**Assignment of Insurance Policy with the Transfer of the Subject Matter Insured in Property Insurance under Chinese Law**

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**Abstract:**

*This article critically examines the Chinese Insurance Law and judicial rules regarding assignment of insurance policy with the transfer of the subject matter of insurance in property insurance and comparatively discusses the “conditional assignment” and the “automatic assignment” of insurance policies in common law and civil law jurisdictions. Particular attention is paid to the key issues regarding increase of risk upon assignment of subject matter and insurer’s remedies for material increase of risk. The assignee has a duty to inform the insurer of the assignment of subject matter. If the assignee fails to do so, the insurer has the right to reject the assignee’s claim for loss which is caused by the materially increased risk after the assignment, but is nevertheless liable for the loss which is not caused by the materially increased risk. Sometimes the risk has materially increased but there is no causal connection between the increased risk and the loss. The insurer would have raised premium had it become aware of the increase of risk, the insurer therefore bears higher risk but received lower premium. To resolve this problem, it is suggested that the insurer be allowed to reduce its liability proportionately by the amount that fairly represents the extent to which its interest was prejudiced.*

**Introduction**

A policy of insurance, being a chose in action,[[1]](#footnote-1) is prima facie freely assignable.[[2]](#footnote-2) Under the general heading of assignment, three distinct but closely related topics are involved. The first concerns the effect of an assignment by the insured of the subject matter of his insurance policy. The second is the assignment of insurance policy which is attached to the subject matter of the insurance, and the third concerns the assignment of right to proceeds which is not the assignment of the insurance policy itself but merely of the right to recover insurance proceeds payable under the policy. [[3]](#footnote-3) This article considers the assignment of insurance policy itself with the assignment of the subject matter of the insurance policy in property insurance, but does not consider the assignment in the context of life insurance which was examined elsewhere.[[4]](#footnote-4)

The assignment of subject matter of insurance by way of purchases, gifts, inheritance etc is a common practice. Certain issues often arise from this practice, namely, whether the insurance policy tying to the particular property will lapse upon the assignment of that property or be assigned to the purchaser of that property automatically or on the satisfaction of certain conditions; whether the insured or the assignee is required to notify the insurer of the assignment of the subject matter of the insurance policy; what options are available to the insurer upon being notified of the assignment; what is the consequence for failure in notifying the insurer of the assignment in the case of a material increase of risk as a result of the assignment of the subject matter of insurance. These issues are critically analysed in this study.

The primary source of legal rules regulating the assignment of insurance policy with the transfer of subject matter insured lies in art.49 of the Insurance Law 2015.[[5]](#footnote-5) The Supreme People’s Court of China (the SPC), in its fourth judicial Interpretation on Certain Issues Concerning the Application of the Insurance Law (the SPC Interpretation IV), [[6]](#footnote-6) provides judicial rules relating to assignments of the subject matter of insurance and the insurance policy. Rules concerning the effect of assignment of movable and real properties are also provided in the Civil Code of the People’s Republic of China 2020 (the Civil Code). [[7]](#footnote-7)

This article critically examines the current position in Chinese laws, [[8]](#footnote-8) and comparatively discusses the positions in common law and civil law jurisdictions relating to assignment of property insurance policy with the assignment of subject matter of insurance in respect of the rights and obligations of the insurer, the assignor and the assignee in these distinct but closely related assignment processes. Discussions focus on art.49 of the Insurance Law 2015 and relevant rules in the SPC Interpretation IV, with particular attention to the key issues as to the increase of risk upon assignment of the subject matter, insurer’s remedies for material increase of risk and the consequence for the assignee’s failure in notifying the insurer of the increase of risk. It is argued that the Chinese law regarding these key issues is unclear and unfair, and needs amendments. This article not only critically analyses the problems with the key issues but also works out solutions to the problems with a view to making the rules clearer and fairer in this important but overlooked area of the Insurance Law.

**Assignment of the subject matter of insurance and insurable interest in the subject matter**

A property insurance policy cannot be assigned in the absence of the assignment of its subject matter; otherwise the assignee would have no insurable interest. Because of the close connection between the assignment of subject matter and the assignment of insurance policy, it is necessary to have a look at the relevant provisions in relation to the assignment of subject matter of insurance.

The assignment of subject matter usually occurs where the insured property is sold or otherwise disposed of by the insured. Article 49(1) of the Insurance Law sets out the rule that where the subject matter of a property insurance policy is assigned, the insurance policy can be automatically assigned to the purchaser of the subject matter, but does not specify the point in time when the assignment of the subject of the insurance will take place. Then the question arises as to whether the assignment of the subject matter of insurance should be deemed to take place at the time when the transfer of the ownership of the property has completed or when the risk to the subject matter has passed to the purchaser of the property. In order to find an answer to this question, we will first take a look at the rules of law in respect of transfer of ownership and transfer of risk of the property.

The rules of law governing assignment of ownership of property and transfer of risk are provided in the Civil Code and vary depending on the nature of the property to be transferred. As to the matter of assignment of ownership, the Civil Code provides different rules for real property and for movable property. For the assignment of a real property (such as a house), the real right of the property becomes effective after it is registered according to law, it has no effect if it is not registered according to law, except it is otherwise prescribed by any law.[[9]](#footnote-9) Here, the transfer of ownership of real property occurs at the time when the property has been registered. For a movable property, the general rule is that the transfer of the real rights becomes effective upon delivery of the property, except it is otherwise prescribed by any law.[[10]](#footnote-10) This general rule is subject to special stipulations of law, i.e. the transfer of ownership of some movable properties is sometimes determined by the law, rather than upon the delivery of subject matter. For example, ships, aircrafts or motor vehicles must be registered for the transfer of ownership. [[11]](#footnote-11) In addition, parties may make agreement as to the transfer of ownership of the subject matter. For example, if there is an agreement in a sale contract that the ownership is retained with the seller before the buyer pays the full price of the subject matter, then this agreement prevails. [[12]](#footnote-12)

As to the matter of passing of risk of a property, as a general rule, 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. [[13]](#footnote-13) In other words, the risk of loss passes to the buyer at the time of delivery of the subject matter. For certain movable property, transfer of ownership and pass of risk do not occur at the same time. For example, the buyer of a motor vehicle bears the risk when the vehicle has been delivered to him, but the ownership will be transferred to him when the vehicle has been registered. In the sale of real property, a contract of transfer of a real property becomes effective upon conclusion of the contract unless otherwise provided by law or the parties agree otherwise, and the validity of the contract is not affected where the property rights have not been registered. [[14]](#footnote-14) The purchaser of the real property is bound by such a contract. This implies that the purchaser starts to bear the risk to the damage or loss of the real property from the date of contract. But the ownership of the real property can be passed to the purchaser at the time of registration of the property.[[15]](#footnote-15)

The next question arises as to whether the assignee has acquired an insurable interest in the subject matter at the time when the risk of the subject matter has passed to him. The insured in property insurance must possess an insurable interest in the subject matter, otherwise he cannot recover for loss under the insurance policy.[[16]](#footnote-16) Article 12 of the Insurance Law defines the insurable interest as “a legally recognized interest in the subject matter of insurance”. Under this narrow test of insurable interest, the insured must show that his insurable interest in the property is legally recognized. But the Insurance Law does not provide a clear definition of the meaning of “a legally recognized interest”. This unclearness gives rise to judicial difficulties. Different courts may reach different judgements on a similar set of facts. [[17]](#footnote-17)

In the event that the purchaser has not completed the registration of the property but the risk of the property has passed to him, the dispute often arises as to whether the purchaser has a legally recognized interest in the subject matter. The purpose of insurance is to cover risk of loss, if the risk passes to the purchaser, he should be deemed to have acquired insurable interest in the subject matter because he will suffer financial loss if the subject matter is damaged. However, the purchaser’s insurable interest may sometimes not be recognised in Chinese judicial practice in the situation where only the risk has passed to him.

The SPC has, in art.1 of its Interpretation IV, provided a solution by relaxing the strictness of the legal recognised interest: “where the subject matter insured has been delivered to the assignee and the assignee who assumes the risk of destruction or loss of the subject matter insured claims the exercise of rights of the insured in accordance with the provisions of [art.48](javascript:ESLC(252626,48)) [[18]](#footnote-18) and art.[49](javascript:ESLC(252626,49)) of the [Insurance Law](javascript:ESLC(252626,0)), although the assignee has not undergone ownership registration in accordance with the law, the people’s court shall uphold such a claim.” The article indicates that if the risk has passed to the assignee, he has then acquired an insurable interest in the subject matter. Consequently, he is entitled to make claims under the insurance policy. Therefore it is reasonable to suggest that the assignment of subject matter of an insurance policy as mentioned in art.49 of the Insurance Law should be deemed to take place at the time when the risk of loss of the subject matter has passed to the assignee.

**Assignment of property insurance policy together with the assignment of subject matter in common law and civil law jurisdictions**

Where the insured assigns the subject matter of his insurance policy to the assignee, the approach to the question of how the insurance policy will be disposed varies from one jurisdiction to the next. Generally, there are two approaches. One may be called “conditional assignment” of the policy, under which some conditions must be met for a valid assignment of insurance policy to the assignee of the subject matter insured. Common law jurisdictions usually take this approach. The other may be termed as “automatic assignment”, under which the insurance policy is automatically assigned to the assignee with the assignment of the subject matter. Some civil law jurisdictions adopt this approach. Some others may take both conditional and automatic assignment approach, depending on the subject matter of the insurance policy to be transferred. Before the critical analysis of art.49 of the Insurance Law, it is necessary and helpful to look at the characteristics of these two approaches in different jurisdictions.

***Assignment of insurance policy or proceeds of policy in common law jurisdictions***

**1. Assignment of insurance policy**

The common law jurisdictions, such as Australia, Hong Kong SAR, New Zealand, Singapore, UK, USA and the other 80 or so jurisdictions that have adopted the Marine Insurance Act 1906 (MIA), take the approach of “conditional assignment” of insurance policy, under which certain conditions must be fulfilled for a valid assignment of an insurance policy. [[19]](#footnote-19) Taking English law as the representative of the conditional assignment approach, a valid assignment of a property insurance policy is subject to the fulfilment of three conditions: the consent of the insurer must be obtained; the assignment of the policy and its underlying subject matter must be contemporaneous in order to avoid problems arising from insurable interest; and the assignment must be in proper form. These conditions arise as a matter of law, and are additional to any restrictions which are contained in the agreement between the parties under which the assignment is to be effected.

The “conditional assignment” treats an insurance policy as a personal contract to the particular insured, so that the assignment of the insured property will not itself operate as an assignment of the insurance policy to the assignee unless the policy itself provides otherwise. This is specifically stated in s.15 of the MIA,[[20]](#footnote-20) a principle which applies to all classes of insurance. The explanation is relatively simple: the bundle of rights considered “property” does not include contracts that have as their subject the property itself. The one exception to this observation involves situations where the insurance policy provides that the coverage runs “for the account of whom it may concern” or language to similar effect. This clause, which appears most often in marine insurance policies, means that any person who subsequently acquires an interest in the property is covered by the policy. Thus, assignment of a property insurance policy usually requires that specific action be taken with respect to the policy itself.

The first condition to be met for a valid assignment of a property insurance policy is that the consent of the insurer must be obtained. Property insurance policies typically contain a clause prohibiting assignment of the policy unless the insurer consents. Insurers desire to make their own decisions about which risks they will underwrite. The risk of fire in a particular residence is a function not only of the home’s characteristic but also of the person living in the residence. Thus, the insurer does not want any particular insured to have an unrestricted right to assign the policy to anyone chosen, even if the purported assignee has an insurable interest in the property. Property insurance is a personal contract of indemnity, and is on the insured’s interest in the property, not on the property itself. Consequently, non-life and non-marine policies are not really assignable without the consent of the insurer. A purported assignment of a property insurance policy is void without the consent of the insurer. In *Peters v General Accident Fire and Life Assurance Corp Ltd*,[[21]](#footnote-21) the vendor of a van handed over his insurance policy issued by the insurers to the purchaser. The latter subsequently injured the claimant by the negligent driving of the van. It was held that the insurers were not liable under the policy, as the insured vendor could not simply assign his motor policy to the purchaser without the insurers’ consent. The policy would have been lapsed upon the sale of the van.[[22]](#footnote-22) Consent, where it is given, takes effect as a novation, rather than as a continuation of the old policy substituting the assignee as the insured party. There is thus a new contract, possibly on new terms and at a different premium rate. It is open to insurers to waive the requirement for their consent by including a term in the policy which allows its assignment.

The second condition for a valid assignment of a property insurance policy is that the assignee must have an insurable interest in the subject matter of insurance, and the assignment of the policy and its underlying subject matter must be contemporaneous in order to avoid problems arising from insurable interest.[[23]](#footnote-23) The requirement of contemporaneity is well established in marine insurance,[[24]](#footnote-24) and applicable to non-marine policies.

The third condition for a valid assignment of a property insurance policy is that the assignment must be in proper form. [[25]](#footnote-25) The common law rule is that choses in action cannot be assigned to another without the assent of the debtor. This rule has been modified by statutes. The Policies of Assurance Act 1867 and the Marine Insurance Act 1906 (s.50) make life and marine insurance policies respectively assignable at law, rendering these forms of choses in action exceptions to the general principle of non-assignability at law. Section 136 of the Property Act 1925 makes all debts and other things in actions assignable at law, without prejudice to the possibility of assignment in equity and under specific insurance legislation. The current position of English law is that: any policy may be assigned in equity; any policy may be assigned at law under s.136 of the Property Act 1925; a marine policy may in the alternative be assigned under s.50 of the Marine Insurance Act 1906; and a life policy may in the alternative to be assigned under the Policies of Assurance Act 1867.

Following a valid legal assignment, the assignee steps into the shoes of the insured (the assignor) and the insured drops out of the picture, any misconduct on the insured’s part will not preclude an action under the policy by the assignee.[[26]](#footnote-26) A legal assignee has the right to sue the insurer in his own name and gives a good discharge of the policy monies.[[27]](#footnote-27) However, any assignment of the policy does not transfer to the assignee rights other than those arising under the policy itself.[[28]](#footnote-28)

An assignment of an insurance policy, whether it is legal or equitable, is subject to equities, this means that while the assignee is allowed to sue the insurer, the insurer retains as against the assignee all rights that it had against the assignor at the date of assignment. Most significantly, any defence available to the insurer against the insured (the assignor) will also prevail against the assignee.[[29]](#footnote-29) Thus, if the policy is voidable against the insured for breach of the duty of utmost good faith it is also voidable against an assignee even if he is unaware of the insured’s breach of duty.[[30]](#footnote-30) The conduct of the assignor after the assignment will be immaterial as the insurer’s contract is at that stage with the assignee.

Similar to the English law position, under Australian law, an insurance contract is a personal contract that insures the insured’s interest in its subject matter, not the subject matter itself. [[31]](#footnote-31) An insured can assign a property insurance policy to some other person, but only with the consent of the insurer. [[32]](#footnote-32) In *Ziel Nominees Pty Ltd v VACC Insurance Co Ltd*,[[33]](#footnote-33) a fire caused substantial damage to improvements on land subject to a contract of sale. The property was insured by the vendor. The vendor assigned the policy to the purchaser on the settlement of the sale contract. When the purchaser sought to recover, the insurer denied liability. The High Court held that the purchaser had no claim on the insurance policy because it was not a party to, or mentioned by, the policy.[[34]](#footnote-34) The insurance policy was one of indemnity. As the vendor had received his price by the time the assignment of the insurance policy became effective, he had suffered no loss and the insurer had, thereby, a complete defence to any claim by the vendor or by his assignee.

Section 50 of the Insurance Contracts Act 1984 (ICA) gets round this problem in relation to a sale or assignment which will give the purchaser or assignee a right to occupy or use of a building, by deeming the purchaser to be an insured under the vendor’s insurance policy over the building from the time when the risk of loss or damage to the building passes to the purchaser to the time when the sale of the property is completed.[[35]](#footnote-35) This provision gives the purchaser a direct right against the vendor’s insurer.

**2. Assignment of proceeds of policy**

The aforementioned rules are related to assignment of insurance policies. The right of recovery of proceeds under an insurance policy is a chose in action and can also be assigned either at law under the terms of s.136 of the Law of Property Act 1925 or in equity. A legal assignment under s.136 is possible only where there is an established present claim; the right to make a claim against the insurers in the event that a claim might arise at some future point is not assignable. To bind the insurer and make it directly liable to pay the assignee, notice must be given to it so that the assignment is legal. The assignee can sue the insurer in his own name. By contrast, if the assignment is purely equitable, then assuming that the necessary intention to effect an assignment can be shown[[36]](#footnote-36) the insured must be joined to the action as claimant if he consents, or otherwise as defendant, subject to the power of the court to dispense with joinder if the insured does not intend to make any conflicting claim. It is immaterial whether the proceeds of the policy are assigned before or after the loss [[37]](#footnote-37) and the consent of the insurer is irrelevant.[[38]](#footnote-38)

The assignee need not possess any insurable interest, so that no assignment of the subject matter of the policy is also required. However, the assignee will recover only what the insured (assignor) is entitled to, that is the measure of the latter’s insurable interest at the date of loss. In line with the principle that assignment takes effect subject to equities, any obligations imposed on the insured under the policy remain to be performed by him even after assignment, so if the insured commits an act which amounts to a breach of a policy term before or after the assignment of the proceeds the insurers are entitled to rely upon that act in the usual way and to refuse to pay.[[39]](#footnote-39) On the other hand, the insurer cannot as against the assignee assert a separate counterclaim which it has against the insured.[[40]](#footnote-40)

There is nevertheless a potential objection in principle to the assignment of the proceeds of an indemnity policy. [[41]](#footnote-41) The claim remains that of the insured, so that what has to be looked at is the loss suffered by the insured. The assignee will recover only what the insured is entitled to. Any sum received by the insured under an indemnity policy from a third party diminishes the amount of the insured’s loss for which recovery is possible under the policy. It was held in *Colonia Versicherung AG v Amoco Oil Co*[[42]](#footnote-42) that the liability of an insurer to pay a claim to the assignee was diminished by the sum received by the insured, even though the effect was to negative the purpose of the assignment. In *Toomey v IAG New Zealand Ltd*, [[43]](#footnote-43) it was recognised that assignment of an insurance claim to a purchaser might deprive the purchaser of any claim under the policy. There, the claimants purchased a property that had been damaged by an earthquake and then repaired and sold for market value. The purchaser also took an assignment of the benefits of the vendor’s insurance policy. Subsequently, further damage was discovered and a claim was brought against the insurers. The court struck out the claim. The claim had to be loss suffered by the assured vendor, but the vendor had suffered no loss because the full value of the house had been received on sale.

Although the proceeds of a policy are assignable, an important restriction on that principle was imposed by the New Zealand Court of Appeal in *Bryant v Primary Industries Ltd,* [[44]](#footnote-44) that is, no assignment of personal rights under the policy is permitted.[[45]](#footnote-45) In *Pryant*, the insured’s farm was covered by a fire policy that was insured on an indemnity basis for $14,060 and an “excess of indemnity” basis up to $48,101. The cover under the latter, but not the former, head was subject to a special condition which read: “If the insured be unable or unwilling to effect reinstatement or replacement of the property … the company shall be under no liability in respect of this item of insurance.” The buildings were destroyed by fire on 27 May 1982, on the morning on which the farm was to be auctioned. It was decided to proceed with the auction on the basis that the insurance claim was assigned to the purchaser. The Court of Appeal allowed the purchaser’s claim for indemnity cover (the repair costs), but rejected the purchaser’s claim for the excess of indemnity cover. On the latter point the Court of Appeal held that the policy covered only the loss suffered by the insured, and the sums payable in respect of that loss were not assignable. As stated by the court: “By selling the property without rebuilding, the vendors put an end to the possibility of invoking the excess of indemnity insurance.” The *Bryant* turns on the fact that payment was conditional on rebuilding by the insured, and in the absence of rebuilding then there was no recovery. It also follows that rebuilding by the assignee would not suffice, because the obligation to rebuild was a personal one imposed upon the insured which is not assignable without the insurer’s consent.

This longstanding principle that an insured’s entitlement to reinstatement value is not assignable without the insurer’s consent is affirmed in *Xu & Anor v IAG* [[46]](#footnote-46) by the Supreme Court of New Zealand. The Barlows (the insureds) owned a property that was damaged in the Canterbury earthquakes. Under their policy the Barlows were entitled to: (i) be paid the cost of repairing their home to the same condition as when new, if they reinstated the property; or (ii) if they did not reinstate their home, the lesser of the indemnity value or the estimated cost of restoring their home to its pre-loss condition. The Barlows made a claim, but sold the property three years later without resolving their claim. As part of the sale process the Barlows assigned their rights under the insurance policy. The new owner (the assignee) sued IAG claiming that they were entitled to the reinstatement value under option (i) above. IAG rejected this, saying that the right to reinstatement was personal to the insured at the time of the earthquakes. As the Barlows had not reinstated the home and had no intention of ever doing so, the right to reinstatement had not accrued and was therefore not assignable without IAG’s consent. IAG argued that the new owner was only entitled to the indemnity value under option (ii) because the right to indemnity accrued when the damage occurred and was therefore assignable. An accrued right to payment under a policy can be assigned if there is no clause in the policy to the contrary.

The Supreme Court held by a majority of 3:2 that, under the policy, the right to replacement value was conditional on reinstatement by the insured and therefore could not be assigned without the insurer’s consent. In doing so the Supreme Court confirmed that the right to reinstatement cannot be assigned. The primary reason underpinning the Supreme Court’s decision is the ‘moral hazard’ associated with replacement insurance. One of the key principles of insurance law is that an insured is entitled to receive a full indemnity for his loss. A replacement insurance policy does not fit easily with this principle because the property may be worth more reinstated than in its original state. If an assignment of this benefit was permitted, the insurer would be required to provide cover to a purchaser it knows nothing about and might not have been prepared to insure in the first place. The Court noted that given this moral hazard, “insistence by insurers on reinstatement by the insured is at least rational.” The Court also mentioned that the insurance industry had been operating on the basis that the right to reinstatement is not assignable, and *Bryant* had been relied upon by insurers for 30 years and it would be wrong to create uncertainty by overruling that decision.

The effect of *Xu* is that the default position is that the exercise of the right to reinstate is one personal to the insured, and if the claim is assigned it will not carry that right with it and thus the higher measure of indemnity available on reinstatement. However, it was made clear by the majority that cannot be any objection in principle to an insurer providing otherwise. In short, all will turn upon whether the policy imposes a contingency on the recovery of reinstatement costs in the form of a personal performance by the insured.[[47]](#footnote-47)

***Approaches to assignment of insurance policy in civil law jurisdictions***

In contrast to the common law position of conditional assignment of insurance policies, many civil law jurisdictions, such as China,[[48]](#footnote-48) Germany,[[49]](#footnote-49) Italy,[[50]](#footnote-50) Macao SAR,[[51]](#footnote-51) and South Korea,[[52]](#footnote-52) take the approach of “automatic assignment” of insurance policies, by which an insurance policy is automatically assigned to the assignee at the same time when the assignment of the subject matter takes place.

Under the German Insurance Contract Act 2008, if the policyholder sells the subject of the insurance, the purchaser of the subject matter shall bear the policyholder’s rights and obligations under the insurance policy during the period of his ownership.[[53]](#footnote-53) The seller and the buyer shall be liable as joint and several debtors for the premium payable during the current period of insurance at such time as the seller assigns the insurance policy to the buyer.[[54]](#footnote-54) The insurer may only accept the assignment of the insurance policy where he has become aware of the assignment. [[55]](#footnote-55) The insurer shall be entitled to terminate the insurance contract vis-à-vis the purchaser of the subject matter by serving a notice of one month period. The right to terminate the contract shall lapse if the insurer does not exercise the right of termination within one month of the insurer learning of the sale of the subject matter of the insurance. [[56]](#footnote-56)

In Macao SAR, the automatic assignment of insurance policy to the purchaser of the subject matter of the insurance is clearly set out in art.1012 of the Macao Commercial Code 1999, which provides that after the subject matter of insurance is assigned, the rights and obligations arising from the insurance contract belong to the purchaser of the subject matter of the insurance, except those that fall into civil liability insurance. [[57]](#footnote-57) The insurer has the right to terminate the contract within one month from the time of knowing of the transfer, but the termination of the contract shall take effect 15 days after the notification of termination is given to the purchaser by registered mail.[[58]](#footnote-58)

In South Korea, article 679 of the Commercial Act of South Korea provides that where the insured has transferred the subject matter insured, the transferee shall be presumed to have succeeded to the rights and obligations under an insurance contract. The transferor or transferee of the subject matter insured shall without delay notify an insurer of such fact.

In some other jurisdictions (such as France), both of the “conditional assignment” and “automatic assignment” approaches are adopted, but which approach is taken depends on the type of the property transferred: if the subject matter insured is a movable property, the insurance policy will lapse from the time when the subject matter is transferred;[[59]](#footnote-59) while if it is a real property, the policy will be automatically assigned to the assignee with the transfer of the subject matter [[60]](#footnote-60) upon some necessary formalities for the assignment being carried out.

**Evolution of Chinese law in relation to assignment of insurance policy**

Chinese Insurance law has experienced the transformation of the approach to assignment of insurance policy from “conditional assignment” to “automatic assignment”. The 1995 [[61]](#footnote-61) and 2002 [[62]](#footnote-62) versions of the Insurance Law adopt the approach of “conditional assignment”; while the 2009 [[63]](#footnote-63) and 2015 [[64]](#footnote-64) versions of the Insurance Law take the approach of “automatic assignment” of insurance policy together with the assignment of the subject matter.

As aforesaid, the main focus of this paper is to examine art.49 of the Insurance Law 2015,[[65]](#footnote-65) which represents the current position relating to the assignment of property insurance policy with the assignment of the subject matter of insurance. In this part, we take a look at the evolution of the two different approaches in the different versions of the Insurance Law.

***“Conditional assignment” of the insurance policy: the position in the past***

The 1995 and 2002 versions of the Insurance Law adopt the conditional assignment of insurance policy. Article 33 of the Insurance Law 1995 (art.34 of the 2002 version) provides that “the insurer shall be notified of the assignment of the subject matter of insurance, and after the insurer agrees to continue to underwrite the insurance, the contract shall be amended according to law…” Under this approach, an insurance policy is treated as a personal contract, so that the assignment of the subject matter insured does not itself operate as an assignment of the policy to the assignee. A valid assignment of insurance policy is subject to the fulfilment of conditions: the notice of the assignment of the subject matter insured must be given to the insurer by either the insured or the assignee; the consent of the insurer must be obtained; and the insurance contract must be amended.

Article 33 does not provide the consequence for failure in notifying the insurer of the assignment of the subject matter, but by implication it can be understood that the insurance policy will lapse without serving a notice to the insurer upon the assignment of the subject matter even if it is handed over to the assignee. This means that neither the insured nor the assignee is covered under that policy upon the assignment of the subject matter. The insured has no insurable interest any more, thus cannot recover under the policy. The assignee has insurable interest in the subject matter, but the effect of the policy lapses, so he is not covered by the policy.

If the insured or the assignee has informed the insurer of the assignment of the subject matter, the insurer should have the options to continue with the policy or to terminate it. If the insurer decides to continue with the policy, he may add an annotation into the policy, amend the contract by changing the name of the insured, and alter premium or the terms of the policy if necessary.

There are a number of deficiencies in art.33 of the Insurance Law 1995. First, it is not uncommon that people are unaware of the legal requirements in relation to the assignment of insurance policy with the assignment of the subject matter, so in practice an assignment notice is rarely served to the insurer by the insured or the assignee. As a result, the insurer often turned down the assignee’s claim on the ground that the assignment of the policy was invalid and the assignee was not the insured party, so he could not recover under the policy. In *Ma v the Insurance Company Beijing Branch,* [[66]](#footnote-66) the owner of the vehicle sold the vehicle and passes the insurance policy to Mr Ma. Neither the insured nor Ma notified the insurer of the assignment of the insured vehicle. Ma claimed for the damage of the vehicle under the insurance policy after a road accident, but was rejected by the insurer on the ground that neither the insured nor the assignee notified it of the assignment of the insured vehicle. The court held that an assignment of the insurance policy was invalid without notice being given to the insurer and without the consent of the insurer, therefore, the insurer was not liable because Ma, the assignee, was not the insured under the policy.

Secondly, article 33 of the 1995 version does not provide whether the coverage is available to the assignee between the time of notification to the insurer of the assignment of the subject matter and the time of the insurer’s decision as to the continuation of the policy. It was therefore unclear whether the insurer was liable to the assignee if the insured event occurred during that period. The insurer might take this loophole to reject an assignee’s claim for a loss occurred during that period.

Thirdly, it is submitted that to invalid an insurance policy entirely on the ground of non-notification of the assignment of the subject matter is unjustified. Because if there is no material increase of risk covered under the policy upon the assignment of the subject matter, the probability for an insured event to happen may not change. So, in this sense, denying the validity of an insurance policy by reason of the assignment of the subject matter is lack of actuarial basis.

The deficiencies in 1995 and 2002 versions were addressed in art.49 of the Insurance Law 2009, which introduced the approach of “automatic assignment” of the insurance policy. Article 49 has remained unchanged in 2015 version.

***“Automatic assignment” of the insurance policy: the present position***

Article 49(1) of the Insurance Law 2015 provides that “where the subject matter insured is assigned, the assignee of the subject matter insured shall enjoy the rights and assume the obligations of the insured.” This indicates that the insurance policy is automatically transferred to the assignee upon the assignment of the subject matter. As discussed earlier, the assignment of the subject matter should take place at the time when the risk of the subject matter has passed to the assignee. Therefore the assignment of the insurance policy occurs contemporaneously with the assignment of the subject matter. The insurer’s consent is not a condition for the continuation of the insurance. The assignee as the new insured is automatically covered under the same policy except for the case where the risk is significantly increased as a result of the assignment of the subject matter.[[67]](#footnote-67)

This “automatic assignment” seems to have several advantages: First, it saves time and facilitates the business efficacy, as the assignee does not need to effect a new policy for the subject matter assigned to him and the insurer does not need to refund the unused premium to the assignor/insured. The continuation of the policy will not be broken by the assignment of the subject matter. It bridges the gap between the termination of the original insurance policy and conclusion of a new policy during which there may be no insurance cover. If the policy is deemed to lapse due to the lack of the assignment notification to the insurer [[68]](#footnote-68) the effect of the lapse would not only negatively affect the assignee’s interest that is not covered by the policy, but also affect the insurer’s business. The assignee may turn to other insurers for a new insurance policy. The insurer needs to repay to the insured the unused premium because of the lapse of the original policy.

Secondly, “automatic assignment” approach may to some extent protect the insurer’s reputation. Frequent rejections of claims by the insurer on the ground of not being notified of the assignment may damage the insurers’ reputation and eventually harm the insurance industry as a whole. Under art.49, the continuation of the policy does not depend on the insurer’s consent, and assignee’s claims cannot be rejected where the loss is not caused by the material increase of risk upon the assignment of the subject matter.[[69]](#footnote-69)

Moreover, the assignment of the subject matter insured from one person to another may not necessarily result in a material increase of risk and therefore the probability of the occurrence of the insured event may not significantly changed. If a material increase of the risk after assignment of the subject matter does occur, the insurer has the right to raise the premium or rescind the contract according art.49(3) of the Insurance Law. This point will be considered below. From the aforementioned analysis, automatic assignment of the policy with assignment of the subject matter seems more convenient and reasonable.

The Insurance Law does not provide any rule in respect of the question of whether the successor of a property can also inherit the insured’s rights and obligations under the insurance policy, where the insured dies and the successor of the insured inherits the subject matter insured. The SPC has recently filled this lacuna. Article 3 of SPC Interpretation IV provides that “Where the insured dies and the party succeeding to the subject matter insured claims the succession to the rights and obligations of the insured under the policy, the people’s court shall uphold such a claim.” It is now clear that the successor and the assignee of the subject matter insured are treated the same in that both can succeed the insured’s rights and obligations under the insurance policy from the time when the subject matter insured is transferred to them.

**The duty of notification of the assignment of the subject matter insured**

A duty to notify the insurer of the assignment of the subject matter is imposed on the insured and the assignee by art. 49(2) of the Insurance Law, which provides that “where the subject matter insured is assigned, the insured or the assignee shall notify the insurer thereof in a timely manner...”

Upon having received the notification, the insurer may amend the policy terms and go through other necessary formalities. The parties need to complete the process for the assignment of the policy, such as the change of the parties’ names from the original insured/assignor to the new insured/assignee, the change of the address and the telephone number and so on.

By art.49(2) of the Insurance Law, the insured or the assignee must notify the insurer of the assignment of the subject matter insured “*in a timely manner”*. This requirement is important because, after the assignment of the subject matter, the sooner the better for the parties to complete the necessary procedure of the transfer of the policy. It is particularly important in the situation where a material increase of risk occurs as a result of the assignment, because the sooner the notification is given to the insurer, the quicker the insurer may make the decision on raising the premium or rescinding the contract.[[70]](#footnote-70) However, the phrase of “*in a timely manner*” is vague, and may cause dispute as to how quickly the notice must be given to meet the requirement of “*in a timely manner”*. In the absence of statutory provision, it is suggested that it should be necessary to set up a time-limit (say two weeks) from the date when the assignment of the subject matter has been completed, the insured or the assignee should notify the insurer of the assignment within this period. The insurer should be liable for the insured loss which occurs within the period.

**Material increase of risk upon assignment of the subject matter insured**

For an assignment of the subject matter insured from one person to another, the matter that an insurer is mostly concerned with is whether the risks insured against have been increased upon the assignment and, if so, the extent of the increase. The terms and premium rate of the insurance policy should be commensurate with the risks covered and the extent of the insurer’s liability, which were fixed at the time of conclusion of the contract. It is possible that the level of risk of the subject matter may increase after the assignment of the subject matter. The material increase of risk will affect the basis on which the insurance contract was concluded. Therefore the insurer should be given options in the case of a material increase of risk upon the assignment of subject matter. For this sake, art.49(3) of the Insurance Law provides the insurer with the options to raise premium or rescind the contract, it states that “where the subject matter insured is assigned and the level of risk increases materially as a result, the insurer may in accordance with the contract raise the premiums or rescind the contract within 30 days of receipt of the notice provided in the preceding paragraph.[[71]](#footnote-71) Where the insurer rescinds the contract, it shall refund to the proposer the premiums received after deducting the premiums in accordance with the contract for the period from the date of commencement of the insurance liability to the date of rescission.” This sub-article raises several important issues. First, how can the insurer become aware of a material increase of risk? Secondly, what is a material increase of risk? Thirdly, what factors should be considered in determining whether an increase of risk can be regarded as material? And fourthly, is the insurance coverage available to the assignee during the 30-day period? These questions are critically discussed in turn below.

***How the insurer can know there is a material increase of risk***

While art.49(2) of the Insurance Law requires the insured or the assignee to notify the insurer of the fact of the assignment of the subject matter, art.49(3) does not expressly require the insured or the assignee to inform the insurer of the increase of risk. The questions may arise as to how the insurer may obtain the information of the increase of risk, and how the assignee can understand he should inform the insurer of a material increase of the risk upon the assignment of the subject matter.

In the absence of the express provision imposing on the insured or the assignee the duty of notification of material increase of risk, it is submitted that it is up to the insurer to find out whether or not there is any material increase of risk as a result of assignment. For this sake, upon being informed of the assignment of the subject matter, the insurer may make inquiry to the assignee to elicit information from him so as to establish whether there is any material increase of risk. The assignee must truthfully reply to the insurer’s inquiry in accordance with the principle of good faith. This suggestion is made by referring to art.16 of the Insurance Law for the proposer’s pre-contract duty of disclosure of material facts to insurer, which provides “When entering into an insurance contract, the insurer may raise questions concerning relevant details of the insured subject matter or of the insured, the proposer shall truthfully disclose such details to the insurer.” This is called as inquiry disclosure.[[72]](#footnote-72)

Where the insurer has worked out on the basis of the information from the assignee that there is a material increase of risk after the assignment of the subject matter, the insurer may decide to continue to cover the subject matter under the same policy or to raise premium or to rescind the policy in accordance with the contract.[[73]](#footnote-73) If there is no material increase of risk, the insurer has no right to raise premium or rescind the contract, but to continue with the policy.[[74]](#footnote-74) The insurer may change the name of the original insured to the name of the assignee as the new insured, so that the assignee can continue to enjoy the rights under the insurance policy and assume the obligations to pay the premium to the insurer if the original insured has not paid the full premium.[[75]](#footnote-75) If the insurer accepts the increase of risk and raises the premium, the increased risk will be covered under the policy. The level of the increase of premium should be reasonable; if it is unreasonable the assignee should be entitled to reject it and terminate the contract. If the risk has increased to such a degree that the insurer would not have accepted the risk at the time of contract, the insurer may rescind the contract.

***Material increase of risk***

The Insurance Law does not define the phrase of “material increase of risk”, there is no such a test to be followed in determining what kind of increase of risk would be regarded as a material increase. The task at this juncture is to formulate a legal definition based on which a test of material increase of risk can be established.

Reference can be made to the pre-contractual duty of disclosure of material facts. With regard to the insured’s pre-contract duty of disclosure, the Insurance Law provides that a material fact is a fact which shall sufficiently influence the insurer’s decision on whether or not it will accept the insurance or raise the premium rate.[[76]](#footnote-76) The test of materiality of the information is thus determined as the prudent insurer decisive influence test.[[77]](#footnote-77) By reference to the test of materiality for pre-contract information, the test of material increase of risk upon assignment of the subject matter may be established as such: there is a material increase of risk if it is increased to such an extent that the insurer would not have accepted the insurance, or would have accepted the insurance at a higher premium had the insurer known about the increase of risk at the time of entering into the contract. The burden of proof is on the insurer. To determine whether the insurer would charge higher premium or rescind the contract for the increase of risk, reference should be taken retrospectively to the insurer’s hypothetical attitude at the time of formation of the contract. Namely, the insurer can increase the premium or rescind the contract in the event of increase of risk if it would have done so had it known the increase of risk at the time of formation of the contract.

The SPC Interpretation IV (art.4(2)) does not define what is a material increase of risk, but defines what is not regarded as a material increase of risk. It provides: “…where the degree of risk of the subject matter insured increases, but the increased risk falls within the scope of the coverage of the insurance contract which was contemplated or should be contemplated by the insurer when the insurance contract was concluded, it does not constitute a material increase of the degree of risk”. This article indicates that not all kinds of increase of risk are material but only those which would fall outside the scope of the coverage of the insurance contract which was not contemplated or should not be contemplated by the insurer when the insurance contract was concluded may constitute a material increase of risk.

***Factors to be considered in determining whether an increase of risk is material***

In practice, it is sometimes difficult to establish what kind of increase of risk can be regarded as a material increase, art.4(1) of the SPC Interpretation IV sets forth certain factors which may lead to significant increase of risk, it provides that “when the people’s court determines whether the subject matter insured has a material increase of the degree of risk as prescribed in art.49 and art.52 [[78]](#footnote-78) of the Insurance Law, the following factors may be comprehensively considered:

(1) Changes of the use of the subject matter insured;

(2) Changes of the scope of the use of the subject matter insured;

(3) Changes of the environment in which the subject matter insured is located;

(4) Changes of the subject matter insured due to refitting or any other reason;

(5) Changes of the owner, user or manager of the subject matter insured;

(6) The duration in which the increase of risk lasts;

(7) Other factors that may lead to the material increase of degree of risk.”

This list of the factors is very useful for an insured, an assignee or an insurer to understand what kind of increase of risk would be regarded as a material one. For example, in the above situation (1), a dwelling house is converted to a warehouse storing inflammable materials; this change can be regarded as a material increase of risk. In the situation (5), assignment of the subject matter to a new owner may result in an increase of risk. The assignee may have different personal characters as compared with the original insured (the assignor). These personal characters are important in influencing the risks covered under the insurance policy and thus the insurer’s decision as to whether to raise premium or rescind the contract.

***The insurance coverage is available to the assignee during the 30-day period***

If the degree of risk is significantly increased after the assignment of the subject matter, the insurer must make a decision on raising premium or terminating the contract within 30 days of receipt of the notice of the assignment,[[79]](#footnote-79) otherwise it should be taken as a waiver of the insurer’s right to do so. Then the insurer should be liable for losses which are caused by the material increase of the risk after the 30-day time limit. [[80]](#footnote-80)

A loss may occur during the 30-day period. The question here arises whether the insurer is liable to the assignee for the loss which is caused by the material increase of risk during the 30-day period. The Insurance Law is silent to this point. The SPC has answered this question in art.5 of the Interpretation IV, which stipulates that “where an insured event occurs after the insured or the assignee has issued the notice on the assignment of the subject matter insured to the insurer in a timely manner in accordance with law and before the insurer gives a reply, if the insured or the assignee claims against the insurer for the payment of the indemnity in accordance with the insurance contract, the people's court shall uphold such a claim.” This article makes it clear that during the period between the notification of the assignment and the insurer’s decision, there is no gap for the coverage of the insurance policy. The assignee is entitled to recover if an insured loss occurs during that period in accordance with the insurance contract. However, it is unclear whether or not the insurer is liable for a loss which is caused by a material increase of risk during the 30-day period. This issue can be resolved by the approach in art.4 of the SPC Interpretation II (2013),[[81]](#footnote-81) which provides that “Where an insurer has accepted an insurance application form filed by an insurance applicant and collected premiums, but has not decided whether to underwrite the insurance, if an insured incident occurs, and the insured or the beneficiary claims compensation or payment of insurance benefit from the insurer in accordance with the insurance contract, the people’s court shall support such a claim provided that the conditions for underwriting insurance are met; otherwise, the insurer shall not assume the insurance liability…”. Accordingly, where the insurer would have decided to terminate the contract after being notified of the assignment of the subject matter, the insurer should not be liable for the loss which is caused by a material increase of risk during the 30-day period. On the other hand, where the insurer would only have raised premium after being notified of the assignment, the insurer should be liable for the loss which is caused by a material increase of risk during the 30-day period, but should be entitled to reduce the amount to be paid proportionately to the ratio of premium it received and the premium it should have charged. This issue will be further discussed below.

**The consequence for failure in notifying the insurer of the assignment**

The consequence for failure in notifying the insurer of assignment of subject matter is provided in art.49(4) of the Insurance Law: “where the insured or the assignee fails to fulfil the obligation of giving notice provided in paragraph two of this article,[[82]](#footnote-82) an insured event occurs due to the material increase in the level of risk in respect of the subject matter insured as a result of the assignment, the insurer shall not be liable for indemnity payment.” Accordingly, if the insured or the assignee fails to perform the duty of notification, the remedy available to the insurer is to reject the assignee’s claim for a loss which is caused by a material increase of risk after the assignment. To reject such a claim, the insurer must prove that the loss is caused by a material increase of risk. By looking at art. 49(1), (2) and (4) together, it can be said that the duty of notification of assignment of subject matter is not mandatory because the insurer is still liable for loss if it is not caused by a material increase of risk after the assignment of the subject matter.

Judicial practice seems to uphold the above analysis. In *the People’s Insurance Company of China Property Co. Ltd Qiqi Haer City branch v Zhang Qinghua*,[[83]](#footnote-83) the owner of the car sold it to the Mr Zhang and the insurance policy was transferred to Zhang simultaneously. However, neither the seller nor Zhang notified the insurer of the assignments of the car and the policy. Zhang’s car was damaged beyond repair in a road accident. He claimed for the total loss but was rejected by the insurer on the ground that the seller or Zhang did not notify the insurer of the assignments of the car. The court held that according to art.49(4) of the Insurance Law, where the insured or the assignee fails to give notice to the insurer of the assignment, the insurer has right to reject a claim only if the insured event is caused by a material increase of risk in respect of the subject matter insured upon the assignment.[[84]](#footnote-84) Zhang used the car for private purpose, the insurer did not show evidence for any material increase of risk after the assignment of the car, and thus was liable for the loss.

***The shortcomings in art.49(4) of the Insurance Law***

In the case of the assignee’s failure in notifying the insurer of the assignment, the insurer is required to establish a causal connection between the loss and the increased risk before it can reject the claim.[[85]](#footnote-85) However, in some situations, the risk of the subject matter insured has materially increased but the loss is not caused by the increased risk, the insurer is nevertheless liable for the loss because of no causal connection between the increase of risk and the loss. If the insurer had become aware of the increase of the risk after the assignment of the subject matter, it would have raised premium or terminated the insurance policy. The problem in this situation is that the insurer bears the increased risk but receives a low premium which is not commensurate with the risk born.

This situation can be illustrated in a hypothetical case, John paid ¥2,500 premium for the insured amount of ¥50,000 of his car for private use. John sold his car and also assigned his insurance policy to Peter who used the car as a taxi but did not notify the insurer of the transfer of the car and the change of use of the car. The insurer would have increased premium for extra ¥500 because of the increase of risk of the car as a taxi had it been notified by Peter. The car was damaged in a road accident while Peter took passengers for money, the insurer can then refuse Peter’s claim for the loss because there was a causal connection between the loss and the increase of risk. If the car was stolen at night while it was parked in front of Peter’s garage, the insurer should be liable for the loss, as no causal connection can be established between the loss and the increase of risk. In this situation, the insurer received ¥2,500 premium and paid ¥50,000 for the loss. Had Peter notified the insurer of the change of the use of the car as a taxi, the insurer would have charged ¥3,000 premium and paid ¥50,000 for the loss. It is suggested that for such a case the insurer should be allowed to reduce its liability by the amount that fairly represents the extent to which his interests were prejudiced.[[86]](#footnote-86) Instead of paying Peter ¥50,000 for the loss, the insurer should be liable to pay ¥41,667 for the loss which is proportionate to the ratio of the premium it received (¥2,500) and the premium it should have received (¥3,000). [[87]](#footnote-87)

From the assignee’s perspective, according to art.49(4), failing in performing the duty of notification the assignee will bear the loss himself if the loss is caused by the increased risk upon the assignment of the subject matter. To avoid this adverse consequence, the assignee should perform the duty of notification of the assignment of the subject matter as required by art.49(2), and the insurer should make an inquiry to the assignee to find out whether there is any increase of risk resulting from the assignment of the subject matter. If the insurer decides to maintain the policy (with a higher premium if necessary), the assignee will certainly be covered no matter whether or not the loss is caused by the increased risk.

***Recommendations for the reform of art.49(4)***

As discussed above, where the risk has been materially increased after the assignment of the subject matter, but the loss is not caused by the increased risk, the insurer is nevertheless liable for the loss. In this case, the insurer bears higher risk but received lower premium. In order to strike the balance of the rights and obligations between the insurer and the insured in this situation, it is necessary to amend the art.49(4) of the Insurance Law.

The amendment may take reference to the rules for the breach of the insured’s pre-contractual duty of disclosure of material information as to the risks to be covered. By virtue of art.16 of the Insurance Law, the insurer’s remedies for the breach of the insured’s duty of pre-contractual disclosure or misrepresentation depend on the degree of the insured’s fault. The insurer is entitled to rescind the contract where the non-disclosure is intentional or by gross negligence, and the facts undisclosed sufficiently influence the insurer’s decision on whether he will accept the insurance or raise the premium rate.[[88]](#footnote-88) For the loss occurred before the rescission of the contract, where the non-disclosure or misrepresentation is intentional, the insurer is no liable for any loss; [[89]](#footnote-89) where the non-disclosure or misrepresentation is grossly negligent, the insurer is liable for loss unless the insured’s non-disclosure or misrepresentation “has a material bearing on the occurrence of an insured event”.[[90]](#footnote-90) In order to make art.49(4) fairer, it is suggested that the assignee’s state of mind in failing to provide information of material increase of risk should be taken into account. It may be amended to the effect that where the assignee fails to truthfully answer the insurer’s inquiries about the increase of risk, the remedies available to the insurer should depend on the degree of the assignee’s fault and the proof of the causal connection between the loss and the increase of risk; and the insurer should also be allowed to reduce its liability by the amount that fairly represents the extent to which its interests were prejudiced. [[91]](#footnote-91) The recommendations may be proposed in the following forms:

(1) Where the assignee fails intentionally to truthfully answer the insurer’s inquiries as to the increase of risk after the assignment of the subject matter, the insurer should not be liable for loss which occurs after the increase of risk.

(2) Where the assignee fails by gross negligence to truthfully answer the insurer’s inquiries as to the increase of risk after the assignment of the subject matter: (a) the insurer is not liable for loss if it can prove a causal connection between the loss and the increase of risk; (b) where there is no causal connection between the loss and the increase of risk, (i) if the insurer would have increased premium for the material increase of risk, the insurer should be entitled to reduce proportionately the amount to be paid on a claim,[[92]](#footnote-92) or (ii) if the insurer would have rescinded the contract for the material increase of risk, the insurer should not be liable for the loss which occurs after the increase of risk.

(3) Where the assignee fails innocently or by mere negligence to truthfully answer the insurer’s inquiries as to the increase of risk after the assignment of the subject matter, the insurer should be liable for loss which occurs after the increase of risk.

**Conclusion**

A critical analysis of the statutory and judicial rules in relation to the assignments of property insurance policy together with assignment of subject matter of insurance has been elaborated in this article. Through the examination of the evolution of the assignment of insurance policy from “conditional assignment” to “automatic assignment”, the pros and cons in these approaches are analysed. The “automatic assignment” under which the assignee of the subject matter automatically succeeds the rights and obligations of the insured (assignor) under the insurance policy[[93]](#footnote-93) seems more reasonable, fairer and practical convenient to both the insurer and the assignee.

Article 49(1) of the Insurance Law adopts the approach of automatic assignment of the insurance policy together with the assignment of the subject matter, but does not specify the point in time when the assignments will be deemed to take place. It is suggested that the assignments should take place at the time when the assignee starts to assume the risk of loss of the subject matter because the assignee has acquired the insurable interest in the subject matter when the risk has passed to him.[[94]](#footnote-94)

By the automatic assignment of insurance policy, the risks as specified in the insurance policy are automatically covered after the assignment of the subject matter,[[95]](#footnote-95) except for any material increase of risk as a result of the assignment.[[96]](#footnote-96) Therefore, the key issue as to the assignment of insurance policy is how to know whether a material increase of risk has taken place after the assignment of the subject matter. In the absence of the statutory provision, it is suggested that when the assignee notifies the insurer of the assignment of the subject matter, the insurer should make inquiries to the assignee in order to find out whether a material increase of risk occurs upon the assignment of the subject matter. The assignee should truthfully answer the insurer’s questions. The assignee’s fault in failing to do so should be taken into account in formulating the insurer’s remedies, i.e. intentional or grossly negligent or innocent failure should be treated differently.[[97]](#footnote-97)

For the assignee’s failure in notifying the insurer of the assignment of the subject matter, the insurer is not liable for the loss caused by a material increase of risk upon the assignment of the subject matter.[[98]](#footnote-98) This implies that the insurer still needs to pay the loss which is not caused by a material increase of risk. This rule is to some extent unfair to the insurer, because, sometimes the risk is materially increased but the loss may not be caused by the increased risk, the insurer is nevertheless liable for the loss.[[99]](#footnote-99) The insurer would have raised premium had it become aware of the increase of risk. The solution to this problem should be to allow the insurer to reduce proportionately the amount to be paid on a claim.

It is concluded that the shortcomings in art.49 of the Insurance Law undermine the effectiveness of the operation of the “automatic assignment” of the insurance policy. Recommendations on improvement of art.49 of the Insurance Law are proposed to resolve the problems.

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   It means the bundle of personal rights over property which can only be claimed or enforced by action, but not by taking physical possession. To put it simple, a chose in action is a right to sue. It is more often referred to as a cause of action. [↑](#footnote-ref-1)
2. A life insurance policy or a marine insurance policy is usually freely assignable. According to art.2 of the Rome Convention 1980, the rights of the parties to an assignment, and the assignability of an insurance policy, are government by the law which governs the policy. [↑](#footnote-ref-2)
3. The relevant rules regulating assignment of rights to proceeds can be found in the Civil Code of the People’s Republic of China 2020. The insured may assign its rights under the insurance contract to the assignee (art.545 of the Civil Code). Where the insured assigns his rights, he shall notify the insurer. Such assignment will have no effect on the insurer without notice thereof. A notice by the insured to assign his rights shall not be revoked, unless such revocation is consented to by the assignee (art.546 of the Civil Code). The assignee will recover only what the assignor/insured is entitled to. The insurer has the right to invoke the same defense as against the insured to defend the assignee’s claim (art.548 of the Civil Code). [↑](#footnote-ref-3)
4. Zhen Jing, “Beneficiaries in Life Insurance in Chinese law and Practice” (2013) *JBL*, 463-485. [↑](#footnote-ref-4)
5. The Insurance Law of the People’s Republic of China was firstly published in 1995 and amended in 2002, 2009 and 2015. [↑](#footnote-ref-5)
6. The Interpretation IV was published on 31 July 2018 and became effective on 1 September 2018. According to articles 5 and 6 of the Stipulation of the Supreme People’s Court on the Judicial Explanation (2007 No.12), the Supreme People’s Court stipulation, judicial explanation or decision have legal force. This means that the Supreme People’s Court stipulations, judicial interpretations, decisions or replies are of the legal sources in China. [↑](#footnote-ref-6)
7. The Civil Code was enacted by the National People’s Congress on 28 May 2020 and became effective on 1 January 2021. [↑](#footnote-ref-7)
8. The Insurance Law, art.49; and the SPC Interpretations IV, articles 1 to 5. [↑](#footnote-ref-8)
9. The Civil Code, art.209. [↑](#footnote-ref-9)
10. Ibid, art.224. [↑](#footnote-ref-10)
11. Ibid, art.225. [↑](#footnote-ref-11)
12. Ibid, art.641. [↑](#footnote-ref-12)
13. Ibid, art.604. [↑](#footnote-ref-13)
14. Ibid, art.215. [↑](#footnote-ref-14)
15. Ibid, art.209. [↑](#footnote-ref-15)
16. The Insurance Law, art.48. [↑](#footnote-ref-16)
17. Yeo et al, “Insurable Interest Rule for Property Insurance in the People’s Republic of China” (2009) *JBL*, 790. [↑](#footnote-ref-17)
18. The Insurance Law, art.48 requires the insured to have an insurable interest in the property at the time of loss. [↑](#footnote-ref-18)
19. For the topic on assignment of insurance policies in English law, see Rob Merkin, *Colinvaux’s Law of Insurance* (12th edn., Sweet & Maxwell, 2020) paras. 15-083 to 15-112. This book is referred to as Merkin’s book later. [↑](#footnote-ref-19)
20. Section 15 provides that “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…”. [↑](#footnote-ref-20)
21. *Peters v General Accident Fire and Life Assurance Corp Ltd* [1938] 2 All E.R. 267. [↑](#footnote-ref-21)
22. *Rogerson v Scottish Automobile and General Insurance Co Ltd* (1931) 48 T.L.R. 17. See John Birds, *Birds Modern Insurance Law* (10th edn, Sweet and Maxwell, 2016) para 11.4. [↑](#footnote-ref-22)
23. Merkin’s book, para. 15-087. [↑](#footnote-ref-23)
24. *North England Oil Cake Co v Archangel Marine Insuance Co* (1875) L.R. 10 Q.B.249. [↑](#footnote-ref-24)
25. Merkin’s book , para. 15-088. [↑](#footnote-ref-25)
26. *Davitt v Titcumb* [1989] 3 All E.R. 417. [↑](#footnote-ref-26)
27. Marine Insurance Act 1906, s.50(2). [↑](#footnote-ref-27)
28. *Punjab National Bank v De Boinville* [1992] 1 Lloyd’s Rep. 7. [↑](#footnote-ref-28)
29. The MIA 1906, s.50(2). [↑](#footnote-ref-29)
30. *British Equitable Insurance Co v Great Western Ry* (1869) 38 L.J. Ch. 314; *Pickersgill & Sons Ltd v London and Marine Provincial Insurance Co Ltd* (1912) 107 L.T. 305; *Patel v Winsor Life Assurance Co Ltd* [2008] Lloyd’s Rep. I.R. 359. [↑](#footnote-ref-30)
31. *Castellain v Preston* (1883) 11 QBD 380 at 397; *Western Australian bank v Royal Insurance Co* [1908] HCA 11; (1908) 5 CLR 533 at 564. [↑](#footnote-ref-31)
32. Greg Pynt, *Australian Insurance Law: A First Reference* (4th edn, LexisNexis Butterworths 2018) paras 9.26 and 9.27. [↑](#footnote-ref-32)
33. [1975] HCA 40, 180 CLR 173; 50 ALJR 106; 7 ALR 667. [↑](#footnote-ref-33)
34. *Davjoyda Estates Pty Ltd v National Insurance Co of New Zealand Ltd* (1967) 69 SR (NSW) 381. [↑](#footnote-ref-34)
35. Or when the purchaser enters into possession of the building, or when insurance cover under a contract of insurance effected by the purchaser in respect of the building commences, or when the sale or assignment is terminated, whichever is the earliest. [↑](#footnote-ref-35)
36. *Floods of Queensferry Ltd v Shand Construction Ltd* [2003] Lloyd’s Rep. I.R. 181. [↑](#footnote-ref-36)
37. *Tailby v Official Receiver* (1888) 13 App. Cas. 523; *Peters v General Accident Fire & Life Assurance Corp Ltd* [1937] 4 All E.R. 628, per Goddard J. [↑](#footnote-ref-37)
38. *Re Turcan* (1888) 40 Ch D 5. [↑](#footnote-ref-38)
39. *Re Carr and Sun Fire Insurance Co* (1897) 13 T.L.R. 186; *Graham Joint Stock Shipping Co Ltd v Merchants’ Marine Insurance Co Ltd* [1924] A.C. 294; *Bank of Nova Scotia v Hellenic Mutual War Risks Association (The Good Luck)* [1989] 3 All E.R. 1. [↑](#footnote-ref-39)
40. *Batey v Jewson* [2008] EWCA Civ 18. [↑](#footnote-ref-40)
41. Merkin’s book, para.15-103. [↑](#footnote-ref-41)
42. [1997] 1 Lloyd’s Rep. 261. [↑](#footnote-ref-42)
43. [2019] NZHC 2882. [↑](#footnote-ref-43)
44. [1990] NHHC 142. [↑](#footnote-ref-44)
45. Merkin’s book, para.15-104. [↑](#footnote-ref-45)
46. [2019] NZSC 68. [↑](#footnote-ref-46)
47. See Merkin’s book, para. 15-107. [↑](#footnote-ref-47)
48. The Insurance Law, art.49. [↑](#footnote-ref-48)
49. The German Insurance Contract Act 2008, s.95. [↑](#footnote-ref-49)
50. The Italian Civil Code, art.1918(1). [↑](#footnote-ref-50)
51. The Commercial Code of Macao SAR, art.1012(1). [↑](#footnote-ref-51)
52. The Commercial Act of South Korea, art.679. [↑](#footnote-ref-52)
53. The German Insurance Contract Act 2008, s.95(1). [↑](#footnote-ref-53)
54. Ibid, s.95(2). [↑](#footnote-ref-54)
55. Ibid, s.95(3). [↑](#footnote-ref-55)
56. Ibid, s.96(1). [↑](#footnote-ref-56)
57. The Macao Commercial Code, art.1012. [↑](#footnote-ref-57)
58. Ibid, art.1013. [↑](#footnote-ref-58)
59. The French Insurance Code, art.L121-11. [↑](#footnote-ref-59)
60. Ibid, art. L121-10. [↑](#footnote-ref-60)
61. Article 33 of the 1995 version. [↑](#footnote-ref-61)
62. Article 34 of the 2002 version. [↑](#footnote-ref-62)
63. Insurance Law, art.49. [↑](#footnote-ref-63)
64. Ibid. [↑](#footnote-ref-64)
65. It is exact the same as art.49 of the Insurance Law 2009. [↑](#footnote-ref-65)
66. This case was decided by the People’s Court, the East Region of Beijing City, Civil Judgement (2011) Dong Min Chu Zi No. 05425, and is reported in *the Annual Report of Typical Insurance Cases* (Law Press China 2014) vol.3, 325. [↑](#footnote-ref-66)
67. The Insurance Law, art.49(3). [↑](#footnote-ref-67)
68. As implied by art.33 of the Insurance Law 1995. [↑](#footnote-ref-68)
69. The Insurance Law, art.49(4). [↑](#footnote-ref-69)
70. Ibid, art.49(3). [↑](#footnote-ref-70)
71. The preceding paragraph means art.49(2). [↑](#footnote-ref-71)
72. For more, see Zhen Jing, “Remedies for Breach of the Pre-Contract Duty of Disclosure in Chinese Insurance Law” (2017) *Connecticut Insurance Law Journal*, 23(2) 327-48. [↑](#footnote-ref-72)
73. The Insurance Law, art.49(3). [↑](#footnote-ref-73)
74. Ibid. [↑](#footnote-ref-74)
75. Yuhua Zhou, *The Latest Insurance Law and Doctrines: Cases, Materials and Problems* (Law Press China 2008) p.193. [↑](#footnote-ref-75)
76. The Insurance Law, art.16. [↑](#footnote-ref-76)
77. Test of materiality is a test which can be used to determine what a material fact is in insurance contract law. The prudent insurer “decisive influence” test of materiality refers to the test under which it is necessary for the insurer to satisfy the court when he declines a claim on the ground of non-disclosure by the insured that a prudent insurer would have acted differently as regards the premium or risk had the information withheld or misstated been made available to the insurer. See Zhen Jing, “Insured’s Duty of Disclosure and Test of Materiality in Marine and Non-marine Insurance Laws in China” (2006) *JBL*, 681-704. [↑](#footnote-ref-77)
78. Article 52 of the Insurance Law deals with the increase of risk during the insurance period. [↑](#footnote-ref-78)
79. The Insurance Law, art.49(3). [↑](#footnote-ref-79)
80. German Insurance Contract Act 2008, s.96(1) sets up one-month time limit which prevents the insurer from terminating the insurance contract after one month of becoming aware of the transfer of the insured property. [↑](#footnote-ref-80)
81. The SPC Interpretation II was enacted on 31 May 2013 and became effective on 8 June 2013. [↑](#footnote-ref-81)
82. This means art.49(2). [↑](#footnote-ref-82)
83. The Intermediate People’s Court, Qiqi Haer Cuty, Heilongjiang Province, Civil Judgement (2020) Hei 02 Min Zhong No 445. [↑](#footnote-ref-83)
84. The Insurance Law, art.49(4). [↑](#footnote-ref-84)
85. Ibid. [↑](#footnote-ref-85)
86. This is the approach as provided in s.54(1) of the Australian Insurance Contracts Act 1984. [↑](#footnote-ref-86)
87. £50,000 × £2500 ÷ £3000 = £41,667. [↑](#footnote-ref-87)
88. The Insurance Law, art.16(2). See Zhen Jing, *Chinese Insurance Contracts: Law and Practice*, (1st edn, Informa Law from Routledge 2017), Chapter 8: The Insured’s Duty of Disclosure and Representations, 221-85. [↑](#footnote-ref-88)
89. The Insurance Law, art.16(4) [↑](#footnote-ref-89)
90. Ibid, art.16(5) [↑](#footnote-ref-90)
91. For the reform of the insured’s duty of notification of material increase of risk during the insurance period, see Zhen Jing, “The Insured’s Post-Contract Duty of Notification of Increase of Risks: A Comparative Perspective” (2013) *JBL*, 842-67. [↑](#footnote-ref-91)
92. “Reduce proportionately” means that the insurer need pay on the claim only X% of what it would otherwise have been under an obligation to pay under the terms of the contract, where X% = (premium actually received ÷ premium that should be charged) × 100. [↑](#footnote-ref-92)
93. The Insurance Law, art.49(1); the SPC Interpretation IV, art.3. [↑](#footnote-ref-93)
94. The SPC Interpretation IV, art.1. [↑](#footnote-ref-94)
95. The Insurance Law, art.49(1). [↑](#footnote-ref-95)
96. Ibid, art.49(3). [↑](#footnote-ref-96)
97. See above for the detailed suggestions on this matter. [↑](#footnote-ref-97)
98. The Insurance Law, art.49(4). [↑](#footnote-ref-98)
99. Ibid. [↑](#footnote-ref-99)