner, operator or charterer. Even if the ship is lost, the agency fee would not be lost as it is the entrusting party's liability to pay the agency fee. Furthermore, although the agent has right to arrest the ship[16] before or during the legal or arbitral proceedings in respect of the non-payment of agency fee, he can not be regarded to hold insurable interest because the arrest of ship is only a kind of preservation of maritime claims and does not confer any legal right on the agent. Same circumstance can also be happened on the ship's manager. According to relevant regulations,[17] the ship's manager does not possess ship and has no right to utilize, profit from and dispose of the ship. He only provides relevant service to the shipowner or charterer without any legal title to the ship under his management, like the position of a ship's agent. His possible economic loss on the damage of the vessel does not provide enough evidence on the valid insurable interest as the principle of 'legally recognised interest' is still upheld in Chinese law. Thus, unless the principle of 'economic interest' is approved in Chinese law, as Walton J held in *Moran, Galloway & Co. v Uziell*[18] and Mr. Siberry QC in *O'Kane v Jones (The 'Martin P')*,[19] the ship's agent and management operator can not be regarded to have insurable interest on the ship under their service in Chinese law of marine insurance.

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[16] 'An application may be made for the arrest of a ship with respect to the following:
....(18) any commissions, brokerages or agency fees payable in respect of a ship by or on behalf of the ship-owner or bareboat charterer.' ---Maritime Procedure Law of the People's Republic of China, 1999.

[17] 'An international ship management operator may, upon the commission of any shipowner, charterer or ship operator, be engaged in the following businesses:
(1) sale and purchase of vessels, chartering of vessels and management of other assets relating to vessels;
(2) ship engineering, handling of navigational affairs and arrangement of ship repair and maintenance;
(3) recruitment, training and manning of seafarers; and
(4) other services purporting to maintain the technical standards of the vessels and ensure their proper navigation.'-- art.30, Regulations of the People's Republic of China on International Maritime Transportation. Same enactment can also be found in art.2, Ordinance of the People's Republic of China on Domestic Ship Management Business.

[18] [1905] 2 K.B. 555.

[19] [2004] 1 Lloyd's Rep.381

11.1.2. Mortgagor and Mortgagee

Clearly the mortgagor as shipowner has insurable interest on the full value of the mortgaged ship. In fact, when the ship is mortgaged to a mortgagee, it is also the mortgagor's legal obligation to insure the ship in a hull policy according to Chinese maritime law.[20] The mortgagee also has insurable interest on the mortgaged ship as mortgage is regarded as a kind of security real right in Chinese law and he would also be prejudiced by the loss or damage of the ship.[21] He can act as the assignee of the mortgagor's hull policy. Under such circumstance, according to relevant Chinese law on the assignment of marine policy which was discussed in Chapter X, this assignment must receive the insurer's consent, and the mortgagor must have insurable interest on the ship at the time of assignment, or the mortgagor should have insurable interest at the time of loss if the policy is assigned after the ship's loss. The mortgagee can only have the right to sue upon the policy in his own name if the entire beneficial interest has been transferred to him and has to face the defence arisen from the policy by the insurer to the original assured, otherwise he has to bring the suit together with the assignor mortgagor. The mortgagee can also act as co-insured in mortgagee's hull policy. Thus the interests of a mortgagor and mortgagee are separated and the insurer can not deny a claim to the mortgagee on the defence against the mortgagor.

The mortgagee can also take out his own insurance on the mortgaged ship, which is legal right if the mortgagor does not insure the ship.[22] Such insurable interest is not void even if the mortgage is unregistered because the contract is still valid without registry according to law.[23] The remaining question is on the valuation of his insurable interest on the mortgaged ship. One point of view is that in contrary to the enactment in s.14(1) MIA that 'the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage', the mortgagee's insurable interest could be extend

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[20] 'The mortgaged ship shall be insured by the mortgagor unless the contract provides otherwise. On case the ship is not insured, the mortgagee has the right to place the ship under insurance coverage and the mortgagor shall pay for the premium thereof.' --art.15, CMC 1993.

[21] 'The mortgages shall be extinguished when the mortgaged ship is lost. With respect to the compensation paid from the insurance coverage on account of the loss of the ship, the mortgagee shall be entitled to enjoy priority in compensation over other creditors.'--art.20, CMC 1993.

[22] Art.15, CMC 1993.

[23] 'The mortgage of a ship shall be established by registering the mortgage of the ship with the ship registration authorities jointly by the mortgagee and the mortgagor. No mortgage may act against a third party unless registered.'--art.13, CMC 1993.

to the full value of the ship.'[24] The reasoning is: firstly, the subject matter insured is the ship and other parties concerned like a maritime lien holder would have priority over the mortgagee to claim the benefit when the ship is lost. Secondly according to the civil law theory on mortgage, the mortgage right and mortgaged property is inseparable, the mortgagee would be prejudiced by the damage of the mortgaged property, fully or partly. Thus, the mortgagee can insured the full value of the mortgaged ship to receive indemnity after the loss, even if the sum due under the mortgage is lower than the ship's value. Thirdly, if the mortgagee insured the full value of the ship, the outstanding part of the benefit can be paid to other parties who are also prejudiced by the loss or damage of the ship. Obviously there are mistakes in this opinion, as for the first reasoning, the writer takes the insured as mortgagor instead of mortgagee and take the policy in the same with the shipowner's hull policy. As it is the mortgagee's insurance on the ship mortgaged, the policy covers not the ship but the mortgagee's interest on the ship which originate from his security right, the mortgagee's right to claim the benefit is not interfered by others'. As for the second reasoning, although it is an important principle in civil law that the mortgage right and mortgaged property is inseparable, but this principle does not interfere with the valuation of the insurable interest as the amount secured under the mortgage does not need to be the same value of the mortgaged property, what the mortgagee can recover from the loss of the ship is only the sum of loan to the mortgagor and the insurer will pay him the sum accordingly. As for the third reasoning, the author mixed the insurance where mortgagee insures the ship for his own benefit with that he insures on behalf of others as agent. If the mortgagee insures not only his interest on the ship, but also on behalf of other person like shipowner, he is permitted to insure the whole value of the ship as agent and should return the remaining part of the benefit to his principal. If he has no intention to insure on behalf of others, it is impossible for others, not as the insured in the policy, to claim the benefit because this policy is made by the mortgagee specially for his secured right on the ship instead of the mortgagor's hull policy for his ownership. Furthermore, the definition of mortgage[25] and its right in the relevant law clearly prove the mortgagee's interest in the

[24] Qiu Jing, On Insurance Protection for Ship's Mortgage, Maritime Law Annual, vol.7, 1996, p.146-170, at p.153. Dalian Maritime University Publishing House, 1997.

[25] 'The right of mortgage with respect to a ship is the right of preferred compensation enjoyed by the mortgagee of that ship from the proceeds of the auction sale made in accordance with law where and when the mortgagor fails to pay his debt to the mortgagee secured by the mortgage of that ship.' Art.11, CMC 1993.

mortgaged property is limited in his loan to the mortgagor, thus the mortgagee's insurable interest should also be the sum of the loan due or to be due under the mortgage, in same with s.14(2) MIA 1906.

From the above analysis, we can find that the relevant rules relating to the insurable interest of mortgagor and mortgagee of ship in English law can also be applied to Chinese law. However, as there are not specific enactments and reported cases on this matter, we have to wait for further confirmation from the legislative authorities and courts' decision.

11.1.3. Shareholder

To decide whether the shareholder has insurable interest in the company's property, we have to know first the relation between the shareholder and the company's property in Chinese company law. According to the newly amended Company Law of P.R. China,[26] a company is a separate legal entity with its own property right on the assets invested by the shareholders on incorporation.[27] Thus, with the application of the 'legally recognised interest' on the definition of insurable interest, the shareholder do not have insurable interest in the company's property as he has not legal relationship with the company's assets which is in the ownership of the company, as in the English case *Macaura v Northern Assurance.*[28] This can also be applied to the sole shareholder in a one man company even he is the beneficial owner of all the shares as he has not any legal right to enjoy the use of the property.[29]

'Mortgage as used in this Law means that the debtor of a third party secures the creditor's rights with property...without transference of its possession. If the debtor defaults, the creditor shall be entitled to convert the property into money to offset the debts or have priority in satisfying his claim from the proceeds of auction or sale of the property in accordance with the provision of this Law.' –art.33, Guaranty Law of P.R. China 1995.

[26] The Company Law of People's Republic of China was adopted at the 5th Session of the Standing Committee of the 8th National People's Congress on December 29, 1993, and effected on July 1, 1994, and amended first time on December 25, 1999, second time on October 20, 2005.

[27] 'A company is enterprise legal person, and enjoys legal person property right on its separate and distinct assets. It assumes its liability to its debts to the extent of its assets.'—art.3, Company Law of P.R. China, 2005.

[28] [1925] A.C. 619.

[29] One-man company with limited liability is first time enacted in the amended company law. Relevant articles are: if the sole shareholder, natural person or legal person, can prove his assets to be independent from the assets of the company, he shall not be personally liable for the company's loss and damage. Some strict requirements are also imposed, like the minimum registered capital for a one-man company is set at RMB100, 000(about £7,100), which must be fully paid at the time of incorporation. Also, natural

It is suggested that because the shareholder has his right to receive profit from the company's assets and accept the remaining assets after liquidation, thus he has the insurable interest on the company's assets to the extent of his shares.[30] According to the company law, the shareholder has the right to receive profit from the company's assets and accept the remaining assets after liquidation,[31] but this right is based on the shareholder's shares holdings or capital contribution on the company's assets which has been transferred to the company's account or under the company's title instead of his property right on the assets. It is true the shareholder would face probable detriment on the destruction of the company's property, which is sometimes severe to him if he is the sole shareholder, but this loss is not based on his definite legal relation to the property, it is based on his shares which can be regarded as a lien 'which floats over the partnership assets throughout the duration of the firm, although it crystallises only on dissolution'.[32] Such kind of vague proprietary right hold by the shareholder on the company's assets surely can not provide a valid insurable interest. On the other hand, originated from his beneficial right on the assets and the right to accept the remaining assets after liquidation, he has enough insurable interest on his own shares and insure them against loss suffered due to the failure of an adventure in which the company is engaged, just like the case of *Wilson v Jones*.[33] In addition, if the rule of 'economic interest' is applied in Chinese insurance law, then clearly the shareholder can be held to have a valid insurable interest on the company's property because the shareholder's void legal relation is no longer a hindrance on the validity of such insurable interest. We have to wait for information from the legislation authorities and courts for final confirmation.

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persons are permitted to set up only one such company, and that company is not allowed in other one-man companies.--Art.58-64, Company Law of P.R. China, 2005.

[30] See, Wang Pin, Research on Insurable Interest, p.201 to 202, China Machine Press 2004.

[31] 'In accordance with the law, the shareholders of a company have the rights to enjoy the benefits from the assets, participate in the major decision-making, select the management etc.'---art. 4, Company Law of P.R.China, 2005.

'After the separate payment of liquidating expenses, payment of wages and expenses for labour insurance of the workers, payment of taxes owed, and payment of company debts with the company's assets, the remaining assets shall be distributed to the shareholders in proportion to their shares of capital contribution in the case of a limited liability company, and in proportion to their share holdings in the case of a joint stock limited company. —art.187, para.2, Company Law of P.R. China, 2005.

[32] Paul L.Davies, Gower and Davies' Principles of Modern Company Law, S&M, 2003, at p.615.

[33] (1867) L.R. 2 Ex. 139.

11.2. Insurable Interest in Cargo

11.2.1. Buyer and Seller

11.2.1.1. Transfer of Ownership and Passing of Risk

Like its counterpart in English law, the question of insurable interest of the buyer and seller is also focused on the determination of ownership or risk during the cargo and documents transfer. To decide who has the ownership on the good under sale is a complicated question. In domestic sale, according to article 133, Chapter 9, Sales Contract, Contract Law of China 1999, without the seller and buyer's agreement or other special stipulation, the ownership on the sold goods shall be transferred upon delivery. The time and place of delivery can be agreed by the seller and buyer, otherwise the delivery of the goods to the first carrier is regarded as passing of ownership to the buyer.[34] It is also enacted that unless otherwise agreed by the seller and buyer, the risk of damage to or loss of the goods shall be borne by the seller prior to the delivery and by the buyer after the delivery to the first carrier,[35] and this risk transfer is not affected by the seller's failure to deliver cargo documents or materials.[36] From the above, we can find that the transfer of ownership and risk from the seller to the buyer is at the same time on delivery of goods if there is not any special agreement in the contract. Thus in domestic marine cargo policy, the buyer shall have valid insurable interest when the seller deliver the goods to the carrier and the seller shall cease his insurable interest accordingly. Even if the seller does not provide the cargo documents or materials to the buyer for proof of ownership and payment, the buyer is still regarded to have insurable interest in the goods. In addition, if the goods are sold to the buyer in transition, the buyer is regarded to have insurable interest at the time of contract establishment as the risk shall be passed to him at that time unless otherwise agreed.[37]

In international sales, the validity of insurable interest is not as certain because the Contract Law of China 1999 is not absolutely applicable to the parties involved in

[34] Art.141(1) Contract Law of China, 1999.
[35] Art.142, 145, *ibid.*
[36] Art.147, *ibid.*
[37] Art.144, *ibid.*

international trade.[38] Apart from the express agreement of the parties in the contract, the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980 and Incoterms are applicable rules in international trade dispute. This is because China is the contracting state of CISG 1980, thus the relevant enactments in this convention under its sphere of application shall be applied.[39] Besides, not being international convention, the rules in Intoterms regulated by the International Commerce, which are regarded as international usages and are widely acknowledged and applied in international trade disputes, are also recognised in China.[40] Thus the relevant articles and terms in CISG 1980 and Incoterms on the transfer of property and passing of risk are the main sources on the determination of valid insurable interest in export marine cargo policy dispute.

In CISG 1980, the concepts of the passing of the risk and the transfer of property are enacted separately because of the practical reason in international trade to bring some protection for seller's claim of the price.[41] The risk will generally pass in a contract for the sale of export goods when the goods leave the custody of the seller, in the absence of special arrangements between the parties.[42] Usually, the risk will pass to the buyer when the goods are handed over to the carrier if carriage of goods is involved.[43] In Incoterms 2000, under the most popular three trade terms FOB, CIF, CFR, the risk shall be born by the buyer from the time when the goods have passed the ship's rail at the named port of shipment. Nevertheless, the time of property transfer is not clearly provided in the Convention or Incoterms. Under this situation, the time of passing of the risk is the only rule to decide the validity of insurable interest in the insured. The transfer of ownership is also mentioned and considered by the courts in judicial decisions but with less emphasis to comply with the 'legally recognised interest' in article 11, CIL 2002. As risk is defined 'the party to whom it is attributed must accept

[38] According to art.126 Contract Law of China 1999, the parties involved in a foreign related contract may select the applicable law for resolution of a contract dispute.
[39] It is enacted in para. 2, article 142, General Principles of the Civil Law of The P.R. China that any provisions in international treaty concluded or acceded to by China differing from those in the civil laws of China should be applied instead of the national law.
[40] It is enacted in para. 3, article 142, General Principles of the Civil Law of The P.R. China that 'International practice may be applied to matters for which neither the law of the People's Republic of China nor nay international treaty concluded or acceded to by the People's Republic of China has any provisions'.
[41] See above S. 5.1.1., Chapter V.
[42] Chapter IV, Passing of Risk, Part III. Sale of goods, CISG 1980.
[43] Art.67(1), CISG 1980.

the loss of, or damage to, the goods and can not hold the other party responsible for it',[44] accordingly the insured who bears the risk to the goods will definitely be prejudiced by their loss or damage even if he has not the property right; furthermore the economic interest is already proposed in the legal proposals and accepted in relevant draft of judicial interpretation. Thus the party who bears the risk shall be solely applied to decide a valid insurable interest in Chinese marine cargo insurance practice.

Under the CIF term, the seller must arrange the insurance before the cargo is delivered to the first carrier or passing the ship's rail because he shall cease to have the insurable interest after that time. The buyer will accordingly get the interest. Under the FOB term, the buyer shall have the insurable interest after the goods passes on or from shipment. Under 'warehouse to warehouse' clause, with invalid insurable interest the buyer can not claim damage if the insured goods is lost before passing the ship's rail because the risk of the damage or loss of the goods has not been passed to the buyer.[45] We can find these rules are generally similar to those in English law as we have discussed in Chapter V. Thus, those discussions on the validity of insurable interest can also be applied as reference in Chinese marine cargo insurance practice. Hereunder some specific questions in judicial practice will be discussed by applying to the relevant rules and laws.

11.2.1.2. Buyer's Insurable Interest on the Lost Cargo not Paid

After the goods are loaded onboard and the risk is transferred to the FOB or CIF buyer, the payment of price will usually be in the late time as it is made under the letter of credit with the presentation of bill of lading, invoice and other related documents and sometimes the payment is even refused by the bank because of the dishonour of the negotiable instrument provided. Then if any loss happened, does the buyer have insurable interest on the goods to claim benefit from the insurer?

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[44] C.M. Schmittoff, 'The Risk of Loss in Transit in International Sales' in Chen Chia-Jui editor: Clive M. Schmitthoff's Select Essays on International Trade Law, at p306 Martinus Nijhoff Publishers/ Graham & Trotman, 1988.

[45] See a cited case in Sun Mei-lan, Research on Passing of Risk of Cargo Loss or Damage in International Sale of Goods, in Liang Hui-xing(editor), Journal of Civil and Commercial Law, Vol. 8, p.690. Legal Publishing House, 1997.

There is one view that the buyer does not have insurable interest. Because if the documents provided by the seller are not in compliance with the terms and conditions of the letter of credit and are rejected by the bank according to international usage,[46] the seller is in breach of the sale contract as the payment term is the important one in the contract and should be strictly followed by the parties, thus the contract is terminated and the buyer may accordingly reject the documents without further responsibility for payment. Thus, the risk of the damage or loss on the goods is back to the seller and the buyer shall cease his insurable interest.[47] Relevant opinion can be found in the case *Nanjing Material Enterprise (Group) Co. v Tian An Insurance Co. Ltd, Nanjing Branch.*[48] In this case, the claimant A as buyer signed a sale contract in CFR terms with seller B on import of logs on board *M.V. Sanaga* from Gabon. After the cargo was loaded, A arranged cargo insurance with the defendant insurer C and policy was issued. The ship and cargo were totally lost due to holds leakage during voyage. Right then, B asked A to amend letters of credit for commercial reason and it was agreed by A. Two revised bills of lading were issued after cargo loss. When B tried to obtain money from the bank, he was rejected because the credit was outdated and discrepant marks were on the bills of lading. Without any payment, A received bills of lading from B and claimed benefit from C who rejected on invalid insurable interest. In the judgment delivered, the judge did not agree that non-performance of payment terms would terminate the contract. In his opinion, this only suspended the contract performance and the risk was back to the seller. It would be born by the buyer again if new agreement was reached. However, after the cargo was lost under both parties' knowledge, actual delivery could not be made and the documentary delivery would be meaningless, the sale contract was thus terminated and the buyer did not bear risk. Accordingly, he held that because the amendment of letter of credit and revision of bills of lading was at B's request, the risk and ownership was back to B; the rejection of discrepant bills of lading proved that new proposal of the payment terms was not agreed by A and B and the contract is continuously suspended, the risk was still at B's side, furthermore, as this amendment was made after cargo loss, it is impossible to make actual delivery of cargo to A, the ownership and risk could not be really transferred and passed to him. A's insurable

[46] Art.14 (B), UCP 500.
[47] See Maritime Trial, vol.4, 1995 at p.20, cited from Huang Wei-qing, '*Insurable Interest in International Maritime Cargo Insurance*', Maritime Law Review, p.14-52, Vol 5, 2002, Beijing University Publishing House, 2002. at p.31.
[48] From the website of China Foreign Related Commercial and Maritime Trial
htttp: /www.ccmt.org.cn/cn//hs/writ/judgementDetail.php?sId=861

interest on the lost cargo was void. From the above illustration, we can find that the learned judge in this case did not agree that the amendment of payment terms constituted termination of contract, but he presumed that the contract was suspended by the amendment of letter of credit and the rejection of discrepant bills of lading, thus the risk was back to the seller and could not be born by the buyer again on the condition of the cargo loss.

Obviously the amendment of payment terms in contract can not be regarded as suspension of the contract because it is an act of modification of contract. As it is agreed by both parties, it is valid and the risk is not revested in the seller. Furthermore, according to article 66, CISG 1980,[49] the buyer has the obligation to make payment even if the cargo is lost, because it is the buyer who bears the loss and damage of the cargo instead of the seller.[50] So, the question is still whether the rejection of discrepant documents can entitle the buyer to terminate the contract for breach and so that the risk is revested in the seller. According to article 49 (1) CISG 1980, 'The buyer may declare the contract avoided: (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract;' The seller's failure on proper tender of documents for payment on a documentary letter of credit is regarded as a fundamental breach of contract,[51] unless the seller can amend any discrepancies in the documents before the time when he must hand over the document.[52] Similar opinions can also be found in English law, as the rule of strict compliance instead of *de minimis* is always applied in English courts to decide that lack of conformity in the documents for payment on a documentary letter of credit is in breach

[49] 'Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.' article 66, CISG 1980.

[50] Similar opinion can also be found in English cases. *Joyce v Swann* (1864) 17 CBNS 84, 103, 104 per Willes J; *Inglis v Stock* (1885) 10 App.Cas.263. *Colonial Insurance Co. of New Zealand v Adelaide Marine Insurance Co.* (1886) 12 App. Cas. 128.

[51] *Cf* Peter Schlechtriem, Ingeborgsch H. Schwenzar, Commentary on the UN Convention on the International Sale of Goods (Vienna Convention), Oxford Press 2nd ed. 2005, at p.579.

[52] 'If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.'--article 34, CISG 1980. The time of handing over is presumed to be followed from the period of validity of the letter of credit opened by the buyer. *Ibid* at p.404.

of a condition term and the buyer can terminate the contract.[53] Thus the buyer's rejection on the inaccurate bills of lading and declaration of the invalidity of contract shall terminate the sale contract and the risk shall be revested in the seller, the insurable interest is consequently lost, only if the seller can cure the lack of conformity up to the time provided in the contract for handing over. In above mentioned case, A rejected the bills of lading not in conformity with the letter of credit, and seller B could not make further amendment as the time of presenting was later than 21 days after the date of shipment required in article 43 A Uniform Customs and Practice for Documentary Credit(UCP 500),[54] but A did not make clear declaration on the invalidity of the contract,[55] it is still in doubt whether the sale contract was terminated on breach of condition and his insurable interest was ceased.

11.2.1.3. Seller's Insurable Interest after the Rejection from the Buyer

If the buyer has rejected the goods and documents, can the seller claim the benefit of cargo loss from the insurer on the original policy? Under the CIF term condition, clearly the insurer can claim because the insurance policy is arranged by the seller. If the goods or cargo documents are rejected, the property and risk in the goods will be revested in the seller and his insurable interest on the goods is valid again. This is confirmed in a reported case *Shenyang North Science, Technology and Trade Group Co. v China Pin An Insurance Co.*[56] In this case, the seller's goods were damaged after passing from the loading ship's rail. The buyer rejected them and refused payment. The seller's claim was refused by the insurer on invalid insurable interest after the risk was passed to the buyer and the policy was endorsed to the buyer. The court decided that

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[53] For discussion in detail, *cf* Debattista, Charles, The Sale of goods Carried by Sea, Butterworths, 1998 2nd, paras 9-12—9-17.

[54] 'A. In addition to stipulating an expiry date for presentation of documents, every Credit which calls for a transport document(s) should also stipulate a specified period of time after the date of shipment during which presentation must be made in compliance with the terms and conditions of the Credit. If no such period of time is stipulated, banks will not accept documents presented to them later than 21 days after the date of shipment. In any event, documents must be presented not later than the expiry date of the Credit.' Article 43, Limitation on the Expiry Date, UCP 500. There was also not stipulation on the exact expiry date of letter of credit in the sale contract payment terms and the later amendment terms.

[55] *Cf* Peter Schlechtriem, Ingeborgsch H. Schwenzar, Commentary on the UN Convention on the International Sale of Goods (Vienna Convention), Oxford Press 2nd ed. 2005, at p.584, 580-593.

[56] Wang Bing-ning, Wang Pen-nan, Case Comment on Cargo Damage Claim, Maritime Law Review (4) 2001 1 at p.184. Legal Publishing House, 2001. We can find the same rules in English law, see above Chapter V, S. 5.1.3.3.

because the buyer had rejected the cargo on total loss and refused payment, the risk was revested in the seller and the insurable interest is valid, the seller could claim benefit.

Under the CFR or FOB terms, as the insurance policy is arranged by the buyer, this question is complicated. If the seller can cover his interest in buyer's policy by both parties' agreements in the contract of sale of the goods and arrange one policy for the through transit, accordingly the benefit of the policy can be assigned to the seller.[57] However, if there are not such agreements in the sale contract, can the seller claim his benefit by the assignment of the policy from the buyer?

If the loss is happened before the goods are delivered to the carrier and the buyer rejected the cargo and documents, *i.e.*, the risk of loss has not passed to the buyer, the seller definitely can not claim the benefit by the assignment of the policy from the buyer because the assignment is invalid as the buyer has no insurable interest at the time of assignment.

If the loss is happened during the voyage, can the seller make claim on the base of buyer's policy? In a reported case *Huang Chun Fa Co. Ltd v China Pacific Insurance Co. Guangzhou Branch*,[58] the cargo loaded was lost during the voyage and the buyer did not pay the price on the discrepant bills of lading. The seller continued to ask for payment. In a late reconciliation agreement reached after arbitration, the buyer agreed to assign the policy to the seller for benefit claiming. The seller then claimed the payment from the insurer and was refused on lack of insurable interest. The policy was declared to be void in the first instance trial[59] on the reasoning of void insurable interest in the identity of original insured.[60] The appellate court[61] held that the original insured was acted as agent on behalf of the buyer to arrange the policy. The buyer had insurable interest in the goods at the time of loss and the assignment is valid. However, both of the courts did not make further deep analysis on the process of the assignment. In fact, such assignment is assignment after loss. As such assignment has not yet recognised in

[57] See above, S. 5.1.3.2. Chapter V, footnote 54.
[58] Wang pen-nan, Abstract and Comments on Marine Insurance Cases in China (vol.1) Dalian Maritime Publishing House, 2003, p.61-67.
[59] GuangZhou Maritime Court.
[60] The original insured on the policy was held to have no insurable interest as the foreign trade agent of the buyer. See discussion in detail in S. 11.2.1.5.
[61] Guangdong Superior People's Court.

Chinese law of marine insurance, its validity is still in doubt.[62] If it is recognised, the buyer as assignor has to prove his valid insurable interest at the time of cargo loss. Accordingly, in this case, the buyer's insurable interest is valid at the time of loss because he only refused on the payment of price without declaration to avoid the sales contract and the assignment is also valid. If the buyer avoided the contract before the cargo loss, the assignment should be invalid because risk will be revested in the seller and buyer will lose his insurable interest.

11.2.1.4. Insurable Interest on Illegal Goods under the Administrative Law

In maritime jurisdiction practice, the validity of insurable interest and the policy legality is sometimes confused by the lawyers and judges who take the 'legally recognised interest' to be a lawful marine policy between the insured and insurer. We can find such opinion in *Metrich International Trading Co. Ltd. v PICC (Property) Guangzhou Branch.*[63] The claimant insured claimed benefit on the lost insured wire rods. The defendant insurer refused on lack of insurable interest because the cargo was imported illegally by the insured in that as a trade dealer he did not possess import-export permission and a trading cargo import-licence. In the first trial in Guang Zhou Maritime Court, not considering the question of lack of import licence, the judges held that the claimant had insurable interest. In the appellate court, Guangdong Superior People's Court, the plaintiff was held not to have insurable interest, one of the reasons was lack of import-export permission and a trading cargo import-licence. A different opinion was expressed by the judge of first trial in relevant article.[64] In his opinion, it is the relevant civil law and contract law on transfer of property right or passing risk that should be applied to decide the validity of insurable interest instead of the relevant articles in administrative law. The buyer's insurable interest on the cargo should not be influenced by the lack of import licence. As administrative sanctions like penalty, returning of cargo and expropriation have been regulated on lack of import-export licence permission, the buyer still has valid property right on the cargo after sanction, except expropriation is exercised. Clearly the writer is correct in his comments that the insured

[62] See the analysis in S.10.3.3., Chapter X.
[63] P.183, Wan Er-xiang, The Selected Foreign Related Commercial and Maritime Law Reports of National Courts, People's Court Publishing House,2002.
[64] Huang Wei-qing, *'Insurable Interest in International Maritime Cargo Insurance'*, Maritime Law Review, p.14-52, Vol 5, 2002, Beijing University Publishing House, 2002.

can not be regarded to have invalid insurable interest only because of lack of import licence. But whether the buyer can claim benefit is another question. A similar rule can also be found in English law,[65] where although the insured has full insurable interest in the cargo as owner but is liable to be seized by the customs authorities, he is prevented by public policy from recovering under the policy in the event of loss or theft. Analogy can also be made here because such insurance contract is also void in China if it does not follow the relevant administrative regulations.[66] Thus the insured can not claim the benefit from the insurer even if he has valid insurable interest.

11.2.2. Secured Creditor

11.2.2.1. Pledgee

It is acknowledged in law and is quite common in China's trade practice for a holder to have his bill of lading pledged for currency of finance.[67] As it is clearly enacted in the relevant articles that the pledgee may accept the delivery of the goods in the pledged bill of lading to be used as advance payment of debt secured or to be deposited with an agreed third party, if the date of payment or the date of delivery written on the bill of lading is prior to the time limit for the performance of the debt,[68] the pledgee thus has security on his loan to the pledgor in the goods under the bill of lading. As the pledge can only be achieved if the cargo arrives without defect and will be lost the pledge after cargo loss, he therefore has insurable interest on the cargo under the pledged bill of lading. Enacted that the pledge shall become effective upon the delivery of the bill of lading within the time limit specified in the pledge contract,[69] the pledgee's insurable

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[65] *Geismar v Sun Alliance and London Insurance* [1978] QB 383.

[66] A contract shall be null and void under any of the following circumstances:
(1) a contract is concluded through the use of fraud or coercion by one party to damage the interests of the State;
(2) malicious collusion is conducted to damage the interests of the State, a collective or a third party;
(3) an illegitimate purpose is concealed under the guise of legitimate acts;
(4) damaging the public interests;
(5) violating the compulsory provisions of laws and administrative regulations.
—article 52, Contract Law of China, 1999.

[67] The following rights may be pledged:
(1) bills of exchange, cheques, promissory notes, bonds, certificate of deposit, warehouse receipts, bills of lading; ... ---article 75, Guaranty Law of the People's Republic of China 1995, China Legal Publishing House, 2000.

[68] Article 77, *ibid.*

[69] Article 76, *ibid.*

interest on the cargo under the pledged bill of lading should be valid from the time of delivery of the bill of lading.

11.2.2.2. Carrier

Besides his valid insurable interest originated from the contractual liability to 'load, handle, stow, carry, keep, care for and discharge the cargo carried,'[70] like that in English law, the carrier also can insure the cargo carried by him on the expenses and profits to be earned. According to article 87, CMC 1993: 'If the freight, contribution in general average, demurrage to be paid to the carrier and other necessary charges paid by the carrier on behalf of the owner of the goods as well as other charges to be paid to the carrier have not been paid in full, nor has appropriate security been given, the carrier may have a lien, to a reasonable extent, on the goods.' The carrier can apply to the court for an order on selling the goods by auction if the goods under lien are not delivered by a certain time.[71] The carrier is legally entitled to have security and the right of disposal on the cargo carried by him, his insurable interest on the cargo carried by him for the unpaid freight or other expenses occurred is thus valid.

11.2.3. Insurable Interest of Foreign Trade Agent

In maritime jurisdiction practice, the often discussed question relating to insurable interest of third party involved in international trade is on the foreign trade agency system. This system is also called 'import and export agency system' and is a form in which the licensed foreign trade enterprises act as agents for domestic commodity suppliers and recipients to conduct their import and export business. The first relevant regulation 'Interim Regulations Concerning the Foreign Trade Agency System' was issued by the Ministry of Foreign Trade and Economic Relations (now the Ministry of

[70] Article 48, CMC 1993.

[71] 'If the goods under lien in accordance with the provisions of Article 87 of this code have not been taken delivery of within 60 days fro mthe next day of the ship's arrival at the port of discharge, the carrier may apply to the court for an order on selling the goods by auction; where the goods are perishable or the expenses for keeping such goods would exceed their value, the carrier may apply for an earlier sale by auction.' – para.1, article 88, CMC 1993.

Commerce) on August 29th, 1991 and was reaffirmed in article 13, para.1[72] Foreign Trade law of the P.R. China in 1994.[73] Under this regulation and law, any individuals or enterprises who do no have foreign trade operation permit from the authority responsible for foreign trade and economic relations (now the Ministry of Commerce) under the State Council could not engage in import and export trade independently, they must entrust special and professional foreign trade companies with such permit to do the business for them as foreign trade agents. That is to say, the agent will sign the export or import trade contract with foreign dealer, apply the import or export licence, open the letter of credit and arrange the import or export customs formalities. It is generally regarded that the foreign trade agent acts on behalf of an unnamed principal or undisclosed principal to arrange the import or export.[74]

As the export or import permit is not required in insurance business operations, in practice either the principal or foreign trade agent may arrange insurance for the goods. The question of valid insurable interest is again raised. If it is the principal who makes insurance, the insurer would doubt his insurable interest on the reason that because the principal has no right to export or import the cargo directly, he accordingly has no right to make relevant insurance directly. Only the policy signed by the foreign trade agent is lawful and valid.[75] Definitely this reasoning is not right. Clearly the sale of goods

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[72] 'Any organization or individual without foreign trade operation permit may entrust a foreign trade dealer located in China as its agent to conduct its foreign trade business within the business scope of the latter.'

[73] After China's accession and commitments to WTO, all companies and enterprises will have the 'trading right' from 2005 according to the commitments in the Protocol of China's Accession to WTO. According to article 9 in newly revised Foreign Trade Law in 2004, to do import and export of goods or technologies, they shall only register with the authority and do not need to apply the permit. Most companies and enterprises now have independent foreign trade rights. This foreign trade agency system is no longer important as a special regulation and relevant disputes will also cease to happen. See Gao Yoong-fu, Foreign Trade law and China and its Revision, in China: An international Journal 3,1 (Mar. 2005): 50-73.

[74] The concept of agency in Chinese law is originated from the civil law system. The direct agent is enacted in Section 2 Agency, Chapter IV, Civil Juristic Acts and Agency, General Principles of Civil Law of the PR China 1982 where the agent is required to perform civil juristic acts in the principal's name within the scope of the power of agency. The indirect agency (Commissionaire or commission agent) is enacted in Chapter 22, Commission Agency Contract, Contract Law PR China 1999. It was suggested during the contract law legislation period to regard foreign trade agent as commission agent, but this was rejected on the reason that the foreign trade agent would face total contractual obligation in the trade contract which he signed on behalf of the principal if he was commission agent. Thus the concept of unnamed and undisclosed principal in English law was accepted in Chinese contract law and enacted in article 402 and 403. See, Sun Li-hai, General Editor, The Selected Materials on Contract Law Legislation of P.R. China, p.269, Law Publishing House, 1999.

[75] *M.V. Leon* (1999) QHSCZ No.240. Cited from Wang Da-rong, The Legal Force of Important Cargo Policy under the Foreign Trade Agency System, in Jin Zhen jia (ed), China Maritime Trial Annual, 2001, p.68-82, The People's Communication Publishing House, 2002.

contract and insurance policy are two independent contracts and the principal's inability to sign the sale of goods contract does not avoid his ability to arrange the relevant insurance. As the foreign trade agency system is recognised in Chinese law, the principal acts as the real importer or exporter of the contracted goods, it is he who has the property right or bears the risk on the cargo loss or damage instead of the foreign trade agent, his insurable interest is definitely valid.

When it is the foreign trade agent who arranges insurance, same question also arises. It is suggested that the foreign trade agent acts on behalf of the unnamed principal to make the insurance policy. Based on the principal's valid insurable interest, he can claim the benefit from the insurer on behalf of his principle.[76] In *Huang Chun Fa Co. Ltd v China Pacific Insurance Co. Guangzhou Branch*,[77] the buyer A signed import trade contract on rubber in CFR terms with the seller B and entrusted his foreign trade agent C to arrange opening of letter of credit and import formalities. C also arranged cargo policy with the defendant D. The cargo was totally lost with the ship during voyage. A did not make payment on inaccurate bills of lading and finally assigned the policy to B under reconciliation an agreement to claim the benefit from D. One of D's refusals was on C's lack of insurable interest in the lost cargo and the assignment was thus invalid. In the first trial, the judge held that C did not have insurable interest in the cargo as he was not the owner of the insured goods. In the appellate court, the judge held that C was the insurance broker of A and A was the actual insured in the policy. As the risk had passed to A when the cargo was loaded on board, he had valid insurable interest on the goods and the assignment was valid. It is commented by scholars that because C as foreign trade agent did not sign the sale of goods contract in his own name with B, he was not the buyer in the sale contract and thus had not insurable interest in the goods insured.[78] This opinion, together with the judge's opinion in first trial, both regarded C as foreign trade agent to be contractual owner of the goods instead of the agent of his principal. In fact, no matter he signed or did not sign the sales contract, C only acted as the agent of A according to the authorising contract. He definitely could not be regarded as the owner of the goods and he was not prejudiced by the loss or damage of the cargo because his earning of commission fee from the buyer would not be prejudiced by the

[76] *Ibid*, at p.78.
[77] Wang pen-an, Abstract and Comments on Marine Insurance Cases in China (vol.1) Dalian Maritime Publishing House, 2003, p.61-67.
[78] *Ibid*, at p.66.

cargo damage or loss. Thus, it is his entrusting party buyer to prove the valid insurable interest instead of the agent. Certainly, the foreign trade agent must have authorisation from his principal to make insurance or his behaviour is ratify by the principal after the policy is made. In addition, the principal can also act as unnamed principal to claim benefit directly from the insurer.[79]

11.3. Insurable Interest in Marine Liability Insurance

In China, the shipowner, bareboat charterer, operator's insurable interest in the liability policy is also his obligation of payment to the damaged party originated from his potential contractual or tortious liability. The support can be found in the case *Shenzhen Guangda Shipping Co. v PICC Shenzhen Branch*,[80] the claimant insured as ship's operator of *M.V.Guang Da* arranged owner's protection and indemnity insurance with the defendant. The insured was decided by Shanghai Maritime Court and Shanghai High People's Court to pay the claim from the cargo owner on his contractual liability for the cargo loss carried by the insured vessel. Accordingly the insurer was asked for the payment. This was refused on insured's lack of insurable interest on owner's liability policy as operator. The court held that the claimant as operator has insurable interest in his potential contractual and tortuous liability during his operation of the insured vessel like the shipowner and bareboat charterer, furthermore, the judgements in Shanghai Maritime Court and Shanghai High People Court had also decided his legal liability on the payment of cargo loss to the cargo owner during the insured vessel's operation.

In practice, 4/4 collision liability can be insured under the all risk cover in ordinary hull policy as stipulated in PICC Hull Insurance Clauses 1986. Other kinds of liability

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[79] *Gui Lin Electric Industrial Institute v PICC Property Insurance Co. Ltd Gui Lin Branch* (2002 BHSCZ No.98) in Beihai Maritime Court. This case was upheld in the appellate court Guang Xi Autonomous Region High People's Court (2003 GMSZ No.7). It is in doubt whether the buyer can be regarded as undisclosed principal in the policy. Because the principle of utmost good faith and disclosure will entitle the insurer to avoid the contract on the failure of the agent to disclose the material facts relating to the true insured which he knows to the insurer, no matter in his intention or unawareness. The duty of disclosure is also enacted in marine insurance law of China: '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 he agrees to insure or not.' article 222, CMC 1993.

[80] In Guangzhou Maritime Court, China Maritime Trial Annual 2002, The People's Communication Publishing House, 2003, at p.400-408.

insurance are usually arranged under mutual protection and indemnity association Like China P&I Club and other international P&I Clubs and the common rule is 'pay to be paid'.

It is not usual in China to insure the liability for the payment to third party of property damage in the cover of first party property insurance. In practice, there are some cases relating to this kind of policy in domestic inland transportation, but there are not reports in detail in relevant books or websites. In different to the relevant reasoning in English law, the judges usually are in favour the insured, not emphasising on the question of valid insurable interest. Their reasoning is that it is the insurer's intentional act to make a first party property policy instead of third party liability one as he clearly knows the identity of the carrier to insure the cargo under his carriage during the contracting period. The later objection of payment on lack of insurable interest is certainly not supported in accordance with the principle of '*culpa in faciendo*' enacted in contract law.[81] We can find it is in similar with Brett MR's judgement in *Stock v Inglis*.[82] However, judges sometimes ignore the doctrine of insurable interest even it is proposed by the lawyers. Further explanation of a valid insurable interest is needed for strong persuasion. The same reasoning in English law on this question can be considered and applied in Chinese law. That is, the description of subject matter in the policy is the dominant authority on the validity of this kind policy.[83] If the insured like carrier or warehouse keeper as bailee insures the goods under his custody on behalf of the cargo owner, clearly such policy is valid and the insured can claim the whole insurance money as agent for the goods owner. If he insures the property under his responsibility or liability, the benefit he can recover from the insurer is only his actual payment originated from his contractual liability on the loss to the cargo owner.

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[81] 'The party shall be liable for damage if it is under one of the following circumstances in concluding a contract and thus causing losses to the other party:
(1) pretending to conclude a contract, and negotiating in bad faith;
(2) deliberately concealing important facts relating to the conclusion of the contract or providing false information;
(3) performing other acts which violate the principle of good faith.'
—article 42, Contract Law of PR China, 1999.

[82] (1884) 12 QBD 564.

[83] See the discussion in above S.7.2, Chapter VII.

11.4. Insurable Interest in Marine Reinsurance

Reinsurance business is just a beginning in China, and the same may be said of the relevant enactments, regulations and judicial practices. The definition of reinsurance is enacted in para.1, article 28, Insurance Law of P.R.China: 'When an insurer transfers part of its accepted business to other insurer by way of cession, it is referred to as reinsurance.'[84] This definition is also confirmed in the Provisions on Reinsurance Business Administration issued by China Insurance Regulatory Commission in September, 2005.[85] As the insurer or insurance company's business is to assess risk being offered to him by the insured, what he transfers to the reinsurer is certainly his part obligation or obligations under the original insurance contract or contracts. Thus the reinsurance contract is an independent contract between the insurer and reinsurer. There is no direct contractual relation between the reinsurer and original insured. We can find this definition is in similar to that in English law. The only difference is that the insurer is not permitted to reinsure his full obligations or risks under the original insurance policy. According to article 10, Provisions on Reinsurance Business Administration, insurance company shall decide the reserved premium[86] and reserved risk in each risk unit[87] in pursuant to enactments in insurance law, and reinsurance shall be arranged for the excess portion. Clearly reinsurance is also a contract of indemnity in the Chinese law of insurance.

There are also discussion of whether reinsurance is insurance on the same subject matter as that of the original insurance contract (or the reinsured's insurable interest in the subject matter), or a reinsurance contract is a form of independent liability policy,[88] in the same reasoning in English law. According to the relevant enactment in maritime law, the marine reinsurance is to be regarded as insurance of the same subject matter in

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[84] http://www.zgbxb.com.cn/inslaw2.htm

[85] 'Reinsurance referred in this provision means the insurance company's operating activity to transfer part of its accepted business to other insurance company by way of cession.' --article 2, Provisions on Reinsurance Business Administration, 2005.

[86] 'For those insurance companies engaged in property insurance business, the premiums retained for the current year shall not exceed more than four times the combined total of its paid-up capital and its accumulated reserve fund.'-- article 99, Insurance Law of China.

[87] 'The liability borne by an insurance company for each risk unit, that is, the liability which might arise from the maximum loss or damage caused by the occurrence of a single insured event, shall not exceed ten (10) percent of the combined total of its paid-up capital and its accumulated reserve fund. Reinsurance shall be arranged for the portion in excess of this sum.'—article 100, Insurance Law of China

[88] Tan Yi, Fan Qi-rong, Discussion on Some Questions in Reinsurance Contract, Research on Business Law, Vol.1, 2000, at p.45.

the original insurance policy.[89] Of course, no matter what kind of reinsurance it is, the existence of valid insurable interest held by the reinsured is also his liability or liabilities under the original insurance policy, or more specifically, it is his contractual liability under the original insurance policy on his obligation to pay the benefit to the insured on his loss upon the destruction or damage to the subject matter caused by the peril insured, in the same way as in English law, as we have analysed in Chapter IX. This insurable interest clearly does not exceed the limit within the definition of 'legally recognised interest' in insurance law. On the other hand, the 'pecuniary interest' in *Feasey* clearly can not be recognised in Chinese law according to the present enactment. This can only be achieved if the 'moral certainty' is confirmed. Thus, it is not permitted for a reinsured to reinsure his contractual liability from the original policy under the life or accident cover.

It is enacted in the Insurance Law of China that the original insured or the beneficiary of the direct insurance shall not have the indemnity or payment from the original insurance from the reinsurer.[90] Nevertheless, it is also enacted in Maritime Code of China that the original insured can have the benefit of the reinsurance it is agreed in the insurance contract.[91] As the relevant enactments in maritime law on marine insurance have priority over the enactments in insurance law, thus the original insured can claim his benefit directly from the reinsurer under the marine reinsurance contract if this is agreed in a cut-through clause. If there is no clear agreement in the policy, then the insured can not claim directly on the reinsurance contract from the reinsurer when the reinsured is insolvent. Because according to article 64, Contract Law of China 1999, [92] the third party in a contract does not get the right to enforce the contract even if he has benefit on it. Only the obligee in the contract can bring action to the obligor for third party's benefit.

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[89] 'The insurer may reinsurance the insurance of the subject matter enumerated in the preceding paragraph. Unless otherwise agree in the contract, the original insured shall not be entitled to the benefit of the reinsurance.'--article 218, para.2, CMC 1993.

[90] The insured or the beneficiary of the original insurance shall not lodge claims with reinsurer for indemnity or payment of insurance benefit.'--article 30, para.2, CIL 2002.

[91] *Ibid*, article 218, para.2, CMC 1993.

[92] 'Where the parties agree that the obligor shall perform the obligations to a third party, and the obligor fails to perform its obligations to such third party or its performance of the obligations is not in conformity with the agreement, the obligor shall be liable to the obligee for breach of contract.'

However, although the principle of *Pari Passu* in English law is not cearly enacted in relevant Chinese insolvent law, the insured's direct recovery from the reinsurer on the condition of reinsured's winding-up or insolvency also faces the claim by the ceding company's liquidator for recovery of those sums to be collect into all the reinsured's assets for distribution to all creditors. Because it is enacted in the insolvency law that in the event of insolvency, the payment of debt by obligee directly to individual obligor is void.[93] In insurance law, it is further enacted that in insurance company's insolvency, the payment of insurance benefit should be made after the payment of the expenses of insolvent proceedings and employees' wages and social insurance expenses.[94] In the consideration that the relevant principle, doctrine and rules in contract law, insovlent law and reinsurance law in China are just a beginning, time is needed to find a comprehensive and detailed solution on this matter. Certainly, the relevant cases, statues and scholars' opinions in English law as the writer has discussed[95] can be good references to Chinese law.

[93] Article 12, Enterprise Insolvency Law of P.R. China 1986, (for trial implementation).
[94] 'When an insurance company is declared bankrupt in accordance with laws, the estate of the bankrupt insurer, after paying off the expenses of bankruptcy proceedings, shall be distributed in the following order:
(1) Wages, salaries and social insurance benefits due to its employees;
(2) Indemnity or payment of the insurance benefits;
(3) Taxes and duties due; and
(4) Servicing of the company debts.'--article 89, Insurance Law of China.
[95] See discussion in above S.9.3., Chapter IX.

CHAPTER XII:

CONCLUSION

Complex in nature and wide in scope, insurable interest is an enduring question since the beginning of marine insurance business. The writer has examined the doctrine in English law where the historical reason has given its reputation in the field of marine insurance law and in effect has in large or less extent affected the other legal regimes in the world. However, the legal problems remain in the doctrine and criticism to the assured has been generated not only among the academic scholars but also by the learned judges.

In particular, in respect of the nature of insurable interest, this is a continuous question in discussion since the start of marine insurance business. Since marine insurance was regarded as a true contract of indemnity instead of a mere wager on the safe arrival of ship or goods in 14th century, insurable interest was required to fulfil this principle. To avoid gambling on the policy and the temptation to bring about the loss insured against, MIA 1745 was enacted to emphasis the significance of this rule and corrected some loose requirements in then Courts of common laws for the benefit of merchants. However, how to define this rule or what kind of relation between the assured and the subject matter insured can be regarded as valid insurable interest? From the writer's analysis in the thesis, we can find this is still not yet fully confirmed in English law. Although the loose requirement of 'existing reasonable expectation of benefit' held by Lord Mansfield in *Le Cras v Hughes*[1] was overruled with 'property right or a right derivable out of some contract about the property' by Lord Eldon in *Lucena v Craufurd*[2] and confirmed in s. 5(2) MIA 1906 as 'legal or equitable relation',[3] Lawrence J's proposal of 'moral certainty' in the same case was not fully discarded by the later judges. On the contrary, this doctrine was applied simultaneously in relevant English cases[4] and was widely accepted among other common law countries like Australia, Canada and the United States.[5] Untill toady, there are still different opinions addressed

[1] (1772) 3 Dougl 91.
[2] (1806) 2 Bos & Pul 269.
[3] Also confirmed in *Macaura v Northern Assurance* [1925] AC 619.
[4] *Wilson v Jones* (1867) LR 2 Ex.139; *Moran, Galloway & Co. v Uzielli* [1905] 2 K.B. 555.
[5] See discussion in details in above, S.10.2., Chapter X.

on the future of insurable interest among the learned judges and scholars. There are opinions to adhere the traditional strict legal or equitable relation[6] to avoid the law to 'look somewhat foolish' and to be uncertainty.[7] Many opinions are in favour of economic interest,[8] or to be implied in the principle that marine insurance is a contract of indemnity.[9] It is generally accepted that in marine insurance, the concept of insurable interest is not only for prevention gambling under the cover of insurance and deterrence of moral hazard, but also to conciliate the requirement of indemnity principle to prove the assured's loss suffering against which he can be indemnified. The adherence to strict legal principle can only create unfair condition to the insured because it is clearly in practice the assured would suffer loss on the destruction of the subject matter insured even if he has not legal or equitable relation with it. If we consider the insurer's strong role in drafting and inserting many terminological words in complicated policies, to adhere the strict rule can only be used by the insurer as technical defence and a hindrance on the development of the business. Thus, stretched by the pressure of commerce, the strict requirement of 'legal or equitable relation' in English law does not meet the commercial need any more and has been expanded to cover more valid interest by the realities and requirements of practice. We can find many examples in the cases relating to buyers, bailees, agents, builders. In the recent important case on insurable interest *Feasey*, the learned judge Waller LJ revisited the relevant old cases and concluded that the 'legal or equitable relation' is intended to be a broad concept. However, as this case was settled just before the hearing in the House of Lords, the 'legal or equitable relation' doctrine is still valid as it was decided in the House of Lords.[10] Therefore, inconsistent situations can be found in the law, as criticised by The Law Commission and The Scottish Law Commission in their joint scoping paper,[11] the

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[6] See Nicholas Legh-Jones QC, The Elements of Insurable Interest in Marine Insurance Law, in Modern Law of Marine Insurance Vol.2 at p.158, LLP 2002; Ward LJ's opinion in *Feasey*.

[7] See Norma J. Hird, Insurable Interest-a step too far? Issue 97, Nov. 2004.

[8] See Sir Jonathan Mance (p.365-367) and Adrian Hamilton, QC (p369-371)'s commentaries in John Lowry and Philip Rawlings Re-thinking Insurable Interest, in Sarah Worthington (editor), Commercial Law & Commercial Practice,p.365-371, Hart Publishing,2003. As Adrian Hamilton QC said: 'In para 24 of the BILA(British Insurance Law Association) report on Insurance Contract Law reform, we point out that the technical rules of insurable interest have not in practice generally caused problems for claimants. We do however recommend statutory reforms on the basis of the Australian reforms—a test of economic disadvantage, rather than of legal or equitable interest.' at p.371.

[9] See John Lowry and Philip Rawlings, Re-thinking Insurable Interest, in Sarah Worthington (editor), Commercial Law & Commercial Practice, p335-371, Hart Publishing,2003.

[10] *Macaura v Northern Assurance* [1925] AC 619.

[11] http://www.lawcom.gov.uk/insurance_contract.htm

present law is 'inaccessible and uncertain', 'unduly restrictive' and 'lacks coherence'.[12] It is really the time to find a solution on this question. If it is hard to achieve in common law, the amendment in the future codification of insurance contract law is a good idea. The application of the 'economic interest', 'moral certainty' or 'factual expectation of damage', including the old rule 'legal or equitable relation' with reasonable extension, shall be regarded as the sole binding principle.

If moral certainty is accepted as the binding rule, is there no boundary for a valid insurable interest? The answer is clearly 'no'. As the writer has analysed in s.2.1.1.2., totally different from the 'mere expectation', 'moral certainty' reasonably extends the sphere to the circumstance where the assured can prove his actual pecuniary loss on the damage or destruction of the insured property or adventure if their legal or equitable relation are not so clearly stated. More than that, the court should ascertain the subject matter, discover the nature of the insurable interest and then decide whether the policy embraces the interest by the construction of the terms of the policy.[13] If the above conditions are all satisfied, the insurable interest is valid. Thus, the bailee can not obtain a sum in respect of the goods greater than his own liability for those goods under a property policy covers goods 'the assured's own, in trust or commission, for which he is responsible.' Even if he can recover the full value of the goods insured 'in trust or on commission therein', he is regarded to act as agent and must hold the balance for the cargo owner.[14] The Co-insured's pervasive insurable interest is based on his possible economic loss on frustration of contract performance due to the damage to or destruction of the insured plant and should be ceased after the construction is completed.[15] The insurer has insurable interest on the assured's life or health because of his contractual liability to make payment on the death or injury of the insured person by the special and careful wordings in the reinsurance contract.[16] It is very difficult to find 'hundreds, perhaps thousands, who would be entitled to insure' on one subject matter if

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[12] Para. 2.6, The Law Commission and The Scottish Law Commission, Insurance Contract Law, A Joint Scoping Paper, January 18th, 2006. http://www.lawcom.gov.uk/insurance_contract.htm

[13] See the learned judge Waller LJ's analysis in *Feasey v Sun Life Assurance Co. of Canada* [2003] 21353304..

[14] *Ramco(UK) Ltd v International Insurance Company of Hannover* [2004] Lloyd's Rep. I.R. 606, for discussion in details, see above, S.7.2., Chapter VII.

[15] *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals and Polymers Ltd* [1999] 1 Lloyd's Rep.387; for discussion in details and the dissidence on this doctrine, see above, S.8.3, Chapter VIII.

[16] *Feasey v Sun Life Assurance Co. of Canada* [2003] Lloyd's Rep. 637.

moral certainty is accepted as the doctrine. Even if hundreds or thousands of assureds want to make insurance on it, the insurer also has to investigate the risks proposed and decide whether to underwrite such policies or not, because clearly he does not want to bear any unpredictable or even dangerous risks.

Likewise, as the writer has analysed, Chinese law is also problematic in the nature of insurable interest. It is vague, ambiguous and in the meantime conflicting. The lack of judicial decisions and interpretations of the application of the doctrine give rise to hardship for the better understanding of the exact legal effect of the doctrine. It is suggested that a more comprehensive interpretation by the Supreme People's Court is necessary to fill the gap and the courts are not to encourage the imposition of a harsh result under the doctrine.

In writer's opinion, moral certainty should also be applied in Chinese law of marine insurance, as from the above analysis, although English law is still bound by the traditional doctrine, it is now changing. More importantly, the legal reasoning behind the decisions made by the judges in the relevant cases from the last two centuries are precious legal resources to Chinese legal legislation and judicial practice as they were and are the vivid and authentic reaction to the development of marine insurance business, especially at this moment, under Chinese law, many issues have not been reached the courts. It is hoped that Chinese Courts will take into account those specific decisions discussed, not only merits but also defects, to make judgements more impartial.

APPENDICES

Appendix A

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, promulgated by Order No.64 of the President of the People's Republic of China on November 7, 1992, and effective as of July 1, 1993.)
(Translated by the Legislative Affairs Commission of the Standing Committee of the National People's Congress of the People's Republic of China)

(EXTRACT)

Chapter I General Provisions

Article 1 This Code is enacted with a view to regulating the relations arising from maritime transport and those pertaining to ships, to securing and protecting the legitimate rights and interests of the parties concerned, and to promoting the development of maritime transport, economy and trade.
Article 2 "Maritime transport" as referred to in this Code means the carriage of goods and passengers by sea, including the sea-river and river-sea direct transport.
The provisions concerning contracts of carriage of goods by sea as contained in Chapter IV of this Code shall not be applicable to the maritime transport of goods between the ports of the People's Republic of China.
Article 3 "Ship" as referred to in this Code means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage.
The term "ship" as referred to in the preceding paragraph shall also include ship's apparel.
Article 4 Maritime transport and towage services between the ports of the People's Republic of China shall be undertaken by ships flying the national flag of the People's Republic of China, except as otherwise provided for by laws or administrative rules and regulations.
No foreign ships may engage in the maritime transport or towage services between the ports of the People's Republic of China unless permitted by the competent authorities of transport and communications under the State Council.
Article 5 Ships are allowed to sail under the national flag of the People's Republic of China after being registered, as required by law, and granted the nationality of the People's Republic of China.
Ships illegally flying the national flag of the People's Republic of China shall be prohibited and fined by the authorities concerned.
Article 6 All matters pertaining to maritime transport shall be administered by the competent authorities of transport and communications under the State Council. The specific measures governing such administration shall be worked out by such authorities and implemented after being submitted to and approved by the State Council.

Chapter II Ships

Section 1 Ownership of Ships
Article 7 The ownership of a ship means the shipowner's rights to lawfully possess, utilize, profit from and dispose of the ship in his ownership.
Article 8 With respect to a State-owned ship operated by an enterprise owned by the whole people having a legal person status granted by the State, the provisions of this Code regarding the shipowner shall apply to that legal person.
Article 9 The acquisition, transference or extinction of the ownership of a ship shall be registered at the ship registration authorities; no acquisition, transference or extinction of the ship's ownership shall act against a third party unless registered.
The transference of the ownership of a ship shall be made by a contract in writing.
Article 10 Where a ship is jointly owned by two or more legal persons or individuals, the joint ownership thereof shall be registered at the ship registration authorities. The joint ownership of the ship shall not act against a third party unless registered.
Section 2 Mortgage of Ships

Article 11 The right of mortgage with respect to a ship is the right of preferred compensation enjoyed by the mortgagee of that ship from the proceeds of the auction sale made in accordance with law where and when the mortgagor fails to pay his debt to the mortgagee secured by the mortgage of that ship.
Article 12 The owner of a ship or those authorized thereby may establish the mortgage of the ship.
The mortgage of a ship shall be established by a contract in writing.
Article 13 The mortgage of a ship shall be established by registering the mortgage of the ship with the ship registration authorities jointly by the mortgagee and the mortgagor. No mortgage may act against a third party unless registered.
The main items for the registration of the mortgage of a ship shall be:
(1) Name or designation and address of the mortgagee and the name of designation and address of the mortgagor of the ship;
(2) Name and nationality of the mortgaged ship and the authorities that issued the certificate of ownership and the certificate number thereof;
(3) Amount of debt secured, the interest rate and the period for the repayment of the debt.
Information about the registration of mortgage of ships shall be accessible to the public for enquiry.
Article 14 Mortgage may be established on a ship under construction.
In registering the mortgage of a ship under construction, the building contract of the ship shall as well be submitted to the ship registration authorities.
Article 15 The mortgaged ship shall be insured by the mortgagor unless the contract provides otherwise. In case the ship is not insured, the mortgagee has the right to place the ship under insurance coverage and the mortgagor shall pay for the premium thereof.
Article 16 The establishment of mortgage by the joint owners of a ship shall, unless otherwise agreed upon among the joint owners, be subject to the agreement of those joint owners who have more than two-thirds of the shares thereof.
The mortgage established by the joint owners of a ship shall not be affected by virtue of the division of ownership thereof.
Article 17 Once a mortgage is established on a ship, the ownership of the mortgaged ship shall not be transferred without the consent of the mortgagee.
Article 18 In case the mortgagee has transferred all or part of his right to debt secured by the mortgaged ship to another person, the mortgage shall be transferred accordingly.
Article 19 Two or more mortgages may be established on the same ship. The ranking of the mortgages shall be determined according to the dates of their respective registrations.
In case two or more mortgages are established, the mortgagees shall be paid out of the proceeds of the auction sale of the ship in the order of registration of their respective mortgages. The mortgages registered on the same date shall rank equally for payment.
Article 20 The mortgages shall be extinguished when the mortgaged ship is lost. With respect to the compensation paid from the insurance coverage on account of the loss of the ship, the mortgagee shall be entitled to enjoy priority in compensation over other creditors.
Section 3 Maritime Liens
Article 21 A maritime lien is the right of the claimant, subject to the provisions of Article 22 of this Code, to take priority in compensation against shipowners, bareboat charterers or ship operators with respect to the ship which gave rise to the said claim.
Article 22 The following maritime claims shall be entitled to maritime liens:
(1) Payment claims for wages, other remuneration, crew repatriation and social insurance costs made by the Master, crew members and other members of the complement in accordance with the relevant labour laws, administrative rules and regulations or labour contracts;
(2) Claims in respect of loss of life or personal injury occurred in the operation of the ship;
(3) Payment claims for ship's tonnage dues, pilotage dues, harbour dues and other port charges;
(4) Payment claims for salvage payment;
(5) Compensation claims for loss of or damage to property resulting from tortious act in the course of the operation of the ship.
Compensation claims for oil pollution damage caused by a ship carrying more than 2,000 tons of oil in bulk as cargo that has a valid certificate attesting that the ship has oil pollution liability insurance coverage or other appropriate financial security are not within the scope of sub-paragraph (5) of the preceding paragraph.
Article 23 The maritime claims set out in paragraph 1 of Article 22 shall be satisfied in the order listed. However, any of the maritime claims set out in sub-paragraph (4) arising later than those under sub-paragraph (1) through (3) shall have priority over those under sub- paragraph (1) through (3). In case there are more than two maritime claims under sub-paragraphs (1), (2), (3) or (5) of paragraph 1 of Article 22, they shall be satisfied at the same time regardless of their respective occurrences; where they

could not be paid in full, they shall be paid in proportion. Should there be more than two maritime claims under sub-paragraph (4), those arising later shall be satisfied first.
Article 24 The legal costs for enforcing the maritime liens, the expenses for preserving and selling the ship, the expenses for distribution of the proceeds of sale and other expenses incurred for the common interests of the claimants, shall be deducted and paid first from the proceeds of the auction sale of the ship.
Article 25 A maritime lien shall have priority over a possessory lien, and a possessory lien shall have priority over ship mortgage.
The possessory lien referred to in the preceding paragraph means the right of the ship builder or repairer to secure the building or repairing cost of the ship by means of detaining the ship in his possession when the other party to the contract fails in the performance thereof. The possessory lien shall be extinguished when theship builder or repairer no longer possesses the ship he has built or repaired.
Article 26 Maritime liens shall not be extinguished by virtue of the transfer of the ownership of the ship, except those that have not been enforced within 60 days of a public notice on the transfer of the ownership of the ship made by a court at the request of the transferee when the transfer was effected.
Article 27 In case the maritime claims provided for in Article 22 of this Code are transferred, the maritime liens attached thereto shall be transferred accordingly.
Article 28 A maritime lien shall be enforced by the court by arresting the ship that gave rise to the said maritime lien.
Article 29 A maritime lien shall, except as provided for in Article 26 of this Code, be extinguished under one of the following circumstances:
(1) The maritime claim attached by a maritime lien has not been enforced within one year of the existence of such maritime lien;
(2) The ship in question has been the subject of a forced sale by the court;
(3) The ship has been lost.
The period of one year specified in sub-paragraph (1) of the preceding paragraph shall not be suspended or interrupted.
Article 30 The provisions of this Section shall not affect the implementation of the limitation of liability for maritime claims provided for in Chapter XI of this Code.

Chapter VI Charter Parties

Section 1 Basic Principles

Article 127 The provisions concerning the rights and obligations of the shipowner and the charterer in this Chapter shall apply only when there are no stipulations or no different stipulations in this regard in the charter party.
Article 128 Charter parties including time charter parties and bareboat charter parties shall be concluded in writing.

Section 2 Time Chapter Party

Article 129 A time charter party is a contract under which the shipowner provides a designated manned ship to the charterer, and the charterer employs the ship during the contractual period for the agreed service against payment of hire.
Article 130 A time charter party mainly contains the name of the shipowner, the name of the charter; the name, nationality, class, tonnage, capacity, speed and fuel consumption of the ship; the trading area; the agreed service, the contractual period, the time, place and conditions of delivery and redelivery of the ship; the hire and the way of its payment and other relevant matters.
Article 131 The shipowner shall deliver the ship within the time agreed upon in the charter party.
Where the shipowner acts against the provisions of the preceding paragraph, the charterer is entitled to cancel the charter. However, if the shipowner has notified the charterer of the anticipated delay in delivery and has given an estimated time of arrival of the ship at the port of delivery, the charterer shall notify the shipowner, within 48 hours of the receipt of such notice from the shipowner, of his decision whether to cancel the charter or not.
The shipowner shall be liable for the charterer's loss resulting from the delay in delivery of the ship due to the shipowner's fault.
Article 132 At the time of delivery, the shipowner shall exercise due diligence to make the ship seaworthy. The ship delivered shall be fit for the intended service.
Where the shipowner acts against the provisions in the preceding paragraph, the charterer shall be entitled to cancel the charter and claim any losses resulting therefrom.

Article 133 During the charter period, if the ship is found at variance with the seaworthiness or the other conditions agreed upon in the charter, the shipowner shall take all reasonable measures to have them restored as soon as possible.

Where the ship has not been operated normally for 24 consecutive hours due to its failure to maintain the seaworthiness or the other conditions as agreed upon, the charterer shall not pay the hire for the operating time so lost, unless such failure was caused by the charterer.

Article 134 The charterer shall guarantee that the ship shall be employed in the agreed maritime transport between the safe ports or places within the trading area agreed upon.

If the charterer acts against the provisions of the preceding paragraph, the shipowner is entitled to cancel the charter and claim any losses resulting therefrom.

Article 135 The charterer shall guarantee that the ship shall be employed to carry the lawful merchandise agreed.

Where the ship is to be employed by the charterer to carry live animals or dangerous goods, a prior consent of the shipowner is required.

The charterer shall be liable for any loss of the shipowner resulting from the charterer's violation of the provisions of paragraph 1 or paragraph 2 of this Article.

Article 136 The charterer shall be entitled to give the Master instructions with respect to the operation of the ship. However, such instructions shall not be inconsistent with the stipulations of the time charter.

Article 137 The charterer may sublet the ship under charter, but he shall notify the shipowner of the sublet in time. The rights and obligations agreed upon in the head charter shall not be affected by the sub-charter.

Article 138 Where the ownership of the ship under charter has been transferred by the shipowner, the rights and obligations agreed upon under the original charter shall not be affected. However, the shipowner shall inform the charterer thereof in time. After such transfer, the transferee and the charterer shall continue to perform the original charter.

Article 139 Should the ship be engaged in salvage operations during the charter period, the charterer shall be entitled to half of the amount of the payment for salvage operations after deducting therefrom the salvage expenses, compensation for damage, the portion due to crew members and other relevant costs.

Article 140 The charterer shall pay the hire as agreed upon in the charter. Where the charterer fails to pay the hire as agreed upon, the shipowner shall be entitled to cancel the charter party and claim any losses resulting therefrom.

Article 141 In case the charterer fails to pay the hire or other sums of money as agreed upon in the charter, the shipowner shall have a lien on the charterer's goods, other property on board and earnings from the sub-charter.

Article 142 When the charter redelivers the ship to the shipowner, the ship shall be in the same good order and condition as it was at the time of delivery, fair wear and tear excepted.

Where, upon redelivery, the ship fails to remain in the same good order and condition as it was at the time of delivery, the charter shall be responsible for rehabilitation or for compensation.

Article 143 If, on the basis of a reasonable calculation, a ship may be able to complete its last voyage at around the time of redelivery specified in the charter and probably thereafter, the charterer is entitled to continue to use the ship in order to complete that voyage even if its time of redelivery will be overdue. During the extended period, the charterer shall pay the hire at the rate fixed by the charter, and, if the current market rate of hire is higher than that specified in the charter, the charterer shall pay the hire at the current market rate.

Section 3 Bareboat Charter Party

Article 144 A bareboat charter party is a charter party under which the shipowner provides the charterer with an unmanned ship which the charterer shall possess, employ and operate within an agreed period and for which the charterer shall pay the shipowner the hire.

Article 145 A bareboat charter party mainly contains the name of the shipowner and the name of the charter; the name, nationality, class, tonnage and capacity of the ship; the trading area, the employment of the ship and the charter period; the time, place and condition of delivery and redelivery; the survey, maintenance and repair of the ship; the hire and its payment; the insurance of the ship; the time and condition for the termination of the charter and other relevant matters.

Article 146 The shipowner shall deliver the ship and its certificates to the charterer at the port or place and time as stipulated in the charter party. At the time of delivery, the shipowner shall exercise due diligence to make the ship seaworthy.

The ship delivered shall be fit for the agreed service.

Where the shipowner acts against the provisions of the preceding paragraph, the charterer shall be entitled to cancel the charter and claim any losses resulting therefrom.

Article 147 The charterer shall be responsible for the maintenance and repair of the ship during the bareboat charter period.
Article 148 During the bareboat charter period, the ship shall be insured, at the value agreed upon in the charter and in the way consented to by the shipowner, by the charterer at his expense.
Article 149 During the bareboat charter period, if the charterer's possession, employment or operation of the ship has affected the interests of the shipowner or caused any losses thereto, the charterer shall be liable for eliminating the harmful effect or compensating for the losses.
Should the ship be arrested due to any disputes over its ownership or debts owned by the shipowner, the shipowner shall guarantee that the interest of the charterer is not affected. The shipowner shall be liable for compensation for any losses suffered by the charterer thereby.
Article 150 During the bareboat charter period, the charterer shall not assign the rights and obligations stipulated in the charter or sublet the ship under bareboat charter without the shipowner's consent in writing.
Article 151 The shipowner shall not establish any mortgage of the ship during the bareboat charter period without the prior consent in writing by the charterer.
Where the shipowner acts against the provisions of the preceding paragraph and thereby causes losses to the charterer, the shipowner shall be liable for compensation.
Article 152 The charterer shall pay the hire as stipulated in the charter. In default of payment by the charterer for seven consecutive days or more after the time as agreed in the charter for such payment, the shipowner is entitled to cancel the charter without prejudice to any claim for the loss arising from the charterer's default.
Should the ship be lost or missing, payment of hire shall cease from the day when the ship was lost or last heard of. Any hire paid in advance shall be refunded in proportion.
Article 153 The provisions of Article 134, paragraph 1 of Article 135, Article 142 and Article 143 of this Code shall be applicable to bareboat charter parties.
Article 154 The ownership of a ship under bareboat charter containing a lease-purchase clause shall be transferred to the charterer when the charterer has paid off the lease-purchase price to the shipowner as stipulated in the charter.

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 agrees 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 materials 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 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, issued 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;

(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 any 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.

Appendix B

INSURANCE LAW OF THE PEOPLE'S REPUBLIC OF CHINA

(Extract)

(Adopted at the 14th Meeting of the Standing Committee of the Seventh National People's Congress on June 30, 1995, promulgated by Order No.51 of the President of the People's Republic of China on June 30, 1995, and effective as of October 1, 1995; amended at 30th Meeting of the Standing Committee of the Ninth National People's Congress on October28, 2002, and effective as of January 1 2003)
(Free Translation)

Chapter I General Provisions

Article 1 This Law is promulgated with the purpose of regulating insurance activities, protecting the legitimate rights and interests of the parties involved, strengthening supervision and regulation of the insurance industry and promoting its healthy development.
Article 2 "Insurance" is the term used in this Law to refer to a commercial insurance transaction whereby an insurance applicant, as contracted, pays insurance premiums to the insurer, and the insurer bears an obligation to indemnify for property loss or damage caused by an occurrence of a possible event that is agreed upon in the contract, or to pay the insurance benefits when the insured person dies, is injured or disabled, suffers diseases or reaches the age or term agreed upon in the contract.
Article 3 All insurance activities within the territory of the People's Republic of China (hereinafter referred to as "the PRC") shall be governed by this Law.
Article 4 Any insurance activity shall be in conformity with laws and administrative regulations and shall have respect for social ethics.
Article 5 The parties in insurance business shall abide by the principle of good faith in exercising their rights and performing their obligations.
Article 6 Legal entities engaged in commercial insurance must be insurance companies established in accordance with this Law; no other entity or individual is permitted to transact commercial insurance business.
Article 7 Any person or entity within the territory of the PRC that needs insurance coverage within the PRC territory shall insure himself/herself/itself with insurance companies established within the territory of the PRC.
Article 8 Insurance companies shall observe the principle of fair competition when conducting insurance business and shall never engage in unfair competition.
Article 9 The insurance supervision and regulation department under the State Council shall be responsible for supervision and regulation of the insurance industry in accordance with this Law.

Chapter II Insurance Contracts

Section 1 General Provisions
Article 10 An insurance contract is an agreement whereby the insurance rights and obligations are specified and agreed by the applicant and the insurer. An applicant refers to the party who enters into an insurance contract with an insurer and is obligated to pay the premiums under the insurance contract. An insurer refers to the insurance company which enters into an insurance contract with an applicant and is obligated to make indemnity or payments of the insurance benefits.
Article 11 An applicant and an insurer shall enter into an insurance contract on a fair, voluntary and mutually beneficial basis through consultation and shall never infringe upon the public interest.
Insurance companies and other entities shall never force others to enter into any insurance contract, except for those insurances made compulsory by laws and administrative regulations.
Article 12 An applicant shall have an insurable interest in the subject matter of the insurance.
An insurance contract is null and void if the applicant has no insurable interest in the subject matter of the insurance.
An insurable interest refers to the interest which the applicant has in the subject matter of the insurance and is recognized by laws.
The subject matter of the insurance refers either to the property of the insured and related interests associated therewith, or to the life and the body of the insured, which is the object of the insurance.
Article 13 An insurance contract is formed when an applicant requests insurance and the insurer agrees to underwrite it under the terms and conditions therein agreed by both parties. The insurer shall issue to the

applicant, on a timely basis, an insurance policy or any other insurance certificate which indicates the terms and conditions as agreed by both parties.

An insurance contract may take any written form other than as prescribed above, upon the mutual agreement of the applicant and the insurer.

Article 14 Once an insurance contract is formed, the applicant shall pay the premium in accordance with the terms and conditions of the contract and the insurer will be at risk effective from the date as specified in the insurance contract.

Article 15 Unless otherwise prescribed herein, or in the insurance contract, the applicant may terminate the contract after it is formed.

Article 16 Unless otherwise prescribed herein, or in the insurance contract, the insurer may not terminate the contract after it is formed.

Article 17 The insurer shall, prior to the conclusion of an insurance contract, explain the contract terms and conditions to the applicant and may inquire about the subject matter of the insurance or person to be insured. The applicant shall make a full and accurate disclosure.

The insurer shall have the right to terminate the insurance contract, in the case that the applicant intentionally conceals facts, or does not perform his/her obligation of making a full and accurate disclosure, or negligently fails to perform such obligation to the extent that it would materially affect the insurer's decision whether or not to underwrite the insurance or whether or not to increase the premium rate.

If any applicant intentionally fails to perform his/her obligation of making a full and accurate disclosure, the insurer shall bear no obligation for making any indemnity or payment of the insurance benefits, or for returning the premiums paid for the occurrence of the insured event which occurred prior to the termination of the contract.

If an applicant negligently fails to perform his/her obligation of making a full and accurate disclosure and this materially affects the occurrence of an insured event before the termination of the contract, the insurer shall bear no obligation for making any indemnity or payment of the insurance benefits but may return the premiums paid.

An insured event refers to an event falling within the scope of cover under the insurance contract.

Article 18 If there are any exclusion clauses imposed by the insurer in the insurance contract, then the insurer shall give specific and clear explanations thereof to the applicant when concluding the insurance contract, otherwise such clauses shall not be enforceable.

Article 19 An insurance contract shall contain the following particulars:

(1) Name and address of the insurer;

(2) Names and addresses of the applicant and the insured, and name and address of the beneficiary in the case of insurance of persons;

(3) Subject matter of the insurance;

(4) Scope of the cover and exclusions;

(5) Period of insurance and the commencement of the insurance liability;

(6) Insured value;

(7) Sum insured;

(8) Premium and method of premium payment;

(9) Method of payment of indemnity or the insurance benefits;

(10) Liability arising from breach of contract and the settlement of disputes ;

(11) Day, month and year of the signing of the contract.

Article 20 The applicant and the insurer may include additional particulars for matters relating to the insurance contract other than those referred to in the preceding Article.

Article 21 During the period of the validity of the insurance contract, the applicant and the insurer may amend the contents of the insurance contract subject to mutual agreement. Should there be any amendments to the insurance contract, then the insurer shall endorse the original policy or any other insurance certificate, or issue an endorsement slip attached to the insurance contract or insurance certificate, or have a written agreement of amendment with the applicant.

Article 22 The applicant, the insured or the beneficiary shall notify the insurer in a timely manner of the occurrence of any insured event once it is known to them.

The insured refers to anyone whose property or person is protected by the insurance contract and who is entitled to claim for compensation. An applicant may be the insured.

The beneficiary with respect to the insurance of persons refers to that person designated by the insured or the applicant, and being entitled to claim for the insurance benefits. The applicant or the insured may be the beneficiary.

Article 23 When a claim for indemnity or payment of the insurance benefits is lodged with the insurer after the occurrence of an insured event, the applicant, the insured or the beneficiary shall, to the best of

their knowledge and ability, provide the insurer with evidence and information which is relevant to ascertain the nature of, the cause for and the extent of the loss due to the occurrence of the insured event.

If the insurer, based on the provisions of the insurance contract, considers the relevant evidence or information incomplete, then the insurer shall notify the applicant, the insured or the beneficiary with a request to provide the insurer with additional evidence or information.

Article 24 The insurer shall, in a timely manner after the receipt of a claim for indemnity or for payment of the insurance benefits from the insured or the beneficiary, ascertain and determine whether to make the indemnity or effect the payment of the insurance benefits, and notify the result to the insured or the beneficiary; and shall fulfil its obligations for such indemnity or payment within ten (10) days after an agreement is reached with the insured or the beneficiary on the amount of indemnity or payment. If the insurance contract specifies the sum insured or the period within which the indemnity or the payment of the insurance benefits should be made, then the insurer shall fulfil its obligation for indemnity or payment of the insurance benefits as specified in the insurance contract. If the insurer fails to fulfil the obligations specified in the preceding paragraph in a timely manner then, in addition to the payment of compensation, the insurer shall compensate the insured or the beneficiary for any damage incurred thereby.

No entity or individual shall illegally interfere with the insurer's obligation for indemnity or payment of the insurance benefits, or hinder the right of the insured or the beneficiary to receive the payment.

The sum insured refers to the maximum amount which the insurer undertakes to indemnify or pay under its insurance obligation.

Article 25 After receiving a claim for indemnity or payment of the insurance benefits from the insured or the beneficiary, the insurer shall issue to the insured or the beneficiary a notice declining indemnity or payment of the insurance benefits for any events not falling within the scope of the cover.

Article 26 If the amount of indemnity or payment of the insurance benefits cannot be determined within sixty (60) days of receipt of the claim for indemnity or payment of the insurance benefits, and relevant evidence and information thereof, then the insurer shall effect payment of the minimum amount which can be determined by the evidence and information obtained. The insurer shall pay the balance after the final amount of indemnity or payment of the insurance benefits is determined.

Article 27 With respect to insurance other than life insurance, the rights of the insured or the beneficiary to claim for indemnity or payment of the insurance benefits shall expire if the insured or the beneficiary fails to exercise his rights to claim within two (2) years from the date when the insured or the beneficiary is aware of the occurrence of the insured event.

With respect to life insurance, the rights of the insured or the beneficiary to claim for payment of the insurance benefits shall expire if the insured or the beneficiary fails to exercise his rights to claim within five (5) years from the date when the insured or the beneficiary is aware of the occurrence of the insured event.

Article 28 The insurer may terminate the insurance contract and refuse to return the premiums paid if the insured or the beneficiary falsely claims that an insured event has occurred, and submits a claim for indemnity or payment of the insurance benefits, although such insured event has not occurred.

If the applicant, the insured or the beneficiary intentionally causes the occurrence of an insured event, except as under the first paragraph of Article 65 of this Law, the insurer may terminate the insurance contract, bear no obligation for indemnity or payment of the insurance benefits and decline to return the premiums paid.

If the applicant, the insured or the beneficiary, following the occurrence of an insured event, provides forged and altered relevant evidence, information or other proofs, falsifies the cause of the occurrence of the insured event or overstates the extent of the loss, then the insurer shall bear no obligation for indemnity or payment of the insurance benefits for the portion which is falsified or overstated.

The applicant, the insured or the beneficiary shall refund or indemnify the insurer for any payments or expenses which were made or incurred by the insurer due to the commission of any act stipulated in the foregoing three paragraphs of this Article by the applicant, the insured or the beneficiary.

Article 29 When an insurer transfers part of its accepted business to another insurer by way of cession, it is referred to as reinsurance.

When requested by the reinsurer, the ceding insurance company shall inform the reinsurer of the ceding insurance company's retained liability and all relevant information with respect to the direct insurance.

Article 30 The reinsurer shall not demand payment of premiums from the applicant of the direct insurance.

The insured or the beneficiary of the direct insurance shall not claim for the indemnity or payment of the insurance benefits from the reinsurer.

The ceding insurance company shall not decline or delay fulfilling its obligation of the direct insurance on the basis that the reinsurer fails to fulfil the reinsurance obligation.

Article 31 If there is any dispute over the interpretation of clauses in an insurance contract between the insurer and the applicant, the insured or the beneficiary, then the People's Courts or arbitration organizations shall interpret such disputed clauses in favour of the insured and the beneficiary.

Article 32 Article 32 The insurer or the reinsurer shall be obligated to maintain confidentiality of information obtained in the course of conducting insurance business regarding the business and financial position of the applicant, the insured or the ceding insurance company and the personal privacy.

Section 2 Contract of Property Insurance

Article 33 A property insurance contract refers to a contract the subject matter of the insurance of which is a property and related interests associated therewith.

The property insurance contract mentioned in this Section is briefly referred to as "the contract", unless specified otherwise.

Article 34 With the exception of cargo insurance contracts and those contracts specified otherwise, the insurer must be notified of the assignment of the subject matter of the insurance. With the consent of the insurer to continue underwriting the assignment of the subject matter of the insurance, the contract may be modified in accordance with laws.

Article 35 A cargo insurance contract or an insurance contract for voyage conveyance shall not be terminated by any party thereto subsequent to the commencement of the insurance liability.

Article 36 The insured shall observe all the regulations prescribed by the State with respect to fire prevention, safety, production, operations and labour protection, and any other regulations associated therewith, to maintain the safety of the subject matter of the insurance.

In accordance with the terms of the contract, the insurer may inspect the subject matter of the insurance concerning its safety conditions and, within a reasonable time, propose reasonable written suggestions to the applicant or the insured to eliminate risks and latent problems undermining the safety of the subject matter of the insurance.

In the event that the applicant or the insured fails to fulfil his contractual obligation to ensure the safety of the subject matter of the insurance, the insurer has the right to request an increase of the premium or to terminate the contract.

The insurer may, with the consent of the insured, take safety preventive measures to protect the subject matter of the insurance.

Article 37 If the extent of risk to the subject matter of the insurance increases during the period of the contract, then the insured shall, in accordance with the contract, promptly notify the insurer and the insurer shall have the right to increase the premium or terminate the contract.

If the insured fails to fulfil the obligation of notice stipulated in the preceding paragraph, the insurer shall bear no obligation for indemnity of the insured event which occurs due to the increased risk to the subject matter of the insurance.

Article 38 Unless otherwise specified in the contract, the insurer shall reduce the premium and return the corresponding premium paid pro rata to the number of days, if either:

(1) A change occurs in the circumstances on which the insurance rate was calculated, so that the risk to the subject matter of the insurance is noticeably reduced; or

(2) A material reduction occurred in the insured value of the subject matter of the insurance.

Article 39 In the event that an applicant requests the termination of the contract prior to the commencement of the insurance liability, the applicant shall pay handling charges to the insurer and the insurer shall return the premiums paid. In the event that an applicant requests the termination of the contract subsequent to the commencement of the insurance liability, the insurer may retain the premiums for the period from the commencement of the insurance liability to the date of the termination of the contract, and shall return the balance of the premiums to the applicant.

Article 40 The insured value of the subject matter of the insurance may be agreed by the applicant and the insurer, and specified in the contract; or it may be assessed based on the actual value of the subject matter of the insurance at the time of the occurrence of the insured event.

The sum insured shall not exceed the insured value of the subject matter of the insurance, and any portion exceeding the insured value of the subject matter of the insurance is null and void as a matter of law.

Unless otherwise specified in the contract, in the event that the sum insured is less than the insured value, the insurer shall undertake the obligation for indemnity pro rata of the sum insured to the insured value.

Article 41 In the event of double insurance, the applicant shall notify all the insurers concerned of relevant information with respect to such double insurance.

If the total amount of the sum insured by double insurance exceeds the insured value, the total amount of indemnity paid by all insurers concerned shall not exceed the insured value. Unless specified otherwise in the contract, the insurers concerned shall undertake their obligation for indemnity based on the proportions their respective amounts of the sum insured bear to the total amount of the sum insured.

A double insurance refers to insurance under which an applicant enters into insurance contracts with two or more insurers on the same subject matter of the insurance, the same insurable interests and the same insured event.

Article 42 Following the occurrence of an insured event, the insured is obligated to take all necessary measures to prevent or mitigate loss or damage.

The insurer shall bear the expenses necessarily and reasonably incurred by the insured in taking measures to prevent or mitigate further loss or damage of the subject matter of the insurance after the occurrence of the insured event; the amount of such expenses borne by an insurer shall be calculated separately from the indemnity for the loss of the subject matter of the insurance and it shall not exceed the sum insured.

Article 42 if the subject matter of the insurance sustains partial loss, the applicant may terminate the contract within thirty (30) days after the loss is indemnified by the insurer. Unless specified otherwise in the insurance contract, the insurer may also terminate the contract. In the event that the insurer terminates the contract, the insurer shall notify the applicant fifteen (15) days in advance of such termination and return to the applicant the premium received for the portion of the subject matter of the insurance which is not lost or damaged after deducting the earned premium for the subject matter of the insurance which is not lost or damaged from the date of the commencement of the insurance liability to the date of the termination of the contract.

Article 44 After the occurrence of the insured event, if the insurer pays in full the sum insured and the sum insured is equal to the insured value, the insurer shall retain all rights pertaining to the subject matter of the insurance which is lost or damaged. If the sum insured is less than the insured value, the insurer shall obtain partial rights pertaining to the subject matter of the insurance which is lost or damaged on the pro rata basis of the sum insured to the insured value.

Article 45 When the occurrence of the insured event results from the loss or damage to the Subject matter of the insurance caused by a third party, the insurer may be subrogated into the insured's right of indemnity against the third party up to the amount of indemnity from the date when the amount of indemnity is made. In the event of the occurrence of the insured event referred to in the preceding paragraph, the insurer may, at the time of making indemnity, deduct there from a corresponding amount which the insured has received as indemnity from the third party.

The right of indemnity by subrogation exercised by the insurer in accordance with the first paragraph shall in no way affect the insured's right of indemnity against the third party for the amount not indemnified.

Article 46 If the insured waives the right of indemnity against the third party after the occurrence of the insured event and before the insurer making the indemnity, the insurer shall bear no obligation for indemnity.

If the insured, without the insurer's consent, waives the right of indemnity against the third party after indemnity is made by the insurer, the waiver of the insured shall be regarded as invalid.

The insurer may deduct a corresponding sum from the amount of indemnity if it is not able to exercise the right of indemnity by subrogation due to the fault of the insured.

Article 47 The insurer has no right of indemnity by subrogation against any family member or staff member of the insured unless the occurrence of the insured event referred to in the first paragraph of Article 44 above has resulted from the wilful misconduct of such a third party.

Article 48 When the insurer exercises the right of indemnity by subrogation against a third party, the insured shall provide the insurer with all relevant and pertinent documents and information known to him/her.

Article 49 The insurer shall bear the necessary and reasonable expenses incurred by the insurer and the insured from investigating and ascertaining the nature of and the cause for the occurrence of the insured event, and the extent of loss or damage to the Subject matter of the insurance.

Article 50 The insurer may directly indemnify a third party for loss or damage caused by the insured of a liability insurance contract in accordance with the provisions of laws or the terms of an insurance contract. Liability insurance refers to an insurance the subject matter of the insurance of which is the insured's liability to indemnify a third party pursuant to laws.

Article 51 If the insured of a liability insurance contract is brought to an arbitration or legal proceeding due to the occurrence of an insured event which caused loss or damage to a third party, unless specified otherwise in the insurance contract, the insurer shall bear the expenses of such arbitration or legal proceeding and other necessary and reasonable expenses paid by the insured.

Section 3 Contract of Insurance of Persons

Article 52 A contract of insurance of persons is an insurance contract insuring a person's life and body.

The contract of insurance of persons mentioned in this Section is briefly referred to as "the contract," unless specified otherwise.

Article 53 The applicant has insurable interests over the following persons:

(1) The applicant himself/herself;
(2) The applicant's spouse, children and parents; or
(3) Other family members or close relatives, apart from the aforementioned, who have relations of fostering, supporting and maintaining with the applicant.
Notwithstanding the foregoing, with the consent of the insured to enter into a contract for the insured, the applicant shall be regarded as having an insurable interest on the insured.
Article 54 If the age of the insured is not correctly given by the applicant, and the actual age of the insured does not fall within the age range specified by the contract, the insurer may terminate the contract and return the premiums to the applicant after deducting expenses there from. However, this does not apply to contracts which have been in force for two (2) years or more.
In the event that the applicant has misstated the age of the insured, thus underpaying the premiums, then the insurer shall have the right to correct the misstatement and request the applicant to pay the balance, or to reduce the payment of the insurance benefits in proportion to the amount of premiums actually paid to the amount that should have been paid.
In the event that the applicant has misstated the age of the insured, thus overpaying the premiums, then the insurer shall return the overpaid portion to the applicant.
Article 55 An applicant shall not apply for and the insurer shall not underwrite an insurance of persons that stipulates death as a prerequisite for the payment of the insurance benefits on a person without civil legal capacity.
The restriction stipulated in the preceding paragraph shall not apply to the case where parents apply for insurance of persons on minor children. However, the total amount of the death benefits shall not exceed the limit as stipulated by the financial supervision and regulation department.
Article 56 A contract stipulating death as the prerequisite for the payment of the insurance benefits is not valid unless its amount is consented to in writing by the insured.
An insurance policy stipulating death as the prerequisite for the payment of the insurance benefits shall not be transferred or mortgaged without the written consent of the insured.
If parents apply for an insurance of persons on their minor children, the restriction stipulated in paragraph one of this Article shall not apply.
Article 57 After the establishment of the contract, the applicant may pay the premium by a single premium or by instalments in accordance with the terms of the contract.
If the contract stipulates that the premium is to be paid by instalments, the applicant shall pay the first instalment at the inception of the contract and the other instalments as scheduled.
Article 58 If the contract specifies payment of the premiums by instalments and the applicant has paid the first instalment but fails to pay any subsequent instalments within a sixty (60) days grace period, the contract shall lapse, or the insurer shall reduce the insured amount in accordance with the contract, unless specified otherwise in the contract.
Article 59 A contract which lapses in accordance with the preceding Article can be reinstated provided that the insurer and the applicant have reached an agreement and that the applicant has paid the outstanding premiums. However, the insurer has the right to terminate the contract if no agreement has been reached by both parties within two (2) years from the date of the lapse of the contract.
When an insurer terminates the contract in accordance with the preceding paragraph, and the applicant has paid the premiums for two years or more, the insurer shall return the cash value of the policy to the applicant in accordance with the contract. In the event that the applicant has paid the premiums for less than two years, the insurer shall return the premiums to the applicant with the expenses deducted there from.
Article 60 The insurer shall not resort to legal proceeding to demand the payment of the insurance premiums of insurance of persons from the applicant.
Article 61 The beneficiary of the insurance of persons shall be designated by the insured or the applicant.
The designation of the beneficiary by the applicant is subject to the approval of the insured.
If the insured is a person without civil legal capacity or a person with limited civil legal capacity, the beneficiary may be designated by the guardian of the insured.
Article 62 The insured or the applicant may designate one or more persons as the beneficiaries.
In the event that there is more than one beneficiary, the insured or the applicant may specify the order of distribution of the payment of the insurance benefits and their respective proportions; in the absence of such specifications on proportions, all the beneficiaries shall share the benefits on an equal basis.
Article 63 The insured or the applicant may change the beneficiary by a written notice to the insurer. The insurer shall endorse the change on the policy upon receipt of the notice.
The applicant may change the beneficiary subject to the consent of the insured.
Article 64 In the event of the death of the insured, the payment of the insurance benefits shall be treated as part of the estate of the insured, and the insurer shall pay the insurance benefits to the legal heirs of the

insured, on the condition of that:

1 there is no designated beneficiary;

2 the beneficiary dies before the insured without other beneficiary being designated; or

3 the beneficiary forfeits or surrenders his/her right as such in accordance with laws without other beneficiary being designated.

Article 65 In the event that the applicant or the beneficiary has intentionally caused the death, disability or illness of the insured, the insurer shall bear no obligation for payment of the insurance benefits. In the event that the applicant has paid premiums for two (2) years or more, the insurer shall, in accordance with the contract, return the cash value of the policy to other beneficiaries, if any.

If the beneficiary has intentionally caused the death or disability of the insured, or attempted to cause the death of the insured or the beneficiary shall lose his/her right to claim the insurance benefits.

Article 66 When a contract stipulates death as the prerequisite for the payment of the insurance benefits then the insurer shall have no obligation for the payment of the insurance benefits if the insured commits suicide, except for the event stipulated in paragraph two of this Article. However, the insurer shall, in respect of the insurance premium already paid by the applicant, return the cash value of the policy in accordance with the terms of the contract.

When a contract stipulates death as a prerequisite for the payment of the insurance benefits, the insurer may effect the payment of the insurance benefits in accordance with the contract if the insured commits suicide two (2) years or more after the formation of the contract.

Article 67 In the event that the insured has died or was disabled as a result of intentionally committing a crime, the insurer shall have no obligation to effect the payment of the insurance benefits. If, however, the applicant has paid premiums for two (2) years or more, the insurer shall return the cash value of the policy to the insured in accordance with the contract.

Article 68 If the insured suffers from death, disability, or illness as a result of a third party's conduct, the insurer shall have no right of subrogation against the third party after the payment of the insurance benefits. Nevertheless, the insured and the beneficiary shall have the right of subrogation against the third party.

Article 69 If an applicant who has already paid in full the insurance premiums for two (2) years or more, terminates the contract, then the insurer shall return the cash value of the policy within thirty (30) days after the receipt of the notice of termination in accordance with the contract. If the applicant has paid the insurance premiums for less then two (2) years, then the insurer shall return the remaining premiums after deducting expenses in accordance with the contract.

Appendix C

CONTRACT LAW THE PEOPLE'S REPUBLIC OF CHINA

(Adopted at the 2nd Session of the Ninth National People's Congress on March 15,1999, promulgated Order No.15 of the President of the People's Republic of China on March 15,1999, and effective as of October1, 1999)
(From the Website of the Ministry of Commerce of P.R.China http://www.mofcom.gov.cn/)

(EXTRACT)

Chapter 3 Validity of Contracts

Article 44 The contract established according to law becomes effective upon its establishment. With regard to contracts that are subject to approval or registration as stipulated by relevant laws or administrative regulations, the provisions thereof shall be followed.
Article 45 The parties may agree on that the effectiveness of a contract be subject to certain conditions. A contract whose effectiveness is subject to certain conditions shall become effective when such conditions are accomplished. The contract with dissolving conditions shall become invalid when such conditions are satisfied. If a party improperly prevent the satisfaction of a condition for its own interests, the condition shall be regarded as having been accomplished. If a party improperly facilitates the satisfaction of a condition, such condition shall be regarded as not to have been satisfied.
Article 46 The parties may agree on a conditional time period as to the effectiveness of the contract. A contract subject to an effective time period shall come into force when the period expires. A contract with termination time period shall become invalid when the period expires.
Article 47 A contract concluded by a person with limited civil capacity of conduct shall be effective after being ratified afterwards by the person's statutory agent, but a pure profit-making contract or a contract concluded which is appropriate to the person's age, intelligence or mental health conditions need not be ratified by the person's statutory agent. The counterpart may urge the statutory agent to ratify the contract within one month. It shall be regarded as a refusal of ratification that the statutory agent does not make any expression. A bona fide counterpart has the right to withdraw it before the contract is ratified. The withdrawal shall be made by means of notice.
Article 48 A contract concluded by an actor who as no power of agency, who oversteps the power of agency, or whose power of agency has expired and yet concludes it on behalf of the principal, shall have no legally binding force on the principal without ratification by the principal, and the actor shall be held liable. The counterpart may urge the principal to ratify it within one month. It shall be regarded as a refusal of ratification that the principal does not make any expression. A bona fide counterpart has the right to withdraw it before the contract is ratified. The withdrawal shall be made by means of notice.
Article 49 If an actor has no power of agency, oversteps the power of agency, or the power of agency has expired and yet concludes a contract in the principal's name, and the counterpart has reasons to trust that the actor has the power of agency, the act of agency shall be effective.
Article 50 Where a statutory representative or a responsible person of a legal person or other organization oversteps his/her power and concludes a contract, the representative act shall be effective except that the counterpart knows or ought to know that he/she is overstepping his/her powers.
Article 51 Where a person having no right to disposal of property disposes of other persons' properties, and the principal ratifies the act afterwards or the person without power of disposal has obtained the power after concluding a contract, the contract shall be valid.
Article 52 A contract shall be null and void under any of the following circumstances:
(1) a contract is concluded through the use of fraud or coercion by one party to damage the interests of the State;
(2) malicious collusion is conducted to damage the interests of the State, a collective or a third party;
(3) an illegitimate purpose is concealed under the guise of legitimate acts;
(4) damaging the public interests;
(5) violating the compulsory provisions of laws and administrative regulations.
Article 53 The following exception clauses in a contract shall be null and void:
(1) those that cause personal injury to the other party;
(2) those that cause property damages to the other party as result of deliberate intent or gross negligence.
Article 54 A party shall have the right to request the people's court or an arbitration institution to modify or revoke the following contracts:
(1) those concluded as a result of significant misconception;

(2) those that are obviously unfair at the time when concluding the contract. If a contract is concluded by one party against the other party's true intentions through the use of fraud, coercion, or exploitation of the other party's unfavourable position, the injured party shall have the right to request the people's court or an arbitration institution to modify or revoke it. Where a party requests for modification, the people's court or the arbitration institution may not revoke the contract.

Article 55 The right to revoke a contract shall extinguish under any of the following circumstances:

(1) a party having the right to revoke the contract fails to exercise the right within one year from the day that it knows or ought to know the revoking causes;

(2) a party having the right to revoke the contract explicitly expresses or conducts an act to waive the right after it knows the revoking causes.

Article 56 A contract that is null and void or revoked shall have no legally binding force ever from the very beginning. If part of a contract is null and void without affecting the validity of the other parts, the other parts shall still be valid.

Article 57 If a contract is null and void, revoked or terminated, it shall not affect the validity of the dispute settlement clause which is independently existing in the contract.

Article 58 The property acquired as a result of a contract shall be returned after the contract is confirmed to be null and void or has been revoked; where the property can not be returned or the return is unnecessary, it shall be reimbursed at its estimated price. The party at fault shall compensate the other party for losses incurred as a result there from. If both parties are fault, each party shall respectively be liable.

Article 59 If the parties have maliciously conducted collusion to damage the interests of the State, a collective or a third party, the property thus acquired shall be turned over to the State or returned to the collective or the third party.

Chapter 5 Modification and Assignment of Contracts

Article 77 A contract may be modified if the parties reach a consensus through consultation. If the laws or administrative regulations so provide, approval and registration procedures for such modification shall be gone through in accordance with such provisions.

Article 78 Where an agreement by the parties on the contents of a modification is ambiguous, the contract shall be presumed as not having been modified.

Article 79 The obligee may assign its rights under a contract, in whole or in part, to a third party, except under the following circumstances:

(1) such rights may not be assigned in light of the nature of the contract;

(2) such rights may not be assigned according to the agreement between the parties;

(3) such rights may not be assigned according to the provisions of the laws.

Article 80 Where the obligee assigns its rights, it shall notify the obligor. Such assignment will have no effect on the obligor without notice thereof. A notice by the obligee to assign its rights shall not be revoked, unless such revocation is consented to by the assignee.

Article 81 Where the obligee assigns its right, the assignee shall acquire the collateral rights related to the principal rights, except that the collateral rights exclusively belong to the obligee.

Article 82 Upon receipt of the notice of assignment of rights, the obligor may assert against the assignee any defences it has against the assignor.

Article 83 Upon receipt by the obligor of the notice of assignment of rights, the obligor shall have vested rights against the assignor, and if the rights of the obligor vest prior to or at the same time as the assigned rights, the obligor may claim an offset against the assignee.

Article 84 Where the obligor delegates its obligations under a contract in whole or in part to a third party, such delegation shall be subject to the consent of the obligee.

Article 85 Where the obligor delegates its obligation, the new obligor may exercise any defence that the original obligor had against the obligee.

Article 86 Where the obligor delegates its obligation, the new obligor shal lassume the incidental obligations related to the main obligations, except that the obligations exclusively belong to the original obligor.

Article 87 Where the laws or administrative regulations stipulate that the assignment of rights or transfer of obligations shall undergo approval or registration procedures, such provisions shall be followed.

Article 88 Upon the consent of the other party, one party may transfer its rights together with its obligations under contract to a third party.

Article 89 Where the rights and obligations are transferred together, the provisions in Articles 79, Articles 81 to 83, and Articles 85 to 87 of this Law shall be applied.

Article 90 Where a party is merged after the contract has been concluded, the legal person or other organization established after the merger shall exercise the rights and obligations there under. Unless otherwise agreed upon by the obligor and obligee, the legal persons or other organizations that exist after the division shall jointly enjoy the rights and jointly assume the obligations under the contract.

Chapter 9 Sales Contracts

Article 130 A sales contract is a contract whereby the seller transfers the ownership of a subject matter to the buyer, and the buyer pays the price for it.

Article 131 In addition to the terms set forth in Article 12 of this Law, a sales contract may also contain such clauses as package manner, inspection standards and method, method of settlement and clearance, language adopted in the contract and its authenticity.

Article 132 The subject matter to be sold shall be owned by the seller or of that the seller shall have the right to dispose.Where the transfer of a subject matter is prohibited or restricted by laws or administrative regulation, such provision shall be applied.

Article 133 The ownership of a subject matter shall be transferred upon the delivery of the object, except as otherwise stipulated by law or agreed upon by the parties.

Article 134 The parties to a sales contract may agree that the ownership shall belong to the seller if the buyer fails to pay the price or perform other obligations.

Article 135 The seller shall perform the obligations of delivering to the buyer the subject matter or handing over the documents for the buyer to take possession of the subject matter and of transferring the ownership thereto.

Article 136 In addition to the document for taking possession, the seller shall deliver to the buyer the relevant documents and materials in accordance with the agreement or transaction practices.

Article 137 In a sale of any subject matter which contains intellectual property such as computer software, etc., the intellectual property in the subject matter does not belong to the buyer, except as otherwise provided by law or agreed upon by the parties.

Article 138 The seller shall deliver the subject matter by the time limit agreed upon. Where a time period for delivery is agreed upon, the seller may deliver at any time within the said time period.

Article 139 Where the time limit for delivery of the subject matter is not agreed upon between the parties or the agreement is not clear, the provisions of Article 61 and Item 4 of Article 62 shall be applied.

Article 140 Where a subject matter has been possessed by the buyer prior to the conclusion of the contract, the delivery time shall be the time when the contract becomes effective.

Article 141 The seller shall deliver the subject matter at the agreed place. Where there is no agreement between the parties as to the place to deliver the subject matter or such agreement is not clear, nor can it be determined according to the provisions of Article 61 of this Law, the following provisions shall be applied:

(1) if the subject matter needs carriage, the seller shall deliver the subject matter to the first carrier so as to hand it over to the buyer;

(2) if the subject matter does not need carriage, and the seller and buyer know the place of the subject matter when concluding the contract, the seller shall deliver the subject matter at such place; if the place is unknown, the subject matter shall be delivered at the business place of the seller when concluding the contract.

Article 142 The risk of damage to or loss of a subject matter shall be borne by the seller prior to the delivery of the subject matter and by the buyer after delivery, except as otherwise stipulated by law or agreed upon by the parties.

Article 143 Where a subject matter cannot be delivered at the agreed time limit due to any reasons attributable to the buyer, the buyer shall bear the risk of damage to or loss of the subject matter as of the date it breaches the agreement.

Article 144 Where the seller sells a subject matter delivered to a carrier for carriage and is in transit, unless otherwise agreed upon by the parties, the risk of damage to or missing of the subject matter shall be borne by the buyer as of the time of establishment of the contract.

Article 145 Where there is no agreement between the parties as to the place of delivery or such agreement is not clearly, and the subject matter needs carriage according to the provisions of Item 1 of Paragraph 2 of Article 141 of this Law, the risk of damage to or missing of the subject matter shall be borne by the buyer after the seller has delivered the subject matter to the first carrier.

Article 146 Where the seller has placed the subject matter at the place of delivery in accordance with the agreement or in accordance with the provisions of Item 2 of Paragraph 2 of Article 141 of this Law, while the buyer fails to take delivery in breach of the agreement, the risk of damage to or missing of the subject matter shall be borne by the buyer as of the date of breach of the agreement.

Article 147 The failure of the seller to deliver the documents and materials relating to the subject matter as agreed upon shall not affect the passing of the risk of damage to or missing of the subject matter.
Article 148 Where the quality of the subject matter does not conform to the quality requirements, making it impossible to achieve the purpose of the contract, the buyer may refuse to accept the subject matter or may terminate the contract. If the buyer refuses to accept the subject matter or terminate the contract, the risk of damage to or missing of the subject matter shall be borne by the seller.
Article 149 Where the risk of damage to or missing of the subject matter is borne by the buyer, the buyer's right to demand the seller to bear liability for breach of contract because the seller's performance of its obligations is not in conformity with the agreement shall not be affected.
Article 150 Unless otherwise provided by law, the seller shall have the obligation to warrant that no third party shall exercise against the buyer any rights with respect to the delivered subject matter.
Article 151 Where the buyer knows or ought to know, at the time of conclusion of the contract, that a third party has rights on the subject matter to be sold, the seller does not assume the obligation prescribed in Article 150 of this Law.
Article 152 Where the buyer has conclusive evidence to demonstrate that a third party may claim rights on the subject matter, it may suspend to pay the corresponding price, except where the seller provides appropriate guaranty.
Article 153 The seller shall deliver the subject matter in compliance with the agreed quality requirements. Where the seller gives the quality specifications for the subject matter, the subject matter delivered shall comply with the quality requirements set forth therein.
Article 154 Where the quality requirements for the subject matter is not agreed between parties or such agreement is not clear, nor can it be determined according to the provisions of Article 61 of this Law, the provisions of Item 1 of Article 62 of this Law shall be applied.
Article 155 If the subject matter delivered by the seller fails to comply with the quality requirements, the buyer may demand the seller to bear liability for breach of contract in accordance with Article 111 of this Law.
Article 156 The seller shall deliver the subject matter packed in the agreed manner. Where there is no agreement on package manner in the contractor the agreement is not clear, nor can it be determined according to the provisions of Article 61 of this Law, the subject matter shall be packed in a general manner, and if no general manner, a package manner enough to protect the subject matter shall be adopted.
Article 157 Upon receipt of the subject matter, the buyer shall inspect it within the agreed inspection period. Where no inspection period is agreed, the buyer shall timely inspect the subject matter.
Article 158 Where the parties have agreed upon an inspection period, the buyer shall notify the seller of any non-compliance in quantity or quality of the subject matter within such inspection period. Where the buyer delayed in notifying the seller, the quantity or quality of the subject matter is deemed to comply with the contract. Where no inspection period is agreed, the buyer shall notify the seller within a reasonable period, commencing on the date when the buyer discovered or should have discovered the quantity or quality non-compliance. If the buyer fails to notify within a reasonable period or fails to notify within 2 years, commencing on the date when it received the subject matter, the quantity or quality of the subject matter is deemed to comply with the contract, except that if there is a warranty period in respect of the subject matter, the warranty period applies and supersedes such two year period. Where the seller knows or ought to know the non-compliance of the subject matter, the buyer is not subject to the time limits for notification prescribed in the preceding two paragraphs.
Article 159 The buyer shall pay the price in the agreed amount. Where the price is not agreed or the agreement is not clear, the provisions of Article61 and Item 2 of Article 62 shall be applied.
Article 160 The buyer shall pay the price at the agreed place. Where the place of payment is not agreed or the agreement is not clear, nor can it be determined according to the provisions of Article 61 of this Law, the buyer shall make payment at the seller's place of business, provided that if the parties agreed that payment shall be conditional upon delivery of the subject matter or the document for taking delivery thereof, payment shall be made at the place where the subject matter, or the document for taking delivery thereof, is delivered.
Article 161 The buyer shall pay the price at the agreed time. Where the time for payment is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 61 of this Law, the buyer shall make payment at the same time it receives the subject matter or the document for taking delivery thereof.
Article 162 Where the seller delivers the subject matter in a quantity greater than that agreed in the contract, the buyer may accept or reject the excess quantity. Where the buyer accepts the excess quantity, it shall pay the price based on the contract rate; where the buyer rejects the excess quantity, it shall timely notify the seller.

Article 163 The fruits of the subject matter belong to the seller if accrued before delivery, and to the buyer if accrued after delivery.
Article 164 Where a contract is terminated due to non-compliance of any main component of the subject matter, the effect of termination extends to the ancillary components. Where the contract is terminated due to non-compliance of any ancillary component of the subject matter, the effect of termination does not extend to the main components.
Article 165 Where the subject matter comprises of a number of components, one of which does not comply with the contract, the buyer may terminate the portion of the contract in respect of such component, provided that if severance of such component with the other components will significantly diminish the value of the subject matter, the party may terminate the contract in respect of such number of components.
Article 166 Where the seller is to deliver the subject matter in instalments, if the seller fails to deliver one instalment of the subject matter or the delivery fails to satisfy the terms of the contract so that the said instalment cannot realize the contract purpose, the buyer may terminate the portion of the contract in respect thereof. If the seller fails to deliver one instalment of the subject matter or the delivery fails to satisfy the terms of the contract so that the delivery of the subsequent instalments of subject matter can not realize the contract purpose, the buyer may terminate the portion of the contract in respect of such instalment as well as any subsequent instalment. If the buyer is to terminate the portion of the contract in respect of a particular instalment which is interdependent with all other instalments, it may terminate the contract in respect of all delivered and undelivered instalments.
Article 167 In a sale by instalment payment, where the buyer fails to make payments as they became due, if the delinquent amount has reached one fifth of the total price, the seller may require payment of the full price from the buyer or terminate the contract. If the seller terminates the contract, it may require the buyer to pay a fee for its use of the subject matter.
Article 168 In a sale by sample, the parties shall place the sample under seal, and may specify the quality of the sample. The subject matter delivered by the seller shall comply with the sample as well as the quality specifications.
Article 169 In a sale by sample, if the buyer is not aware of a latent defect in the sample, the subject matter delivered by the seller shall nevertheless comply with the normal quality standard for a like item, even though the subject matter delivered complies with the sample.
Article 170 In a sale by trial, the parties may agree the trial period. Where a trial period is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 61 of this Law, it shall be determined by the seller.
Article 171 In a sale by trial, the buyer may either purchase or reject the subject matter during the trial period. At the end of the trial period, the buyer is deemed to have made the purchase if it fails to demonstrate its intent to purchase or reject the subject matter.
Article 172 In a sale by tender, matters such as the rights and obligations of the parties and the tendering procedure, etc. are governed by the relevant laws and administrative regulations.
Article 173 In a sale by auction, matters such as the rights and obligations of the parties and the auctioning procedure, etc. are governed by the relevant laws and administrative regulations.
Article 174 If there are provisions in the law for other non-gratuitous contracts, such provisions shall apply; in the absence of such provisions, reference shall be made to the relevant provision on sales contract.
Article 175 Where the parties agree on a barter transaction involving transfer of title to the subject matters, such transaction shall be governed by reference to the relevant provisions on sales contracts.

Chapter 21 Commission Contracts

Article 396 A commission contract is a contract whereby the principal and the agent agree that the agent will handle the principal's affairs.
Article 397 The principal may specifically appoint the agent to handle one or more of its affairs, or generally appoint the agent to handle all of its affairs.
Article 398 The principal shall prepay the expenses for handling the commissioned affair. Any expense necessary for handling the commissioned affair advanced by the agent shall be repaid with interest by the principal.
Article 399 The agent shall handle the commissioned affair in accordance with the instruction of the principal. Any required deviation from the principal's instruction is subject to consent by the principal; in an emergency where the agent has difficulty in contacting the principal, the agent shall properly handle the commissioned affair, provided that hereafter the agent shall timely notify the principal of the situation.

Article 400 The agent shall personally handle the commissioned affair. Subject to consent by the principal, the agent may delegate the agency to a third party. If the delegation is approved, the principal may issue instructions concerning the commissioned affair directly to the delegate, and the agent is only responsible for its selection of the delegate or its own instruction thereto. Where the agency is delegated without consent, the agent shall be liable for any act of the delegate, except in an emergency where the agent needs to delegate the agency in order to safeguard the interests of the principal.

Article 401 Upon request by the principal, the agent shall report on the progress of the commissioned affair. Upon discharge of the commission contract, the agent shall render an account of the commissioned affair.

Article 402 Where the agent, acting within the scope of authority granted by the principal, enter into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party, except where there is conclusive evidence establishing that the contract is only binding upon the agent and such third party.

Article 403 Where the agent enter into a contract in its own name with a third party who is not aware of the agency relationship between the agent and the principal, if the agent fails to perform its obligation toward the principal due to any reason attributable to such third party, the agent shall disclose the third party to the principal, allowing it to exercise the agent's rights against such third party, except where the third party will not enter into the contract with the agent if he knows the identity of the principal at the time of entering into the contract.

Where the agent fails to perform its obligation toward the third party due to any reason attributable to the principal, the agent shall disclose the principal to the third party, allowing the third party to select in alternative either the principal or the agent as the other contract party against whom to make a claim, provided that the third party may not subsequently change its selection of the contract party.

Where the principal exercises the rights of the agent against the third party, the third party may avail itself of any defence it has against the agent. Where the third party selects the principal as the other party to the contract, the principal may avail itself of any defence it has against the agent as well as any defence the agent has against the third party.

Article 404 Any property acquired by the agent in the course of handling thec ommissioned affair shall be turned over to the principal.

Article 405 Upon completion of the commissioned affair by the agent, the principal shall pay the remuneration thereto. Where the agency appointment contract is terminated or the commissioned affair is not capable of being completed due to any reason not attributable to the agent, the principal shall pay to the agent an appropriate amount of remuneration. If the parties agrees otherwise, such agreement shall prevail.

Article 406 Under a commission contract for value, if the principal sustains any loss due to the fault of the agent, the principal may claim damages .Under a gratuitous agency appointment contract, if the principal sustains any loss due to the agent's intentional misconduct or gross negligence, the principal may claim damages. Where the agent acts beyond the scope of authorization, thereby causing loss to the principal, it shall pay damages.

Article 407 In the course of handling the commissioned affair, if the agent sustains any loss due to a reason not attributable to itself, the agent may seek indemnification from the principal.

Article 408 Subject to consent by the agent, the principal may, in addition to appointing the agent, also appoint a third party to handle the commissioned affair. If such appointment results in loss to the agent, it may seek indemnification from the principal.

Article 409 Where two or more agents jointly handle the commissioned affair, they are jointly and severally liable to the principal.

Article 410 Either the principal or the agent may terminate the agency appointment contract at any time. Where the other party sustains any loss due to termination of the contract, the terminating party shall indemnify the other party, unless such loss is due to a reason not attributable to the terminating party.

Article 411 A commission contract is discharged when either the principal or the agent is deceased or incapacitated or enters into bankruptcy, except where the parties agree otherwise, or where discharge is inappropriate in light of the nature of the commissioned affair.

Article 412 Where discharge of the commission contract due to the death, incapacitation or bankruptcy of the principal will harm the principal's interests, the agent shall continue to handle the commissioned affair before an heir, legal agent or liquidation team thereof takes over the commissioned affair.

Article 413 If the commission contract is discharged as a result of the death, incapacitation or bankruptcy of the agent, the heir, legal agent or liquidation team thereof shall timely notify the principal. Where discharge of the agency contract will harm the principal's interests, before the principal makes any care-taking arrangement, the heir, legal agent or liquidation team of the agent shall take the necessary measures.

Chapter 22 Contracts of Commission Agency

Article 414 A contract of commission agency is a contract whereby the commission agent conducts trading activities in its own name for the principal, and the principal pays the remuneration.

Article 415 The expenses incurred by the commission agent in the course of handling the commissioned affair shall be borne by the commission agent, except as otherwise agreed upon by the parties.

Article 416 Where the commission agent is in possession of the entrusted item, it shall keep the entrusted item with due care.

Article 417 If an entrusted item is defective, perishable or susceptible to deterioration at the time it was delivered to the commission agent, upon consent by the principal, the commission agent may dispose of the item; where the trustee-trader is unable to contact the principal in time, it may dispose of the entrusted item in a reasonable manner.

Article 418 Where the commission agent is to sell the entrusted item below, or buy the entrusted item above, the price designated by the principal, it shall obtain consent from the principal. If such sale is effected without consent by the principal, and the commission agent makes up the deficiency on its own, it is binding on the principal. Where the commission agent sells the entrusted item above, or purchases the entrusted item below, the price designated by the principal, the remuneration may be increased in accordance with the contract. Where such matter is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 61of this Law, the benefit belongs to the principal. Where the principal gives special pricing instruction, the commission agent may not make any sale or purchase in contravention thereof.

Article 419 Where the commission agent is to sell or purchase a commodity the price of which is fixed by the market, the commission agent may act as the purchaser or seller itself, unless the principal expresses otherwise. Where the commission agent is under the situation prescribed in the preceding paragraph, it may still require payment of remuneration from the principal.

Article 420 Once the commission agent purchases the entrusted item in accordance with the contract, the principal shall timely take delivery. Where after receiving demand from the commission agent, the principal refuses to take delivery without cause, the commission agent may place the entrusted item in escrow in accordance with Article 101 of this Law. Where the entrusted item fails to be sold or the principal withdraws it from sale, the commission agent may place the entrusted item in escrow in accordance with Article 101 of this Law if the principal fails to retrieve or dispose of it after receiving such demand from commission agent.

Article 421 Where the commission agent enters into a contract with a third party, it directly enjoys the rights and assumes the obligations there under. Where the third party fails to perform its obligations, thereby causing damage to the principal, the commission agent shall be liable for damages, except as otherwise agreed upon by the commission agent and the principal.

Article 422 Where the commission agent has completed the entrusted matter or has partially completed the entrusted matter, the principal shall pay the appropriate remuneration thereto. Where the principal fails to pay the remuneration within the prescribed period, the commission agent is entitled to lien on the entrusted item, except as otherwise agreed upon by the parties.

Article 423 Matters not prescribed in this Chapter shall be governed by the relevant provision on commission contracts.

Chapter 23 Intermediation Contracts

Article 424 A intermediation contract is a contract whereby the broker presents to the client an opportunity for entering into a contract or provides the client with intermediary services in connection with the conclusion thereof, and the client pays the remuneration.

Article 425 The broker shall provide true information concerning matters relevant to the conclusion of the proposed contract. Where the broker intentionally conceals any material fact or provided false information in connection with the conclusion of the proposed contract, thereby harming the client's interests, it may not require payment of any remuneration and shall be liable for damages.

Article 426 Once the broker facilitates the formation of the proposed contract, the client shall pay the remuneration in accordance with the intermediation contract. Where remuneration to the broker is not agreed or the agreement is not clear, nor can it be determined in accordance with Article 61 of this Law, it shall be reasonably fixed in light of the amount of labour expended by the broker. Where the broker facilitates the formation of the proposed contract by providing intermediary services in connection therewith, the remuneration paid to the broker shall be equally borne by parties thereto. Where the broker facilitates the formation of the proposed contract, the brokerage expenses shall be borne by itself.

Article 427 Where the broker fails to facilitate the formation of the proposed contract, it may not require payment of remuneration, provided that it may require the client to reimburse the necessary brokerage expenses incurred.

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