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Citation for final published version:

Jing, Zhen and Jiang, Tianyi 2022. Restrictions on insurer's subrogation rights in co-insurance: a case study of Chinese law and judicial practice. *The Journal of International Maritime Law* 28 (3) , pp. 194-206.

Publishers page:

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(The article has been accepted to be published in the Journal of International Maritime Law)

Restrictions on Insurer's Subrogation Rights in Co-insurance: A Case Study of Chinese Law and Judicial Practice

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Abstract: *This article examines the Chinese judicial practice regarding subrogation action in co-insurance. It also considers the recent development in English common law in respect of subrogation action against a co-insured. It is concluded that whether an insurer can take a subrogation action against a co-insured depends on the construction of the underlying contract between the co-insureds. If the underlying contract provides that there is to be no liability of a co-insured to the principal insured, the insurer cannot exercise his subrogation right against the co-insured. If there is no such an express exclusion, in the absence of a subrogation waiver clause in the insurance policy, the insurers would not be precluded from bringing a subrogated claim against the co-assured. To what extent the insurer may sue the co-insured depends on the extent to which liabilities are imposed on the co-insured by the interpretation of the underlying contract. The absence of statutory provisions relating to subrogation in co-insurance in the Chinese Insurance Law is a major loophole, it is suggested that the Insurance Law should introduce provisions regarding subrogation against co-insured. It would be beneficial to refer to the recently developed English common law rules in the future attempt to formulating statutory provisions for the Chinese Insurance Law in this area.*

Introduction

In indemnity insurance, subrogation means that where an insured event is caused by a negligent third party, the insurer, having indemnified the insured for the loss, is entitled to step into the insured's shoes to sue the third-party wrongdoer.¹ The insurer's right of subrogation comes from the insured and is therefore limited to whatever rights its insured has against the third party who causes the loss. If the insured has no right to sue the third party, the insurer has no recourse to the third party. In some situations, the insurer may lose his subrogation rights. This often occurs in the case of co-insurance where two or more parties are insured under a single policy. Co-insurances can be classified into joint policy and composite policy. If the co-

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¹ In *Mason v. Sainsbury* (1782) 3 Doug. K.B.61, Lord Mansfield said "Every day the insurer is put into the shoes of the assured." See also Marine Insurance Act 1906 (UK), s.79; *Stratti v Stratti* [2000] NSWCA 358; (2000) 50 NSWLR 324 at 19 [Fitzgerald JA]; The Insurance Law of China, arts. 60 - 61.

insureds share a common interest in the insured subject-matter, the policy is joint.² By contrast, if the parties have different interests, the policy is composite.³

It seems no doubt that an insurer cannot exercise subrogation right against a co-insured in a joint policy where two or more parties are co-insured under a single policy for the same risk.⁴ Issues often arises under a composite policy which covers two or more persons who have different interests in the subject matter,⁵ and there is an insurance provision in the underlying contract which requires one party to take out insurance for the interests of other parties. The typical examples are construction contracts and bailment contracts. In a construction contract, there may be a term requiring one party to take out a co-insurance for the parties involved in the underlying construction contract.⁶ In a bailment contract, one party may be required to take out insurance for the different interests of the bailor and the bailee in the subject-matter of the bailment contract.⁷ The issue is whether, where one of the co-insureds suffers loss as a result of the other co-insured's negligence, the insurer, after having indemnified the loss, will have a subrogation right against the co-insured who caused the loss. The insurer's right of subrogation may be restricted by the agreements between the primary insured and the co-insured under the underlying contract.

In China, neither the Chinese Insurance Law⁸ nor the Maritime Code (which regulates marine insurance)⁹ provides rules on subrogation in co-insurance. In recent years, Chinese courts have tried cases in respect of subrogation action in co-insurance. This paper aims to explore how Chinese courts deal with the insurer's subrogation in co-insurance. However, judicial precedents of higher courts have no binding effect on lower courts in China, it is

² A joint insurance policy is a policy under which, most commonly, a co-ownership or business partnership with the same interests is covered, for example where they are joint owners of property.

³ As in the case of a bailor and bailee, a contractor and subcontractor, a landlord and tenant, or a mortgagor and mortgagee.

⁴ *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] 1 W.L.R. 1419.

⁵ However, as Professor Merkin comments, "Confusingly, composite policies, particularly in the construction industry, are often referred to as "joint names" policies, but that description is convenient shorthand and does not mean that the policy is joint. It will almost inevitably be composite." (Robert Merkin, *Colinvaux's Law of Insurance* (13th edn, Sweet and Maxwell 2022) para 12-061.

⁶ *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 501; *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] 1 W.L.R. 1419; *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others* [2018] EWHC 558 (TCC); *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956.

⁷ *Wager v Providence Insurance Co* 150 U.S. 99 (1893). *Anderson v Saugeen Mutual Fire Insurance Co* (1889) 18 Ont.R. 355 at 359, 367–368. *A Tomlinson (Hauliers) Ltd v Hepburn* [1966] A.C. 451. See also the Chinese case of *Taiping Property Insurance Co Ltd v Ande Logistic Co Ltd* (2018) Yue Min Zai 71 Hao (Civil Retrieal No 71).

⁸ The Insurance Law was firstly enacted in 1995, the Law has been amended several times in 2002, 2009 and 2015. The current edition is 2015 Insurance Law.

⁹ The Maritime Code of the People's Republic of China was enacted in 1992 and came into effect in 1993. Chapter 12 of the Code concerns matters of marine insurance.

necessary to introduce to Chinese Insurance Law new rules to regulate subrogation action in co-insurance. English common law has been well developed regarding immunity of co-insureds to insurer's subrogation action. These common law rules are also examined in this article, which may be referred to when China is to formulate statutory rules in this area.

The current position about subrogation in co-insurance in Chinese law and practice

Co-insurance is a complex issue, especially where the insurers' subrogation action is involved. Under English law, there are many decided cases setting up rules in respect of co-insurance and subrogation in co-insurance,¹⁰ although there is no statutory provision in any legislation relating to subrogation in co-insurance. In China, there is no statutory provisions in any legislation in subrogation action in co-insurance, but a few relevant cases are reported. Unlike the common law system, China has a civil law system. A decided case, even if decided by the Supreme People's Court (SPC) does not bind the lower courts but can be taken as a reference by lower courts. However, the SPC's interpretations on statutory laws have legal force.¹¹ The SPC have so far published four sets of interpretations on Insurance Law,¹² but none of them sets out provisions in respect of co-insurance and subrogation in co-insurance.

In judicial practice, the courts hear co-insurance cases following the general principle that the insurer is usually not allowed to sue a co-insured who causes loss to the other co-insured. However, whether a wrongdoer co-insured can be immune from the insurer's

¹⁰ For more on English common law in respect of immunity of subrogation in co-insurance, see Robert Merkin, *Colinvaux's Law of Insurance* (13th edn, Sweet and Maxwell 2022) paras 12-061 to 12-076; and John Birds, Ben Lynch and Simon Paul, *MacGillivray on Insurance Law* (15th edn., Sweet and Maxwell 2022) paras 22-098 to 22-108.

¹¹ 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.

¹² Interpretation I of the Supreme People's Court on Certain Issues concerning the Application of the Insurance Law 2009; Interpretation II of the Supreme People's Court on Certain Issues concerning the Application of the Insurance Law 2013; Interpretation III of the Supreme People's Court on Certain Issues concerning the Application of the Insurance Law of the People's Republic of China 2013; and Interpretation IV of the Supreme People's Court on Certain Issues concerning the Application of the Insurance Law 2018. In Interpretation IV articles 7 to 13 are concerned with subrogation, but no provision is about subrogation in co-insurance. For more on the SPC Interpretations, see Wenhao Han, "Judicial Interpretations on Chinese Insurance Act 2009 from its Highest Court" (2013) the Journal of BILA, No.126, 189. Zhen Jing and Tianyi Jiang, "The Latest Development of the Insurance Law in Life Insurance in China: The Third Judicial Interpretation on the Insurance Law by the Supreme People's Court of China" (2016) Journal of BILA, No.129, 11. And Zhen Jing and Hongbin Guo, "The New Development of the Insurance Law in Indemnity Insurance in China: The Fourth Judicial Interpretation on the Insurance Law by the Supreme People's Court" (2019) Insurance Law Journal 92-123.

subrogation action depends on the parties' intention determined by the construction of the terms of the underlying contract between the co-insureds.¹³

In industrial practice, the insurer is not allowed to exercise his subrogation right against a co-insured. For example, in the Contractors All Risks Insurance Policy, an additional third-party liability coverage is attached to the policy, which reads "... for the loss caused by a co-insured due to his fault or negligence, after the payment by the insurer to the insured who suffered the loss, the co-insured who caused the loss is immune from the insurer's subrogation action."¹⁴

The absence of rules in this aspect in Chinese law is a major loophole, which has caused and may continue to cause judicial difficulties in trying cases concerning subrogation in co-insurance.

Judicial decisions on subrogation in co-insurance in China

In this part, two recent Chinese cases are examined regarding subrogation in co-insurance.

*Case 1: Taiping Property Insurance Co Ltd v Ande Logistic Co Ltd (2018)*¹⁵

In this case, Company A, the owner of the subject matter of insurance, entered into a warehousing service contract with Ande Co (a Logistic Co) for the storage of the goods owned by Company A. The contract period was from 16 November 2014 to 13 December 2015. Two clauses in the contract are particularly important to the topic of this article, one is on the liabilities of the Logistic Co and the other on the arrangement of co-insurance in the joint names of the parties.

Clause 5 was about the Ande's liabilities for the goods, which provided that "Ande Co is responsible for providing Company A storage services, with timely, efficient and safe cargo storage, loading and unloading services. Ande Co is responsible for the safety of the goods of

¹³ The Chinese case *Taiping Property Insurance Co Ltd v Ande Logistic Co Ltd* (2018) illustrates this point which will be discussed shortly. There are several recent English cases showing that whether an insurer may sue a co-insured depends on the construction of the underlying contract. For example, *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls Royce Motor Cars Ltd* [2008] EWCA Civ 286; *Gard Marine Insurance & Energy Ltd v China National Chartering Co Ltd* [2017] UKSC 35; [2017] 1 WLR 1793 (SC); *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956. These cases will be discussed later.

¹⁴ See the Contractor's All Risk policy and the additional Third-Party Liability Insurance of the People's Insurance Company of China.

¹⁵ See the Civil Judgement of the High People's Court of Guangdong Province (2018) Yue Min Zai 71 Hao (Civil Retrial No 71).

Company A in the warehouses. If the goods suffer loss, shortage or damage due to improper storage, Ande Co shall compensate for the losses according to the contract.”

Clause 6(B) is concerned with the arrangement of warehouse cargo insurance which stipulates: “(1) For the goods entrusted by Company A to Ande Co for safekeeping, Company A shall be responsible for purchasing Warehouse Property All Risks Insurance for the goods with the Property Insurance Co and Ande Co shall be added in the insurance policy as a co-insured, and Company A shall pay all premium.¹⁶ (2) Company A shall take out the insurance according to the highest peak inventory value of the applicable warehouse.¹⁷ If any goods are not insured or the insured amount is insufficient, resulting in the inability to pay or pay in full by the insurer after the accident occurs, Company A itself shall bear the loss for the uninsured or under-insured goods, and Ande Co will not be liable for the loss. (3) In the event of an insurance accident, Ande Co shall immediately report to Company A, provide relevant evidence of the loss in a timely manner, and assist the owner to go through the insurance claims procedures with the insurance company. The amount of indemnity for losses is subject to the insurance company’s verification and payment, and Ande Co will not be responsible for the uninsured or under-insured losses which are not paid by the insurance company. (4) The expenses incurred in the rescue process by Ande Co shall be claimed by Company A against the insurance company in the insurance claim process, and Company A shall transfer the rescue expenses to Ande Co after insurance payment.”

The key issue of this case is that if there is any loss resulting from Ande’s negligence, whether the insurer, after having paid Company A, can sue Ande through subrogation. This depends on the construction of the two clauses. Clause 5 imposed liabilities on Ande to look after the goods safely, and to be liable for loss of goods. Clause 6 required Company A to take out Warehouse Property All Risks Insurance in the joint names of Company A and Ande for the interests of both parties. Clause 6 also expressly excluded the liabilities of Ande to the loss of goods. According to the effect of the insurance arrangement as provided in Clause 6, any damages or losses was to be paid by the insurance and made good by Company A itself to the extent that there was a policy shortfall.

However, the joint names policy had not been taken out at all. Company A did not obtain Property All Risks Insurance in the joint names and instead effected Property

¹⁶ In return for the premium paid by Company A for the insurance, Ande Co agreed to give a favorable warehousing fee to Company A. In other words, Ande contributed to the premium in the way by compromising the warehousing fee.

¹⁷ The insurance for the maximum amount of the value of goods in the warehouse.

Comprehensive Insurance for its own benefit with Taiping Property Insurance Company on 18 November 2014 without adding Ande into the policy as the co-insured. The insurance contract was one year from 19 November 2014 to 18 November 2015, and the insured amount was 15 million yuan.

On 9 December 2014, a fire occurred in the Ande's warehouse and damaged the goods. According to the Fire Brigade Report, the fire was resulted from the sparks generated during the welding work that spread to the surrounding combustibles in Ande's warehouse.¹⁸ The welding work was carried out by another party (Huahang Company) whose negligence in welding operation caused the fire.

Upon the occurrence of the loss of the goods by fire, Taiping Insurance Co indemnified Company A the amount of 10.50 million yuan for the loss of the goods under the policy and obtained the "Receipt and Subrogation Form"¹⁹ from Company A, by which Company A's right to claim against Ande was transferred to the insurer. The insurer then sued Ande through subrogation. The insurer argued that as the loss occurred in Ande's warehouse, Ande should be liable for the loss. The main issue in this case was whether the insurer had right to sue Ande. According to the general principle of subrogation, the insurer is entitled to be subrogated to the insured's right to sue a third-party wrongdoer.²⁰ However, this case was complex and tried by three courts through initial trial, appeal and retrial.

¹⁸ The person who caused the fire was sentenced for a limited imprisonment.

¹⁹ In China, the "Receipt and Subrogation Form" was issued by the insured which has the effect that the insured's right to sue the third-party wrongdoer is transferred to the insurer. Where the loss is caused by a third party, after having paid the insured, the insurer sues the third party using the receipt and subrogation form and using its own name. The following is a sample of the "Receipt and Subrogation Form":

Receipt and Subrogation Form

Loss No _____

Policy/Certificate No _____

Insured Amount _____

To The People's Insurance Company of China, Qingdao Branch.

Received from The People's Insurance Co. of China, Qingdao Branch the sum of ___ in full and final settlement of the claim under the above mentioned policy/certificate on ___ Shipped per S/S ___ From ___ To ___ In consideration of having received this payment, we hereby agree to assign, transfer and subrogate to you, to the extent of your interest, all our rights and remedies in and in respect of the subject matter insured, and to grant you full power and give you any assistance you may reasonably require of us in the exercise of such rights and remedies in our or your name and at your own expense.

Dated at _____ This _____ day of _____ 20 _____

Signed _____

²⁰ See the Insurance Law, art.60. In addition, SPC Interpretation IV 2018 gives further interpretation on art.60 of the Insurance Law, providing: "Where the insurer claims the right to subrogate the insured's claim for indemnity against the third party's tortious act or breach of contract, among others, in accordance with the provision of art.60 of the Insurance Law, the people' courts shall uphold such a claim."

Judgement in the first instance: The case was heard by Shunde District People's Court (the lower court) of Foshan City, Guangdong Province in the first instance.²¹ The judgement was made for Ande. The lower court did not uphold the insurer's subrogation action on the ground that although the loss occurred in Ande's warehouse, but it was not directly caused by Ande. In the underlying warehousing service contract, Clause 6 required Company A to take out co-insurance in joint names for the goods and add the Ande into the policy as a co-insured. Ande's liability was expressly excluded and all the losses were covered by insurance. Where the insured event occurred, Ande immediately notified Company A about the loss and also provided relevant evidence to Company A and assisted it to claim against the Insurance Co. Company A has no right to claim against Ande, therefore, the Insurance Co has no right to sue Ande through subrogation action.

Appeal: Taiping Insurance Co appealed. The Intermediate People's Court of Foshan City, Guangdong Province,²² rejected the lower court's judgement and upheld the insurer's subrogation action, holding that although the fire damage was not caused directly by Ande, it occurred in Ande's warehouse while the goods were under its custody, so Ande should be liable for the loss according to Clause 5 of the warehousing service contract, and the insurer was not restricted to bring subrogation action against it.

Retrial: Ande then applied for retrial to the High People's Court of Guangdong Province.²³ The final judgement was for Ande. The High People's Court held that the insurer was not entitled to exercise subrogation right against Ande. Upon the construction of Clause 6 of the underlying warehousing contract, Ande was an intended co-insured and whose liability for the loss of or damage to Company A's goods was expressly excluded and the only resource for the compensation of the loss is the insurance.

Analysis: Three main issues of the case are analysed here to explore why the insurer could not sue Ande. The first issue is what the relationship is between Clause 5 and Clause 6. one imposed liability on Ande and the other excluded its liability. Thus, how to interpret the two inconsistent clauses and to determine which of them prevails is the key issue to the case. It appears that Clause 5 and Clause 6 are conflict each other in terms of Ande's liability to Company A's goods. By Clause 5, Ande had the duty to keep the goods safe in its custody,

²¹ The Civil Judgement of People's Court of Shunde District, Foshan City, Guangdong Province, No (2016) Yue 0606 Min Chu 14634 Hao (Civil Initial Trail No 4634) Civil.

²² The Civil Judgement of The Intermediate People's Court of Foshan City of Guangdong Province, No (2017) Yue 06 Min Zhong 4330 Hao (Civil Final No 4330).

²³ The Civil Judgement of the High People's Court of Guangdong Province (2018) Yue Min Zai 71 Hao (Civil Retrial No 71).

and was liable for any loss to the goods resulting from its negligence.²⁴ By contrast, Clause 6 required Company A to arrange a joint name insurance for their mutual benefit, and provided that any loss to the goods covered by the policy would be paid by the insurer and borne by Company A itself if there is a shortfall in the policy. Ande will not be liable for damages or losses. This waiver by Company A would have been effective to shut off any claim against Ande for the loss of the goods. It is the parties' intention for arranging the co-insurance in order to avoid making a claim against one another in respect of loss of or damage to the goods covered by the policy. The High People's Court of Guangdong Province upheld Ande's argument that: Because Ande bears responsibility to keep the goods safely imposed by Clause 5, it then had an insurable interest to take out insurance to cover its liability. In order to transfer the liability to the insurer, Ande and Company A reached the agreement on the arrangement of insurance in joint names. Accordingly, Clause 6 which excluded Ande's liability by arranging the co-insurance should take priority which rendered Clause 5 nugatory. Thus, Company A had no right to claim against Ande, nor had its insurer.

It is submitted that the High People's Court's interpretation on Clause 5 and Clause 6 is reasonable in that Clause 5 imposed liabilities on Ande, that was the reason for the two parties agreed to arrange a co-insurance to cover Company A's goods as well as Ande's liabilities. Thus, Ande's liabilities would be transferred to the insurer. Therefore, the insurer, after having paid Company A, cannot sue Ande through subrogation action.

The second issue is what is the consequence for Company A's failure to take out co-insurance in their joint names. This issue can be discussed in two respects:

(1) Whether this failure may affect the immunity of Ande against the insurer subrogation action. Due to the failure of Company A to add Ande into the policy as a co-insured, the insurer argued that Ande was not a co-insured, but a third party who was not covered by the policy. According to art.60 of the Insurance Law,²⁵ where a third party causes an insured

²⁴ This is also a statutory duty for a bailee. Article 394 of the Chinese Contract Law (art.917 of the Civil Code 2020) provides "Where the goods are damaged or lost during the warehousing period due to improper safekeeping by the safekeeping party, it shall be liable for damages." Further, art.107 of the Chinese Contract Law (art.577 of the Civil Code 2020) provides "If a party fails to perform its obligations under a contract, or its performance fails to satisfy the terms of the contract, it shall bear the liabilities for breach of contract such as to continue to perform its obligations, to take remedial measures, or to compensate for losses." Chinese Contract Law was replaced by the Chinese Civil Code which came into effect on 1 January 2021.

²⁵ The Insurance Law, art.60 provides: "Where a third party damages the subject matter of insurance, thereby leading to the occurrence of an event insured against, the insurer shall, from the date of payment of insurance moneys to the insured, be subrogated to the insured's right to claim indemnity from a third party within the amount of the payment.

Where the insured has been indemnified for losses by the third party after the insured incident prescribed in the preceding paragraph occurs, the insurer may, when paying insurance money, deduct the corresponding amount of indemnity which the insured has obtained from the third party.

event, the insurer has right to sue the third party. Had Ande been added in the policy as a co-insured, the insurer would not be entitled to excise subrogation right against it because an insurer cannot sue its insured. The Intermediate People's Court upheld the insurer's argument upon the appeal. However, the High People's Court reversed the Intermediate People's Court's judgement and held that whether an insurer has right to sue a third-party wrongdoer through subrogation does not merely depend on whether the wrongdoer is a co-insured but depends on the construction of the relevant terms of the underlying contract to see the true intention of the parties. If Company A has no right to claim against the wrongdoer, its insurer also has no right. It is submitted that the High People's Court's decision is reasonable, because even if a party were a co-insured, it is not necessary to be said that a co-insured must be immune against the insurer's subrogation action, whether the insurer has right to sue the co-insured, depends on the construction of the terms of the underlying contract. In this case due to Company A's fault, Ande did not become a co-insured, but the underlying contract (Clause 6) clearly excluded its liability, therefore the insurer cannot sue it through subrogation.

In this case, from the point of view of the insurer's subrogation action against Ande, it made no difference whether or not Ande was a co-insured, as Clause 6 expressly excluded Ande's liability for the goods and all losses would be borne by the insurer. The insurance is the only source of recovery.

(2) Whether Company A should be liable for its failure to obtain a co-insurance. On this issue, the High People's Court upheld lower court's judgement that it was Company A's fault, who failed to add Ande into the policy that led to the result that Ande was not covered by the policy. There was no evidence to prove that Company A obtained Ande's consent when it took out Property Comprehensive Insurance for its own benefit without Ande's name being included in the policy or notified Ande that it effected such a policy. Company A breached Clause 6 of the underlying contract by failing to arrange the co-insurance. According to art.107 of the Chinese Contract Law,²⁶ the party who fails to perform its contractual duty should be liable to the other party. Therefore, Company A had no right to claim against Ande, so its insurer had not right to sue Ande.²⁷

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

²⁶ The Chinese Civil Code 2020, art.577.

²⁷ This issue is similar to the English case *Scottish and Newcastle plc v GD construction (St Albans) Ltd* [2003] EWCA Civ 16, the employer and main contractor had contracted under the JCT conditions. The employer had been obliged to insure the property for fire in their joint names but had not done so. After a fire caused by the negligence of a sub-contractor, the employer sued. The contractor argued, had the employer taken out the insurance, the insurers would not have been able to bring a subrogated claim against the contractor because the contractor was a joint insured and because the contract provided for an express waiver of subrogation rights.

The third issue which may arise here is whether the insured is required, when the insurance contract is concluded, to disclose to the insurer the information that he waived his right to claim against the third party via a contractual term under the underlying contract, such a term may exclude or limit the insurer's potential subrogation right. As discussed above, Clause 6 of the underlying warehouse service contract expressly excluded Ande's liability to the goods, when the insurance contract was concluded, the insured was expected to disclose this information to the insurer. By virtue of art.16 of the Insurance Law, when entering an insurance contract, the insured must disclose material information to the insurer by truthfully answering the questioned raised by the insurer. The Insurance Law does not deal with the remedy for the insured's waiver to claim against the third party by reaching an agreement with the third party before the insurance contract is concluded. Some high people's courts published several guiding opinions relating to the remedies for the insured's waiver of his right to claim against the third party before the conclusion of the insurance policy. For example, the Guiding Opinions of Beijing High People's Court on Several Issues concerning the Trial of Insurance Dispute Cases (for Trial Implementation)²⁸ provides that "where the insured waives his right to claim against a third-party wrongdoer before the conclusion of the insurance contract, the insurer raises queries on this point, the insured must disclose this fact, otherwise, the insurer is not liable for the insured loss." It must be noted that in China the way of enquiry disclosure is adopted in the Insurance Law for an insured to disclose material information,²⁹ namely, the insured performs his duty of disclosure by truthfully answering the questions raised by the insurer. In the above case, by referring to the Guiding Opinions of Beijing High People's Court and the enquiry disclosure approach adopted in the Insurance Law, the High People's Court of Guangdong Province held that the warehouse service contract was concluded on 16 Nov 2014, and the insurance was concluded later on 18 Nov 2014 for the warehoused goods, if the insurer wished to know about the agreement between the parties of the underlying warehouse contract about Company A's right to claim against Ande, it should raise queries on it. The insurer did not ask questions on this point, therefore, it could not reject Company A's claim for the loss on the ground of non-disclosure, it was liable for the loss. But it had no right to sue Ande Co after

The court held: The effect of the contract was that the parties had agreed to exclude contractor's liability for negligence through arranging joint name insurance. The employer had an explicit obligation to insure in joint names and without subrogation, as part of an agreement allocating risks under the contract.

²⁸ The Guiding Opinions of Beijing High People's Court on Several Issues concerning the Trial of Insurance Dispute Cases (for Trial Implementation) 2004, art.22. See also, The Guiding Opinions of Guangdong High People's Court on Several Issues concerning the Trial of Insurance Dispute Cases 2011, art.33.

²⁹ The Insurance Law, art.16(1) provides: "When entering an insurance contract, the insurer may raise concerning relevant details of the insured subject matter or of the insured, the proposer shall truthfully disclose such details to the insurer."

having paid Company A, as Company A had abandoned its right to claim against Ande before the conclusion of the insurance contract.³⁰

*Case 2: Meiya Property Insurance Company Guangdong Branch v Ande Logistic Co and China Pacific Property Insurance Co Foshan Branch (2018)*³¹

This case did not involve the issue of subrogation under a co-insurance, but it showed that the agreement between the insured and the third party relating to the third party's liability in the underlying contract may affect the insurer's potential subrogation right.

In this case, Party A (Xiahui Co, a logistic company) contracted with Party B (a cargo transportation company) for carriage of goods of fast food. In the transport service contract, the parties agreed that "Trusted by Party A, Party B will provide cargo transportation services. If loss of or damage to the goods is caused by Party B's fault during transportation or during loading or discharging process, Party B shall be liable for the amount of loss below 1500 yuan. The amount of loss above 1500 yuan shall be compensated by Party A's insurer."

Party A took out insurance for those goods with Meiya Property Insurance Co (Meiya). There was an excess clause in the policy stating that Meiya shall only indemnify Party A for losses exceeding 1500 yuan. This indicated that the insurance was arranged with the insurer's knowledge of the agreement between Party A and Party B in respect of Party B's liability limitation (1500 yuan), namely Meiya agreed with Party A's (the insured) waiver of claim against Party B for the amount over 1500 yuan for any loss of the goods which occurred during transportation, including loading and discharging process. In addition, there was a waiver clause in the insurance policy saying that the insurer agrees to waive his subrogation right to sue Party B for the loss of goods covered by Meiya's policy (which was over 1500 yuan).

Party B effected a policy with Pacific Insurance Co for the liability he may incur for the transportation of Party A's fast food. The food was transported by a lorry. When the lorry arrived at the destination, the food was found to have gone bad due to the improper temperature control inside the vehicle. Party A claimed against Meiya, its insurer, for the loss. Meiya paid

³⁰ Under English law, if the insured fails to disclose to the insurer when the policy is issued that there is an agreement between the insured and the third party by which the insured waived his right to claim against the third party, the insurer's remedy is to avoid the insurance contract for the insured's failure to disclose a material fact, namely that there no recourse to the third party in respect of specific insured losses. See *Tate & Sons v Hyslop* (1885) 15 Q.B.D. 368; For the detailed discussion, see Robert Merkin, *Colinvaux's Law of Insurance* (13th edn, Sweet and Maxwell 2022) para. 12-122.

³¹ See the Civil Judgement of the Intermediate People's Court of Guangzhou City, Guangdong Province (2016) Yue 01 Min Zhong 19279 Hao (Civil Final No 19279). This case was cited at <http://www.gzcourt.gov.cn/cpws/ckal/2018/04/16085936734.html> (Accessed on 7 October 2022).

509,270.38 yuan for the loss covered by the policy. Party A signed a Receipt and Subrogation Form to Meiya who exercised subrogation action against Party B and Party B's insurer (Pacific Insurance Co).

The main issue in this case was whether Meiya is entitled to sue Party B in exercising the subrogation right. By construing the transportation agreement between Party A and Party B under which Party B's liability was limited to 1500 yuan, and the relevant terms of insurance contract concluded between Party A and Meiya which limited Meiya's subrogation right against Party B to the loss below 1500 yuan, the parties' intention can be identified as excluding Party B's liability to the amount of loss that were covered by Party A's insurance policy. The Intermediate People's Court of Guangzhou City held that Meiya was not allowed to exercise subrogation right to sue Party B for the whole loss because Party B's liability for goods was limited to 1500 yuan. If Meiya had paid the whole loss to Party A, he can only sue Party B for 1500 yuan which Party B's insurer (Pacific Insurance Co) would pay. It indicates that by looking at the insurance waiver clause in the policy together with the relevant terms of the underlying transport contract, Party A's insurer did not have subrogation right to sue Party B and over 1500 yuan. Although Party B was not a co-insured, the waiver clause in the insurance policy and the relevant terms of the underlying transport contract clearly excluded Party B's liability for the amount over 1500 yuan, which restricted the insurer's subrogation action against Party B for that amount.

The above two cases represent the current position of the Chinese judicial practice relating to the insurer's subrogation action in a co-insurance or where there is a clause in the underlying contract between the insured and the third party which excludes or limits the liability of a third party to the insured. In China, since judicial precedent has no legal force for binding the lower courts, it is necessary for the Chinese Insurance Law to be amended to introduce relevant rules relating to co-insurance and insurer's subrogation in co-insurance. To improve the Chinese law in this area, it would be beneficial to have a look at relevant English common law under which the rules relating to subrogation in co-insurance have been well developed in recent years.

Subrogation in co-insurance under English law

Under English law,³² where there is a co-insurance, the rules relating to the issue whether, assuming that the insurer is liable to any one insured, subrogation rights can be exercised against another insured for bring about an insured peril have been well established. The general rule is that the insurer has no right to sue a co-insured who negligently caused the loss to the other(s). Three theories have been propounded by common law as to the basis for the immunity of a co-insured from insurer's subrogation action: circuitry of action theory, implied term theory and the theory of construction of underlying contract between the primary insured and the co-insured.

Circuitry of action theory

The insurer's subrogation right may be defeated by circuitry of action. This theory was first proposed in *The Yasin*.³³ In this case, Lloyd J, the learned judge, rejected the argument that there was any general principle which prevented an insurer from exercising subrogation rights against a co-insured in a composite policy. He held that any subrogation immunity rested on the principle of circuitry. This theory means that by construing the insurance terms, the insurers who have paid out to an insured for loss or damage cannot bring a subrogated claim against a co-insured who is himself insured in respect of the very same loss or damage, because he himself would make a claim under the policy, so that subrogation action would give rise to circuitry in claims. The learned judge also held that the rule of subrogation immunity applies only under the situation where A is insured against damage to goods, and B is insured against his liability for damage to the goods under the same policy. If the damage of A's property is caused by B's negligence, after he has indemnified A, the insurer plainly cannot exercise subrogation rights in A's name against B, because B himself is entitled to claim under the policy which covers his liability for A's property. Thus, the subrogation action would give rise to circuitry in claims.

The view of circuitry of action basis was also adopted in *Petrofina Ltd v Magnaload Ltd*.³⁴ It was held that the insurers under a contractors' all risks insurance policy could not use the name of the main contractor to sue the negligent sub-contractors who are co-insureds responsible for the loss. The insurer's subrogation right was defeated by circuitry of action.

³² See Robert Merkin, *Colinvaux's Law of Insurance*, (13th edn, Sweet and Maxwell 2022) paras 12-061 to 12-076; and John Birds, Ben Lynch and Simon Paul, *MacGillivray on Insurance Law* (15th edn, Sweet and Maxwell 2022) paras 22-098 to 22-108.

³³ *The Yasin* [1979] 2 Lloyd's Rep. 45 QBD (Comm)

³⁴ *Petrofina Ltd v Magnaload Ltd* [1984] Q.B. 127

Because the co-insured himself insured in respect of the very same loss or damage, and he himself would make a claim under the policy.

Implied term theory

The second theory is that subrogation immunity of a co-insured is based on implied terms in the policy. The representative cases are *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd*³⁵ and *National Oilwell (UK) Ltd v Davy Offshore Ltd*,³⁶ in which the implied term basis theory was propounded. The courts refused the insurer's subrogation action against a co-insured on the ground that the exercise of subrogation rights would be so inconsistent with the insurer's obligation to a co-insured that there must be implied into the insurance contract an exclusion of those rights. Business efficacy necessitates such an implication, that is, that exercising subrogation rights against a co-insured would be completely inconsistent with the insurer's obligation to the co-insured under the policy. That means that the immunity of a co-insured from subrogation action is based on an implied term in the policy. This is an alternative rationale for precluding an insurer from exercising the subrogation right to sue a co-insured. The implied term theory has been supported and followed by later cases.³⁷

The theory of construction of the underlying contract

In recent years, the theory of construction of the underlying contract between the co-insureds has been developed to determine the immunity of a co-insured to subrogation action. By this theory, subrogation immunity rests upon the relationship between the co-insureds. Whether an insurer may sue a co-insured depends on the construction of the underlying contract between the co-insureds. It is now established that subrogation immunity generally rests upon the contract between the principal insured and the co-insured, and not on circuitry or – other than in exceptional circumstances – on the implication of a subrogation waiver clause in the policy itself.³⁸ The purpose of construing contractual terms is to identify the parties' intention objectively.³⁹ If there is in the underlying contract between the parties an obligation on A to

³⁵ *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd* [1992] 2 Lloyd's Rep. 578

³⁶ *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 582 QBD (Comm)

³⁷ *Co-operative Retail Services Ltd v Taylor Yong Partnership Ltd* [2002] 1 W.L.R. 1419; *BP Exploration Operating Co Ltd v Kvaerner Oilfield Products Ltd* [2004] EWHC 999; *Tate Gallery (Trustees) v Duffy Construction Ltd* [2007] Lloyd's Rep. L.R. 758; *Tate Gallery (Trustees) v Duffy Construction Ltd (No 2)* [2008] Lloyd's Rep. L.R. 159.

³⁸ Robert Merkin, *Colinvaux's Law of Insurance*, (13th edn, Sweet and Maxwell 2022) para 12-066.

³⁹ Ozlem Gurses, "Subrogation against a contractual beneficiary: a new limitation to insurers' subrogation?" (2017) JBL, 560.

insure on behalf of A and B, there is an implication that A has agreed to look only to the insurers and not to B in the event that there is loss or damage resulting from the fault of B. If that is the case, then clearly no question of subrogation proceedings can arise. This basis was laid down in *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls Royce Motor Cars Ltd* in 2008⁴⁰ and confirmed by several recent cases: such as *Rathbone Bros Plc v Novae Corporate Underwriting Ltd*,⁴¹ *Gard Marine Insurance & Energy Ltd v China National Chartering Co Ltd*,⁴² *Prezzo Ltd v High Point Estates Ltd*,⁴³ *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others*,⁴⁴ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd*.⁴⁵

Regarding the construction of the underlying contract, in *Tyco Fire*, Rix LJ distinguished two circumstances:⁴⁶ (1) the underlying contract clearly provides that there is to be no liability of a contractor to his employer in the area of the regime for joint names insurance; (2) there is no such clarity in that direction, but, on the contrary, if anything there is, or appears to be, clarity in another direction, namely in favour of the contractor's continued liability to his employer for his negligence. In circumstance (1), the insurer cannot exercise his subrogation right against the co-insured contractor, because the underlying contract by its terms conferred immunity of liability upon the co-insured. In circumstance (2) the insurer may sue the co-insured who remains liability to the employer for his negligence. To explain this in another way, Rix LJ noted that this analysis was straightforward where the contract between the primary insured and the co-insured by its terms conferred immunity upon the co-insured because in that case the primary insured – and thus his insurers by way of subrogation – could not have an action against the co-insured. However, if the contract between the primary insured and the co-insured does not by its terms exclude a possible action for breach of duty on the part of the co-insured, Rix LJ was of the view that, absent a subrogation waiver clause, the insurers would not be precluded from relying upon that cause of action to bring a subrogated claim even though the co-insured was an insured person under the policy.

One of the main principles of contractual construction is that the underlying contract should be construed as a whole. The basis of subrogation is that a third party is liable for the

⁴⁰ *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls Royce Motor Cars Ltd* [2008] EWCA Civ 286; 1 CLC 625.

⁴¹ *Rathbone Bros Plc v Novae Corporate Underwriting Ltd* [2015] Lloyd's Rep. I.R. 95.

⁴² *Gard Marine Insurance & Energy Ltd v China National Chartering Co Ltd* [2017] UKSC 35; [2017] 1 WLR 1793 (SC)

⁴³ *Prezzo Ltd v High Point Estates Ltd* [2018] EWHC 1851 (TCC)

⁴⁴ *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others* [2018] EWHC 558 (TCC)

⁴⁵ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956

⁴⁶ *Tyco Fire & Integrated Solutions (UK) Ltd v Rolls Royce Motor Cars Ltd* [2008] 1 CLC 625, at [76].

insured loss and the insurer's payment does not discharge the third party's liability.⁴⁷ Whether an insurer may sue a co-insured through subrogation action depends on the following two situations:⁴⁸ (a) If a co-insurance provision in the underlying contract is sufficient to construe that the co-insured's liability is excluded, so long as the matter is covered by the insurance policy, the co-insured has no liability to the primary insured, so no subrogation action will arise. (b) If the co-insurance provision is not to wholly extinguish but only to satisfy the co-insured's liability under the underlying contract, the liability would exist, and the function of insurance is to satisfy such liability. The insurer would then be entitled to a subrogation action against the co-insured who caused the loss to the extent that was not insured.⁴⁹

In the recent case *Gard Marine Insurance & Energy Ltd v China National Chartering Co Ltd*⁵⁰ the approach of construction of underlying contract was adopted. This case is concerned with the charterparty between shipowner and demise charterers and the subrogation in the co-insurance. The Supreme Court held that upon the construction of the underlying charterparty contract, the terms of clause 12 precluded rights of recovery by owners against the demise charterers and rights of subrogation.⁵¹ Lord Toulson states:⁵²

“The critical question is whether the contractual scheme between the owners and the demise charterers precluded any claim for the insured loss of the vessel. This is a matter of construction. It has become a common practice in various industries for the parties to provide for specified loss or damage to be covered by insurance for their mutual benefit, whether caused by one party's fault or not, thus avoiding potential litigation between them. The question in each case is whether the parties are to be taken to have intended to create an insurance fund which would be the sole avenue for making good the relevant loss or damage, or whether the fund co-exists with an independent right of action for breach of a term of the contract which has caused that loss. Like all questions of construction, it depends on the provisions of the particular contract....”

⁴⁷ *Bradburn v Great Western Railway Co* (1874) L.R. 10 Ex. 1; *Mason v Sainsbury* (1782) 3 Doug. K.B. 61; *Bee v Jensen* [2008] Lloyd's Rep. I.R. 221 CA; *Sousa v London Borough of Waltham Forest* [2011] 1 W.L.R. 2197; *W v Veolia Environmental Services* (UK) Plc [2011] EWHC 2020 (QB).

⁴⁸ Ozlem Gurses, “Subrogation against a contractual beneficiary: a new limitation to insurers' subrogation?” [2017] JBL, 561.

⁴⁹ *Prezzo Ltd v High Point Estates Ltd* [2018] EWHC 1851 (TCC)

⁵⁰ *Gard Marine Insurance & Energy Ltd v China National Chartering Co Ltd* [2017] UKSC 35; [2017] 1 WLR 1793 (SC).

⁵¹ Clause 12 provided that the vessel was to be kept insured by the demise-charterer at its expense against marine, war and Protection and Indemnity risks; that such insurances were to be arranged by the demise-charterer to protect the interests of both the ship owner and the demise-charterer; and that all insurance policies should be in the joint names of the ship owner and the demise-charterer.

⁵² *Gard Marine Insurance & Energy Ltd v China National Chartering Co Ltd* [2017] UKSC 35; [2017] 1 WLR 1793 (SC), Lord Toulson at [139].

However, it does not mean that a faulty co-insured can be immune from liabilities for all losses he caused. To what extent his liability is excluded still depends on the terms of the underlying contract. For example, in *Prezzo Ltd v High Point Estates Ltd*⁵³ which concerns subrogation in co-insurance of landlord and tenant, the landlord was required to insure the premises of the leased building and add the tenant (who rented the basement) into the fire policy as a co-insured. The tenant negligently caused fire which destroyed the whole building. The insurer paid the landlord and the owners of other parts of the building and sued the tenant via subrogation. The court held: Based on the construction of the Tenancy Contract, the tenant is the co-insured for the basement, the insurer cannot sue a co-insured. However, the tenant is still liable for the loss to other parts of the building caused by fire because he was not a co-insured for other parts, so he cannot be immune from the insurer's subrogation action for the other parts.

Again, *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others*⁵⁴ concerns the insurers' subrogation right in a construction project co-insurance of the head contractor and the sub-contractor, the decision in this case confirms that for a potential subrogation claim against a co-insured, the focus will be on the underlying contract between the "co-insureds", rather than the insurance policy. An express term in that underlying contract between the head contractor and the subcontractor required the subcontractor to take out his own insurance against his liability to the head contractor in respect of damage to property due to the subcontractor's act or default. If there was alternative insurance in place covering the sub-contractor's liability, the sub-contractor was not a co-insured at all under the project policy which was taken out by the head contractor. Therefore, the head contractor's insurers, having indemnified the head contractor, were entitled to exercise subrogation rights against the subcontractor.

In a more recent case, *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd*,⁵⁵ the judgement was awarded to the insurer who exercised subrogation action against a co-insured. In *RFU*, the judgment contains a very useful summary of the law regarding subrogation in co-insurance to date, the court began by outlining the basic principles that (i) the law does not allow an action between two or more persons (or by an insurer by way

⁵³ *Prezzo Ltd v High Point Estates Ltd* [2018] EWHC 1851 (TCC)

⁵⁴ *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others* [2018] EWHC 558 (TCC)

⁵⁵ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956.

of subrogation) who are insureds under the same policy against the same risk,⁵⁶ and (ii) insurers who have indemnified one co-insured cannot exercise rights of subrogation against another co-insured.⁵⁷ However, the key issue in this case was not the existence of cover in the first place, but the extent of that cover for a co-insured, namely to what extent the co-insured can be protected from the insurer's subrogation action.

This case involves the works to upgrade Twickenham Rugby Stadium for the 2015 World Cup. The Rugby Football Union (RFU) engaged Clark Smith to design the ductwork and FM Conway to install it. The RFU and Conway entered into a JCT (Joint Contracts Tribunal) Standard Building Contract without Quantities 2011. The Contract required RFU (as principal insured) to put in place a joint name all risks insurance policy under Insurance Option C, which required RFU to effect insurance to cover Conway for physical loss or damage to the work executed or to site materials. The Contract itself provided that the cost of rectifying damage caused by Conway's own defective work would not be covered by any such policy. This exclusion meant there was no obligation on RFU to put in place project insurance to cover such losses.

RFU asserted that the ductwork was defective which caused damage to the cables as they were pulled through, which resulted in replacement costs of £3,334,405.26. RFU contented that Clark Smith and Conway are liable for those losses and had issued a Claim Form against them. The replacement costs were indemnified by the project insurers, Royal & Sun Alliance Plc (RSA). Upon the payment to RFU, RSA sought to recover those sums from Conway (and Clark Smith) in a subrogated action on the basis that the damage had been caused by their defective workmanship. In response, Conway argued that it was a co-insured under the project policy and that it had the benefit of cover to the same extent as RFU, which prevented RSA from bringing the subrogated claim against it.

The judgement says that if Conway "had been co-insured with the RFU in respect of the same risk" then it would have had "no liability to the RFU in respect of that risk." However, the judgement continues: "My conclusion in respect of the extent and effect of the co-insurance

⁵⁶ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956, at [52]. Eyre J quoted [61] of Lord Hope's speech in *Co-operative Retail Services Ltd v Taylor Young Ltd* [2002] UKHL 17, [2002] 1 WLR 1419.

⁵⁷ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956, at [52]. Eyre J quoted [614] of Colman J's speech in *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.

here means this principle does not assist Conway, and such liability, as is otherwise established, is not precluded by the co-insurance.”⁵⁸

Conway also argued that the express waiver of subrogation in the insurance policy precluded the insurer, from bringing a subrogated claim against it, regardless of whether it was fully co-insured with RFU. Eyre J rejected Conway’s argument, saying, “The Policy insured both the RFU and Conway but they were not insured to the same extent in respect of the same risk.”⁵⁹ The judge also said “The starting point in considering the effect of a waiver of subrogation clause is the underlying contract between the parties. This will influence the approach to determining the proper interpretation of a provision for the waiver of subrogation. For current purposes the insurer’s right is one of subrogation to the entitlement of an insured who has been indemnified and as explained above the extent of that entitlement against a co-insured will depend on the underlying contract between the co-insured parties.”⁶⁰ The contract obliged the RFU to take out insurance to cover Conway in respect of physical loss or damage to the work executed or to site materials, and not for loss flowing from breaches by Conway or any other contractor, that means that Conway was not co-insured with the RFU in respect of the relevant loss. As a result, RFU can seek to recover from Conway for the loss resulting from Conway’s own defective work. Accordingly, the insurer's ability to exercise subrogation against Conway is unrestricted.

To conclude, the judgment on *RFU* doesn’t alter the previous state of the law in this area but is a salutary reminder to make sure that the contractual documents are in line with the expectations of the parties.⁶¹ The principle derived from the aforementioned common law authorities is that to determine whether and to what extent an insurance policy applies to other parties beyond the principal insured, it is necessary to look to the terms of the contract between those parties. It is those terms which provide the key to the existence and extent of the insurance cover.

Conclusion

⁵⁸ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956, as per Eyre J at [132].

⁵⁹ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956, as per Eyre J at [109] and [126].

⁶⁰ *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* [2022] EWHC 956, as per Eyre J at [74] and [83].

⁶¹ Rob Goodship, “Co-Insurance, it’s a bit of a scrum” (<https://www.fenchurchlaw.co.uk/co-insurance-its-a-bit-of-a-scrum/> , accessed on 7 October 2022)

The insurer's subrogation right comes from the insured. The recent development regarding subrogation in co-insurance in both Chinese courts and English courts is that whether an insurer is entitled to sue a co-insured depends on the construction of the relevant terms of the underlying contract between the co-insureds. The clear principle derived from the English common law authorities is that to determine whether and to what extent an insurance policy applies to other parties beyond the principal insured, it is necessary to look to the terms of the contract between those parties. It is those terms which provide the key to the existence and extent of the insurance cover. The basis for construction of the underlying contract is still the general principle that if the insured, upon construction of the underlying contract, has right to claim against a co-insured who brings about the insured event, the insurer, after having paid the primary insured, is entitled to sue the co-insured; if the insured does not have such a right, the insurer will be precluded from bringing the subrogation action against the co-insured.

In China, there is no legal rules relating to subrogation in co-insurance. In the absence of the legal rules, Chinese courts have tried cases in this area based on the construction of the underlying contract. However, the courts' judgements have not produced detailed rules for the construction of the underlying contract. As discussed above, English common law has, in recent years, developed new rules for the construction of underlying contract to determine whether and to what extent, any co-insurance cover taken out by one party applies to the other(s), thereby to determine whether or to what extent that party (or its insurer) may sue the co-insured. The absence of provisions relating to subrogation in co-insurance in the Chinese Insurance Law is a major loophole, it is suggested that the Insurance Law should add provisions in this area and the Supreme People's Court should set up detailed rules through judicial interpretation to supplement the Statutory Law. To achieve this goal, it would be beneficial to refer to the rules recently developed in English common law.