



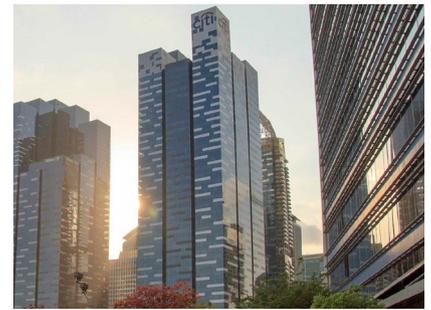
SUBROGATED RECOVERIES



A comparative guide – Asia Pacific



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ADVISORY | DISPUTES | TRANSACTIONS

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Introduction

The principle of subrogation is recognised and enshrined in many legal systems, particularly in the context of insurance relationships. Common law practitioners often refer to insurers “standing in the shoes” of their insureds to take the benefit of their rights and remedies against third party wrongdoers. The rationale for this is simple: as insurers have paid monies to their insured that otherwise the insured could have sought to recover from a third party, insurers therefore become entitled to enforce those rights.

With ever increasing globalisation, insurers and reinsurers are typically underwriting risks in a plethora of jurisdictions. Just as policies are often written subject to the local laws in jurisdictions where risks are located, often recoveries fall to be pursued in those locations. The emergence of new and developing markets with rising levels of insurance penetration and the increasing complexity of supply chains also mean that insurers must consider potential recoveries in a range of jurisdictions around the globe with wildly different governing laws, procedures and court systems. At the same time (due to market conditions) insurers are increasingly focused on “getting something back” and the value which recoveries can have to their balance sheets.

While many international claims professionals will consider they have a good understanding of policy provisions relevant to subrogation and how recovery actions are likely to operate, this understanding may be founded on principles of systems they are familiar with (such as English law). However differing legal systems and local application of contractual terms can lead to very different, and often surprising, results.

In jurisdictions with less mature legal systems, the absence of developed law on specific issues, a lack of specialist judges and a range of other factors may lead to greater levels of uncertainty of outcome. An appreciation of these factors and their impact at the outset assists insurers in deciding whether to pursue recoveries and in adopting the most appropriate strategies.

Subrogated recovery actions are not simply commercial litigation, as additional considerations must be taken into account. “Claimant” lawyers will be instructed by a party (insurers) who were not a party to the original contract or relationship. The insured may well have been fully indemnified by insurers and have little or no interest in the recovery litigation – indeed very often the potential subrogation target will be a key supplier or contractor and have an on-going relationship with the insured, one on which the insured may be highly dependent. Accordingly, legal mechanisms by which insurers can compel a reluctant insured to cooperate with the recovery proceedings are a very relevant consideration.

The question of exactly when insurers may commence recovery proceedings differs significantly from jurisdiction to jurisdiction. Certain legal systems require an insured to be fully indemnified before the right to subrogate arises, whereas other systems permit insurers to pursue partial recoveries as soon as corresponding partial indemnities have been made.

One issue for prompt consideration is the applicable limitation period. In addition to identifying any contractual specification, the relevant statutory regime should be considered. Statutory limitation periods vary significantly, for example a claim may be subject to a one year time bar before the Thai courts, but the same claim could be subject to a 30 year limitation period if pursued in Indonesia.

Another crucial consideration prior to embarking on (often costly) litigation is the extent to which any ultimate judgment or award is likely to be satisfied. There is little point incurring the costs of proceedings if the subrogation target ultimately proves to be impecunious. It is therefore essential to understand what investigations may be undertaken at an early stage to assess asset-worthiness and the procedures available to prevent a subrogation target from dissipating its assets.

Other issues such as: costs (whether or not a “loser pays” principle is applied); allocation of recovery proceeds; weight given (or not given) to independent expert evidence; and whether actions against co-insureds are permitted, can all have a significant bearing on how (and indeed whether) recoveries are pursued. Likewise parties to litigation should always consider the scope for commercial settlement (at the outset but also in parallel with any proceedings). The recognition, or otherwise, of concepts such as “without prejudice” will also have a bearing on the manner in which any settlement overtures are made.

Within the confines of a comparative booklet of this size, it is not possible to provide a definitive statement of all law and procedure relevant to subrogation in 15 jurisdictions and legal systems across Asia Pacific (not to mention our “starting point”, England and Wales). However working with our friends and colleagues in some of the leading regional legal practices, we have endeavoured to provide an accessible reference point to assist insurers in their immediate considerations, prior to seeking more substantive advice. We hope that this is useful and informative.



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England and Wales

What is the law on subrogation in England?

The principle of subrogation embodies an insurer's right to seek recovery of indemnity payments made to an insured from a third party responsible for the loss. The insurer "stands in the place of the insured", and is thereby entitled to take advantage of any rights which the insured has against a culpable third party and seek recovery of sums paid under the policy. Unless insurers and the insured agree to an assignment of the insured's rights against the third party, a subrogated recovery action will be brought by insurers in the name of the insured.

The right of subrogation exists at common law and under statute pursuant to section 79 of the Marine Insurance Act 1906. However the operation and extent of the insurer's right of subrogation can be modified by express terms in the insurance policy.

When does an insurer's right to subrogate arise in England?

An insurer's right to subrogate only arises if the insurance is a contract of indemnity. It does not arise in the case of life or accident insurance.

The right arises once the insurer has indemnified the insured. However, insurers may be prevented or restricted from exercising their rights of subrogation by express terms in the policy.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

There are various investigations that can be undertaken to determine whether a potential subrogation target is worth pursuing. These include:

- company searches – Companies House searches will show annual returns and company accounts; reveal existing and unsatisfied mortgages and charges; and confirm whether the company has gone into liquidation, administration or been dissolved
- winding-up searches – a register of all winding-up petitions issued in England and Wales is maintained by the Companies Court
- bankruptcy searches – where the subrogation target is an individual, a bankruptcy search may be carried out. This can be undertaken using the Land Charges Register or the Individual Insolvency Register
- Land Registry searches – a search will allow an insurer to find out whether the company is the owner of any land or building and if there are any restrictions on the land (ie whether a mortgage on it has been discharged).

In the event that a target is insolvent, enquiries should be made under the Third Parties (Rights against Insurers) Act 2010 as to whether the target has insurance in place that would respond to the claim. The Act enables a claimant to directly recover from the insurers of the insolvent target to the extent the target would have been entitled to recover under its policy of indemnity.

In order to ensure that assets are not dissipated, an application may be made for a freezing order. Such an order restrains the defendant from disposing or dealing with his assets and ensures that any “pot” of assets is available to enforce a judgment against if the claimant is successful at trial. The court has discretion on whether to make such an order, the primary consideration for the court being whether the granting of the order is “just and convenient”.

Is the insured required to cooperate in a subrogated action in England?

Insurers typically include express obligations in the policy requiring the insured to cooperate in any subrogated recovery proceedings. These can be general requirements to take all necessary steps to protect the insurer’s rights or more specific requirements to provide assistance to insurers in the pursuit of the recovery. Insured parties also have a general obligation not to prejudice insurers’ rights of recovery.

The insurer’s remedy for breach of these obligations by the insured will normally be to seek to recover damages from the insured for the loss attributable to the insured’s conduct.

What is the limitation period for a subrogated action in England and when does it begin to run?

As an insurer “steps into the shoes” of the insured, it can be in no better position than the insured would have been in. Therefore, where an insured’s claim is time barred, either by a contractual term or by statute, an insurer’s right of subrogation also falls foul of limitation.

Under the Limitation Act 1980, for a contractual claim the limitation period is six years from the date of the breach of contract, for a tortious claim it is generally six years from the date of the damage. However, in the case of latent damage, the limitation period may be three years from the date of the claimant’s knowledge of the loss, if that period expires later than the general six year period.

Who is responsible for costs in a subrogated action in England?

The costs of a subrogated action will ordinarily be paid by the insurer if the insured has been fully indemnified.

Where the subrogated action includes the pursuit of both insured and uninsured losses, the insurer and the insured are free to agree apportionment of costs in whatever proportion they wish. However, costs will often be split between the insurer and insured according to the size of their respective interests in the recovery.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Once a judgment is obtained, it will not be automatically enforced by the courts. There are various methods available for insurers to enforce the judgment and the nature of the debtor's assets will determine which enforcement action will be most effective:

- where the debtor is owed money by third parties, an application can be made for a third party debt order. An interim order will freeze the debt in the hands of the third party, and a final order will compel payment to the insurer
- where the debtor holds land or securities, a charging order will secure the debt against the property. However an application for an order for sale will be required for the sum secured to be realised
- if the target is an individual, an attachment of earnings order may be appropriate. This requires the debtor's employer to deduct sums from the debtor's salary and to pay these to the insurer
- an insurer may choose to pursue insolvency proceedings, although consideration should be given to whether other creditors may have a higher priority claim to the assets.

Are subrogated actions against co-insureds allowed under English law?

In general, insurers are not able to pursue a subrogated claim against a defendant who is a co-insured under the relevant contract of insurance. Under a joint policy, where the co-insureds have joint insurance of a common interest, the insurer will be unable to pursue a subrogated recovery against one co-insured in respect of an insured loss caused to the other, as each co-insured's subrogated right is the same.

However, where parties are insured under a composite policy they typically have different interests. The issue most commonly arises in construction projects where co-insurance for the employer, contractor and subcontractor may be required under the construction contract(s). In general, the rule remains that insurers cannot pursue a subrogated recovery against a co-insured. However there are narrow exceptions to this rule, for example where insurers can establish that the co-insured is not insured for the loss that is the subject of the claim under the policy and that the underlying construction contract does not prevent such a subrogated recovery via either its express or implied terms.



Australia

What is the law on subrogation in Australia?

The doctrine of subrogation, under which one person becomes entitled to exercise the rights of another, applies in relation to a number of legal relationships, including those which arise under contracts of indemnity where the insured is entitled to be indemnified against loss. This includes most contracts of general insurance, but does not normally include life insurance or personal accident insurance contracts (except to the extent that the policy provides for compensation in respect of actual financial loss). The doctrine of subrogation arises from a mix of common law, equity and contract law and in Australia is affected by the Insurance Contracts Act 1984 (Cth) (Insurance Contracts Act).

The principal effect of the doctrine is that an insurer is entitled to exercise, in the insured's name, any rights of the insured against third parties which are related to the subject matter of the insurance and whose exercise may reduce his or her loss. The insurer's right of subrogation arises upon completion of the contract. However, entitlement to exercise it depends on actual indemnification of the insured.

When does an insurer's right to subrogate arise in Australia?

The insurer's entitlement to exercise its right of subrogation arises when it has fully indemnified the insured in accordance with the contract. The phrase "in accordance with the contract" is critically important. The insurer's right of subrogation arises once it has paid the full amount due under the contract, even if that amount is not sufficient to give the insured a complete indemnity – because, for example, an excess applies or the insured's loss exceeds the maximum amount payable under the contract.

The insurer's entitlement to exercise its right of subrogation does not arise if the insurer pays part of the amount due under the contract and reserves its position in relation to the balance. However practically speaking, this does not usually preclude an insurer from investigating and advancing a subrogated claim against a third party prior to fully indemnifying the insured. It is important to ensure that the insured agrees with any demands made, court proceedings issued and or settlement of the claim before subrogation rights arise. This is not usually contentious because the insured benefits from any recovery of uninsured losses and a reduced loss history.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Company searches from the Australian Securities & Investments Commission are conducted initially to ensure that court proceedings can be issued against the target (ie to confirm that it has not been deregistered) and that there are no filings such as winding up, administration or liquidation which indicate potential solvency issues. For individuals, bankruptcy searches are conducted.

Assessing the financial viability of a subrogation target can be undertaken by first considering the target's insurance position. Insurance information may have been provided in a certificate of cover to the insured, or it may be sought from the target where required under contract. Where the target is in liquidation, it will be obliged to provide a copy of any applicable insurance policy. Otherwise, a response to the claim by an insurer, a loss adjuster or insurance lawyers often provides a sufficient indication of insurance. In addition to which, these parties commonly reveal that the claim has been indemnified by an insurer.

In the absence of sufficient or confirmed insurance, searches can be undertaken to identify if the target is the owner of any real property by a title search with the relevant state Titles Office or the owner of any secured personal property by searching the Personal Property Security Registry. Searches for annual reports and other financial documents filed at the Australian Securities & Investments Commission can also be obtained. Finally, financial reports can be obtained from several private organizations including Dun & Bradstreet but these can be of limited value for private companies.

If there is reasonable apprehension that assets may be dissipated before a judgment can be obtained and enforced, freezing orders and property preservation orders may be sought from the court seeking restraint of assets. Other court orders are also available to prevent the sale of real assets and dissipation of funds.

Is the insured required to cooperate in a subrogated action in Australia?

The insured is required to cooperate in a subrogated action and is also under a duty to the insurer not to prejudice the insurer's right of subrogation. This is either expressly specified in the policy or otherwise arises under the common law. The courts consider that this duty arises as an implied term in contract and equity arising out of the duty of utmost good faith. Although the insurer's right to exercise the insured's rights by way of subrogation does not arise until it has fully indemnified the insured in accordance with the contract, the insured's duty applies before full indemnification is made.

If the insured breaches this duty, the insurer may seek to reduce the amount payable to the insured or equivalent damages which reflect the extent of the prejudice caused to the insurer. However the courts rarely consider that there has been sufficient prejudice and the authorities indicate that the prejudice must be capable of being assessed in monetary terms, making many cases of failed co-operation difficult in practice to prosecute. Orders for specific performance and injunctive relief can also be sought to obtain cooperation.

What is the limitation period for a subrogated action in Australia and when does the limitation period begin to run?

In Australia there is no separate statute of limitations that applies to the doctrine of subrogation itself. As the insurer must bring its claim in the insured's name rather than its own, each limitation period applies equally to the claim whether brought by the insured

or insurer. In most Australian states, the limitation period for a contract claim is six years from the date of the breach, and for a negligence claim six years from when the damage occurred. Other causes of action have differing limitation periods.

Who is responsible for costs in a subrogated action in Australia?

Payment of costs for a subrogated action is determined by the policy. Where the policy is silent or unclear, the Insurance Contracts Act implies that costs are paid by the party obtaining priority over any recovery proceeds, or if both, then costs are paid by both. Both the policy and the Insurance Contracts Act can be contracted out of however allowing the parties to agree to a different costs regime. Commonly, insurers choose to fund the recovery other than for costs related to uninsured losses.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

There are a variety of options available to enforce a judgment once obtained, depending on whether the third party is a company or an individual and the nature of known assets. In the case of companies, statutory demands can be issued and if not complied with, the target can be wound up with a liquidator appointed. In the case of individuals, bankruptcy notices are often the most effective way of procuring payment. Where specific assets, incomes or debt credits are known, warrants of seizure and sale as well as attachments of earnings and account can be obtained by court order. In all cases, it pays to consider methods of enforcement and a third party's ability to pay prior to embarking on a subrogated recovery action.

Are subrogated actions against co-insureds allowed under Australian law?

There is no specific legislative or common law bar to making subrogated claims against co-insureds under Australian law. However, the authorities demonstrate a reluctance to allow such claims.

In many cases the policy will include a clause prohibiting recovery being sought against a co-insured. Such clauses will be upheld by the courts.

It is also worth noting that the Insurance Contracts Act prohibits subrogated claims where there is a family or other personal relationship between the insured and the third party or where the third party is an employee of the insured (and the conduct giving rise to the loss occurred in the course of employment and was not serious or wilful misconduct).

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China

What is the law on subrogation in China?

The laws applicable to subrogation in China are divided into two parts: (i) the statutory laws relevant to marine insurance policies; and (ii) statutory laws relating to non-marine insurance policies.

Subrogation under non-marine insurance policies will primarily be subject to the Insurance Law of the People's Republic of China (the PRC). Generally, subrogation under marine insurance policies is governed by the Maritime Code of the PRC and the Special Maritime Procedure Law of the PRC. Where there is an absence of provisions in specific maritime laws, then the Insurance Law will govern.

The judicial interpretations promulgated by the Supreme Court also have a similar effect to the statutory rules.

When does an insurer's right to subrogate arise in China?

The insurer's right to subrogate arises when an insurance payment is made to the insured. Insurers are only entitled to claim the sum of the insurance payment paid to the insured.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

For the purpose of determining whether a potential subrogation target is worth pursuing, insurers may carry out investigations against the subrogation target, including: (i) company searches to determine the time of establishment, the registered capital and the shareholders; and (ii) property searches, such as bank account information and the ownership or proprietary rights of the targeted assets.

In order to prevent the subrogation target from dissipating any assets before a judgment is enforced, Chinese law allows the subrogated insurers to file applications to competent courts for property preservation, such as to freeze the bank account or to attach the property, either before or during subrogated proceedings.

Is the insured required to cooperate in a subrogated action in China?

The insured's duty to cooperate in a subrogated action is limited to the provision of the necessary documents and the information within the insured's knowledge. However, the insured shall not prejudice the insurer's right of subrogation in a wilful or grossly negligent way, otherwise the insurer is entitled to deduct or require the insured to refund the compensation amount to the corresponding extent.

What is the limitation period for a subrogated action in China and when does the limitation period begin to run?

The limitation period for subrogated actions in China varies depending on the type of claim. Generally speaking, the limitation period is three years (from 1 October 2017) unless otherwise stipulated by law. For example, the limitation period is one year if the claim arises from bodily injury, sale of defective goods without notice, delay and refusal to pay rent and loss of or damage to the deposited property. Additionally the Maritime Code sets out specific limitation periods for different types of claims.

For subrogated actions in respect of non-marine insurance policies, the limitation period begins to run from the day the insurer indemnifies the insured. However, for subrogated actions in respect of marine insurance policies, the limitation period begins to run from the day when the underlying claim arises.

Who is responsible for costs in a subrogated action in China?

The costs involved in a subrogated action in China usually include court fees and attorney fees. The plaintiffs and/or applicants prepay court fees which will eventually be apportioned by reference to the adjudicated outcome. This means that the losing party will have to bear court fees. It is also common practice for each party to bear their own attorneys' fees in an action before the courts.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

If a final judgment is not honoured, the winning party may file an enforcement application indicating which property is subject to enforcement. The methods of enforcement include sealing up, distraining, freezing and auctioning and/or selling off the targeted property. Chinese courts may also exercise discretion (responding to specific applications) and issue restraining orders against the legal representatives of the target company so as to impose restrictions on their movement, including a prohibition on travelling abroad. In addition, the courts may also inform the media of the target company's failure to abide by and comply with the judgments.

Are subrogated actions against co-insureds allowed under Chinese law?

Chinese law does not specify whether insurers may bring subrogated actions against co-insureds. Conceivably, it would depend on the wording of the particular policy. Subrogated actions against co-insureds may be feasible if a co-insured wilfully caused the insured incident.

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Our underlying philosophy is to understand the commercial objectives of our clients. Our clients resolve disputes in different ways. So while our legal advice will meet the required technical excellence, it will always be informed by the specific needs of our clients and their commercial reality. Our function is to help our clients enhance their commercial balance sheet and that is how we measure our success.



Hong Kong

What is the law on subrogation in Hong Kong?

It is a long established principle in Hong Kong that an insurer has the right of subrogation, similar to the position under English law. Subrogation is the principle by which an insurer, having paid a claim, then stands in the place of an insured, and exercises the insured's right of recovery in the insured's name against any third parties responsible for the loss.

The insurer's rights to pursue a third party are no better than those of the insured. Therefore, the insurer can exercise any remedy exercisable by the insured as against a culpable third party in relation to the insured event and claims can be contractual, tortious, legal or equitable.

When does an insurer's right to subrogate arise in Hong Kong?

The insurer's right to bring an action against a culpable third party does not come into effect unless and until the insurer has fully satisfied his liability to the insured. An insurer who does not admit liability, or who claims the right to withhold a portion of the proceeds of the policy, does not have a right to bring a subrogated action.

There are certain situations in which the insurer's subrogation rights are not applicable, for example where the culpable third party is a co-insured (as discussed below). In such situations, while the insured can claim under the policy, the insurer will be unable to pursue recovery from the third party responsible for the loss.

The right of subrogation arises by operation of law in indemnity insurance contracts once the insured has been indemnified by the insurer. The right of subrogation can be limited in scope, extended, or expressly waived by the provisions of the policy. It is common that in certain types of insurance policies, such as construction policies, the right of subrogation will be, to some degree, excluded. In some situations, the insurer may agree not to exercise its right to bring a subrogated action, for example if there is a knock-for-knock agreement in place between insurers (the International Hull Clauses 2003, for example, provides for such waiver of enforcement of subrogation rights against a third party).

Subrogation only applies to indemnity insurance and so does not apply to life or accident insurance policies.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

There are a number of preliminary investigative steps that the insurer can take to establish whether it might be worthwhile pursuing a potentially culpable third party. These include searching the Companies Register, where the third party is a corporate entity, or

undertaking a bankruptcy search where the third party is an individual. These searches will highlight any insolvency issues which is the first step in determining whether the target has the means to satisfy a potential claim. If there is information indicating that the target owns any property, a title search can be conducted to verify the ownership. A civil litigation search may also reveal whether the target is subject to any court proceedings in Hong Kong.

The insurer should also consider whether the third party holds any insurance which might respond to the claim. Even if the third party is insolvent, provided the loss is covered, the insurer may be able to claim directly against the target's insurer under the Third Party (Rights against Insurers) Ordinance (cap 273).

There are a number of options available in the event of concern over whether the target may dissipate assets before judgment can be obtained and enforced. For example, the insurer may be able to apply to court for a freezing injunction (sometimes referred to as "Mareva" injunction) seeking restraint of the third party's assets.

Is the insured required to cooperate in a subrogated action in Hong Kong?

Until full payment of the indemnification by the insurer, the insured is entitled to have conduct of any proceedings brought in its name. However, once the action is vested in the insurer, the insurer will have control of the conduct of proceedings.

Most insurance policies will give the insurer certain (limited) rights to ensure that the insured's conduct does not prejudice its subrogation rights. They will commonly contain wording to the effect that the insured shall cooperate with and assist the insurer with any action, and should not prejudice the insurer's position with its conduct, for example by compromising the claim against the third party. If the insured breaches this duty, it is open to the insurer to claim damages from the insured in an amount equivalent to the prejudice suffered.

What is the limitation period for a subrogated action in Hong Kong and when does the limitation period begin to run?

As subrogated recoveries involve an assumption by the insurer of the insured's cause of action, the same limitation period as would have applied to the insured, applies to the insurer. There is no separate period of limitation which is specific to subrogated recovery actions.

Under Hong Kong law, limitation periods are imposed by statute, usually the Limitation Ordinance. There are different limitation periods for different types of claim. For example, the limitation period for a contract claim is six years from the date of the breach and for a negligence claim six years from when the damage occurred.

Who is responsible for costs in a subrogated action in Hong Kong?

Unless provided for under the terms of the policy, insurers will usually bear the costs of any subrogated recovery action. Where the insurer pursues both insured and uninsured losses in a subrogated action, an apportionment of costs may be agreed between the insured and insurers.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

A number of options exist to enable insurers to enforce a judgment. The most appropriate way forward may turn on whether the third party is a company or an individual and the assets which it holds.

If the assets of the third party are known, the insurer can seek a writ of execution from the court in order to seize and sell the assets to satisfy the judgment. If the third party's assets are unknown, the insurer can seek to have the third party (where a company, one of its officers) examined in court (through cross-examination), to find out what specific assets, income and debt credits may be available to satisfy the judgment.

In the event that a statutory demand has been made by the insurer against a third party company but remains unpaid, the insurer can seek a winding-up petition or, in the case of an individual, a declaration of bankruptcy. The insurer might also obtain a charging order ie, a charge in favour of the insurer, imposed on an interest in land or securities owned by the third party.

Are subrogated actions against co-insureds allowed under Hong Kong law?

There is no specific legislative barrier to subrogated claims against co-insureds under Hong Kong law. However, case authorities in Hong Kong have established that insurers are, as a general rule, barred from pursuing subrogated recovery proceedings against co-insureds. Furthermore, insurance policies commonly expressly prohibit any subrogated action against co-insureds.

RPC Hong Kong



India

What is the law on subrogation in India?

The equitable assignment of the rights and remedies of the insured in favour of the insurer, implied in a contract of indemnity, is known as “subrogation”. It is based on two basic principles of equity: (a) no tort-feasor should escape liability for his wrong; and (b) there should be no unjust enrichment for the injured, by recovery of compensation for the same loss, from more than one source.

The right of subrogation is a statutorily recognised right in India. The Indian Contract Act, 1872 (section 140) deals with the rights of a surety under a contract of indemnity, embodying the right of subrogation. This right has also been recognised specifically in section 79 of the Marine Insurance Act, 1963, as well as in section 92 of the Transfer of Property Act, 1882.

Subrogation occurs when the insurer is allowed to “stand in the shoes” of the insured and enforce the rights of the insured against the wrongdoer. Subrogation enables the insurer to exercise the rights of the insured against third parties in the name of the insured. Consequently, any plaint, complaint, suit, action or petition for recovery of compensation can be filed in the name of the insured, or by the insured represented by the insurer as subrogee-cum-attorney, or by the insured and the insurer as co-plaintiffs or co-complainants.

When does an insurer’s right to subrogate arise in India?

Indian law recognises three types of subrogation. They are:

- **subrogation by equitable assignment:** In this type of subrogation, there is no instrument/ letter of subrogation governing the terms of subrogation between the insurer and the insured. It occurs automatically, when the insurer settles the claim under the policy by reimbursing the entire loss suffered by the insured. However, where the insurer does not reimburse the entire loss/claim of the insured, the insurer does not step into the shoes of the insured but only gets the right to recover from the insured any amount remaining out of the compensation recovered by the insured from the wrongdoer after the insured fully recovers his loss. Thus in cases of equitable subrogation where there is no formal agreement, subrogation is not possible without full payment of the insured’s loss
- **subrogation by contract:** Here subrogation is evidenced by a contractual arrangement referred to as a letter of subrogation which sets out the terms of the relationship between the insured and the insurer. Upon execution of a letter of subrogation, the insurer becomes entitled to recover in terms of the said instrument, a sum not exceeding what was paid by it under the contract of insurance by suing in the name of the insured. The letter typically authorises the insurer to first appropriate the sum paid to the insured and pay the balance (if any) to the insured even where the insurer has settled only a part of the loss incurred by the insured. This is not possible in the case of a subrogation by equitable assignment referred to above
- **subrogation-cum-assignment:** In the case of a subrogation-cum-assignment, the insured executes a letter of subrogation-cum-assignment permitting the insurer to recover monies not limited to the quantum of payment made to the insured. Such an instrument also gives the insurer an option to sue in the name of the insured or to sue in its own name. Where the insured

executes a subrogation-cum-assignment in favour of the insurer, the insured is left with no right or interest in the matter and will not be able to sue the wrongdoer on its own account and for its own benefit. Moreover in a subrogation-cum-assignment the insurer is entitled to keep the entire amount recovered from the third party and unlike a subrogation by contract or subrogation by equitable assignment is not required to account for the balance to the insured.

A transfer or assignment of a mere right to sue for compensation is invalid under Indian law. But when a letter of subrogation-cum-assignment is executed, the assignment is interlinked with the subrogation and is therefore valid and enforceable as it is not an assignment of a mere right to sue.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Parties may choose to employ a “private eye” to investigate whether a potential subrogation target is worth pursuing.

The insurer may decide to apply for interim relief under the provisions of the Code of Civil Procedure, 1908 for example, an injunction restraining the third party from doing a particular act or an order of attachment before judgment, which is somewhat similar to Mareva principles.

Is the insured required to cooperate in a subrogated action in India?

Policies often require the insured to cooperate with the insurer in general and more specifically in pursuing subrogation claims against third parties.

Independent of policy requirements, the Insurance Regulatory Development Authority (Protection of Policyholders’ Interests) Regulations 2002 obliges an insured to assist the insurer in the prosecution of a proceeding or in the matter of recovery of claims against third parties.

What is the limitation period for a subrogated action in India and when does the limitation period begin to run?

The limitation period for a subrogated action is the same as the limitation period for suing for the underlying cause of action ie, the injury/damage. It therefore cannot be specified and will depend on the nature of the underlying claim.

The limitation period would begin to run from the date when the right to sue accrued ie from the time of the casualty/breach causing the loss.

Who is responsible for costs in a subrogated action in India?

Generally, the insurer, upon fully indemnifying the insured and on taking over control of any proceedings against third parties, would be liable for financing the costs incurred in pursuing recovery/ subrogation proceedings. However, the responsibility for costs may depend on the terms of the insurance contract and would therefore depend on the facts of the case.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Upon obtaining a decree, the judgment creditor must apply to execute the decree. The court has no obligation to execute a *decree suo moto* if the judgment creditor takes no steps in that regard. A decree will be executed by the court which has passed the judgment or by the court to which such decree has been transferred. The modes of executing a decree are by: a) delivery of any property specifically decreed (movable or immovable); b) attachment and sale or by sale without attachment of any property; c) arrest and detention in prison; and d) appointing a receiver or in any such other manner as the nature of the relief granted may require.

Are subrogated actions against co-insureds allowed under Indian law?

Typically where parties share a common insurable interest in the property and are joint insureds under the policy, the insurer does not have a right to recoup the indemnity paid to the insured from a co-insured by exercising the right of subrogation. This exclusion is an implied term in a contract of insurance as the insurer is entitled to only exercise those rights which the insured could have exercised before subrogation. It thus flows that if the insured has no right against the co-insured, neither will the insurer.

It is pertinent to note that in cases where the co-insureds do not share a common insurable interest in the insured property but rather have separate insurable interests, the insurer's right to proceed against a co-insured will depend on the terms of the insurance policy entered into with the insurer and the underlying contractual arrangement (if any) between the co-insureds. The position regarding subrogated actions against co-insureds remains untested in India and much will depend on the facts of the case.

Zarir Bharucha & Associates



Indonesia

What is the law on subrogation in Indonesia?

Article 284 of the Indonesian Commercial Code (the Code) provides the right of subrogation in the business of insurance. Article 284 of the Code states:

“If an insurer has paid in full the compensation to the insured, then the insurer will replace the position of the insured in any matters to claim against third party already causing the loss to the insured”. (Unofficial translation).

When the insured suffers a loss which is caused by a third party, he has two options to obtain compensation: (i) from the insurer; or (ii) from the third party who has caused the loss. If the insured has received compensation from the insurer in accordance with the insurance policy/insurance agreement between the insurer and the insured, the insured cannot ask such third party to pay the compensation, since the insurer shall replace the position of the insured to claim against such third party. The right of subrogation entitles the insurer, having paid the insured’s claim, to “step into the shoes” of the insured and assume the insured’s rights and remedies against such third party.

When does an insurer’s right to subrogate arise in Indonesia?

When the insurer and the insured sign the insurance policy, the insured agrees that upon receipt of the insurance proceeds, he will pass his right and remedies against any third party who causes the loss to the insurer. Thus the right of subrogation arises upon receipt of the proceeds claimed when a third party causes loss to the insured, whether through commission of a tort, based on a contractual relationship or abandonment (in marine insurance).

Article 284 of the Code requires that the claim be paid in full in order for the right of subrogation to arise.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

The law does not provide a specific mechanism in which to undertake investigations prior to issuing a claim against a third party based on subrogation rights. However, it is very common in civil cases for a plaintiff to conduct investigations such as company searches or property/assets searches before filing a claim. However, as there are no effective public databases of assets or obligations, a private investigation service is often engaged to undertake an investigation.

Is the insured required to cooperate in a subrogated action in Indonesia?

The insured is required to provide data/information about the third party that caused the loss. In addition, Article 284 of the Code clearly states that the insured shall not take any action that might prejudice the insurer's potential rights of subrogation.

What is the limitation period for a subrogated action in Indonesia and when does the limitation period begin to run?

Generally, the time limit after which the insurer is barred from making a claim is 30 years (Article 1967 of the Indonesian Civil Code), which is the normal statute of limitations.

Certain claims have shorter limitations, such as aviation or maritime claims or claims for unpaid legal fees, and these would apply to any subrogation claims as well as to the main claim, where applicable.

Who is responsible for costs in a subrogated action in Indonesia?

The insurer shall be liable for costs arising in subrogation proceedings. Generally each party to litigation must cover its own legal costs unless they have agreed otherwise.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Once a judgment is obtained ordering the third party to pay compensation to the insurer, the insurer must first ask the third party to obey the judgment voluntarily. If the third party does not obey the judgment voluntarily, then the insurer may file a request for enforcement to the court having jurisdiction over the errant defendant.

After issuance of the enforcement order (exequatur) the court will request the defendant to comply within a certain period, normally eight days. If no compliance is forthcoming, the insurer may seek execution against the assets of the defendant. This must be done in the court having jurisdiction over such assets, which must be clearly identified, and such assets will then be sold at public auction and the proceeds, up the amount of the judgment, are paid over to the insurer.

Are subrogated actions against a co-insured allowed under Indonesian law?

Articles in the Code which relate to insurance do not specifically address this issue. Therefore, the general principle of freedom of contract as stated in Article 1338 of the Indonesian Civil Code shall apply.

In order to avoid disputes on this issue, the insurer and the insured should seek to address this issue in the insurance policy prior to inception. If it is stated clearly that the insurer has the right of subrogation against a co-insured, then the insurer may take subrogated action against the co-insured. It is also recommended to provide clear definitions of the co-insured and the respective rights and obligations of the insurer, the insured and the co-insured.

KarimSyah Law Firm



Japan

What is the law on subrogation in Japan?

In Japan, the Insurance Act (Act No. 56 of 2008 (the IA)) is the primary legislation governing insurance contracts, including subrogation. The relevant provisions are Articles 24 and 25.

Article 24 states that in the event of a total loss of an insured object, the insurer, having paid out a claim to the insured, shall by operation of law “step into the shoes” of the insured and obtain proprietary rights to the insured object – of the proportion A/B , where A is the amount the insurer paid out for the claim, and B is the value of the insured object.

Article 25 states that an insurer, having paid a claim to the insured, shall by operation of law “step into the shoes” of the insured and may enforce a claim held by the insured against the third-party tortfeasor responsible for causing the loss, to an amount up to the lesser of: (i) the payout made by the insurer; or (ii) the amount of the insured’s claim against the third-party (provided, however, that where the amount of the insurer’s payout is less than the amount of loss incurred by the insured, this amount shall be reduced by the amount of this shortfall).

When does an insurer’s right to subrogate arise in Japan?

The right to subrogate arises upon the insurer’s initial payment to the insured in relation to the insurance claim. It is not necessary for the insurer to make full payment; a partial payment is sufficient to give rise to the right to subrogation, in accordance with the IA provisions discussed above.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

In cases involving high value property or liability claims, insurance companies will typically engage a loss adjuster to estimate the amount of loss and investigate causation and the level of culpability. The insurer will consider the loss adjuster’s reports, consult with its own legal counsel, and take appropriate measures to secure its subrogation right.

Various legal measures are available to the insurer, including freezing orders and property preservation orders. The appropriateness of each will depend on the value of the claim and the jurisdiction of the insured and tortfeasor.

Is the insured required to cooperate in a subrogated action in Japan?

This depends on the nature of the insurance provided and the terms and conditions of the relevant insurance policies. In a case involving liability claims, for example, the insurer will generally require the insured to provide the information necessary for it to determine the existence of liability of the insured. During this process, the insurer will naturally acquire ancillary information, which may enable it to exercise subrogation rights against third parties. The required cooperation from the insured will generally be limited to the provision of information.

What is the limitation period for a subrogated action in Japan and when does the limitation period begin to run?

A subrogated recovery action simply means the transfer of the right held by the insured to claim damages against the tortfeasor to the insurer, by operation of law. In Japan, the statute of limitations that is applicable to the original claim held by the insured against the third-party tortfeasor will continue to apply in the same way to the insurer. As long as the insurer initiates a litigation process by the expiration of the relevant limitation period, the claim will not be barred. No additional limitations will apply simply because the claim is one of subrogation by operation of law.

Who is responsible for costs in a subrogated action in Japan?

Insurers must initiate any subrogation action at its own cost.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

If the third-party tortfeasor refuses to pay damages despite a final and binding judgment (or a judgment with a declaration for provisional enforcement), insurers may enforce the judgment following the procedures under the Civil Execution Act of Japan (Act No. 4 of, 1979, as amended). Detailed description of the procedures is outside the scope of this brochure, however, it is important that insurers first identify the assets of the tortfeasor that they are wishing to enforce the judgment against.

Are subrogated actions against co-insureds allowed under Japanese law?

The IA does not prohibit subrogated actions against co-insureds. However, in practice, these actions rarely materialise. This is because insurers generally tend to waive, through a term in the policy, their right of subrogation against co-insureds (to make the insurance product more marketable).

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Malaysia

What is the law on subrogation in Malaysia?

The law on subrogation in Malaysia is akin to the position in England. Insurers have the right to take over the rights and remedies of the insured against a third party responsible for causing the insured loss. An insurer cannot recover more than the indemnity paid to the insured. Likewise, an insured cannot make a profit from his loss by recovering compensation from both the insurer and the third party which caused the loss. The insurer can exercise the right of subrogation by taking an action against a third party in the name of the insured or by way of an assignment of the insured's cause of action. A settlement effected between an insurer on behalf of an insured and a third party is binding on the insured.

When does an insurer's right to subrogate arise in Malaysia?

An insurer's right to subrogate accrues after an insured is indemnified by the insurer for the loss and upon the execution of the subrogation receipt by the insured.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

A Registrar of Companies search can be undertaken to determine the assets, liabilities and unsatisfied charges over a company. A Winding Up search can also be undertaken to determine whether a company is wound up/in liquidation and a bankruptcy search can be done to determine the status of an individual. A private investigator can also be engaged to conduct more in depth asset searches.

In respect of the mechanisms in place to prevent the dissipation of assets, it is possible to file an application for a Mareva Injunction (freezing order) and an application for the preservation of property.

Is the insured required to cooperate in a subrogated action in Malaysia?

Yes, the insured is required to give reasonable co-operation in a subrogated action. This requirement is usually incorporated into the relevant insurance policy terms and conditions.

What is the limitation period for a subrogated action in Malaysia and when does the limitation period begin to run?

The limitation period for a subrogated action begins to run from the time the cause of action arose in respect of the insured loss. The limitation period for actions founded on contract and tort is six years from the date the cause of action accrues.

Who is responsible for costs in a subrogated action in Malaysia?

The insurer will bear the costs of a subrogated action.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Once a judgment is obtained, the judgment must be served on the third party and a demand must be made for the third party to satisfy the terms of the judgment. If no payment is made within the prescribed period, the following actions can be taken:

- Writ of Seizure and Sale of any assets belonging to the third party
- Garnishee Proceedings where the insurer may garnish money that the third party is supposed to receive from another party
- Judgment Debtor Summons where a third party is required to attend court to be questioned to examine his means of repaying the judgment debt. In the case of a company, an officer of the third party will be examined on the company's means of repaying the judgment debt. After examination, an order can be made which requires the third party to settle the judgment debt in full or in monthly instalments
- winding up (liquidation) proceedings against companies
- bankruptcy proceedings against an individual if the principal sum contained in the judgment is \geq RM30,000.

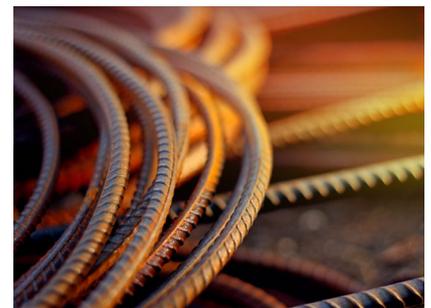
Are subrogated actions against co-insureds allowed under Malaysian law?

Subrogated actions against co-insureds are generally disallowed. However, this rule may not be applicable if one co-insured ceases to be covered by the insurance policy.

Shaikh David & Co.



Deconstructing some of the region's most complex construction claims



RPC's specialist construction insurance team advises clients on the full spectrum of claims impacting insurers and reinsurers of the construction industry. We have a depth of experience in advising on some of the largest construction losses globally.

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Nepal

What is the law on subrogation in Nepal?

The law on subrogation in Nepal is governed by the Contract Act 2000 (the Contract Act). Pursuant to sub-section 23(1) of the Contract Act, if an insured concludes a contract with an insurer to insure against any loss or damage which could be caused by a third person to the insured's property, facilities, rights or profits, the insurer is responsible for bearing any such losses or damages irrespective of whosoever caused such losses or damages to the insured pursuant to the terms of the contract. In such circumstances, the insurer then has the right to pursue the third party responsible for the loss.

When does an insurer's right to subrogate arise in Nepal?

Section 23(2) of the Contract Act provides that in the event of a claim an insurer is obligated to pay to the insured the amount prescribed in the contract. Where the amount is not prescribed in the contract, a reasonable amount shall be paid to the insured by the insurer. The right of an insurer to subrogate shall arise immediately when the agreed amount, or a reasonable amount in lieu of the agreed amount in the contract, becomes payable by the insurer to the insured or his/her heirs.

What investigation can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Prior to initiating subrogated proceedings, investigations such as, company searches, property searches etc may be undertaken in order to determine whether a potential subrogation target is worth pursuing.

In order to ensure that any assets are not dissipated before a judgment is enforced, a petition seeking to attach the assets may be sought from the court pending disposition of the main proceedings. The court may issue an order to prevent the subrogation target from dissipating the assets and also to the relevant authorities to attach the assets until final adjudication of the case.

Is the insured required to cooperate in a subrogated action in Nepal?

Generally, yes. If the subrogated action is dependant upon the insured's cooperation, the insured is required to provide the necessary cooperation to the insurer.

What is the limitation period for a subrogation action in Nepal and when does the limitation period begin to run?

The limitation period for subrogated claims in Nepal is two years from the date when the cause of the action has arisen. The period of limitation begins to run once the insurer is liable to pay compensation to the insured under the contract of insurance. In most cases, it shall arise from the date of accident or incident triggering the insurance claim.

Who is responsible for costs in a subrogated action in Nepal?

It is the responsibility of the party initiating a subrogated action to bear all costs for such action. However, pursuant to sub-section 24(b) of the Contract Act, if the subrogated action is successful, the costs of such action may be recovered from the third party who caused the loss or damage.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Once the court renders the final judgment, the parties to the case will have a time period of 35 days to file their appeals with a higher court. If no party files an appeal within the specified time period, then the judgment becomes final and the successful party or parties can proceed further to enforce the judgment.

A final judgment will be enforced by the enforcement division, Tahasil, which is located within each District Court. The Tahasil will take all necessary measures to enforce the judgment, such as granting the possession of movable and immovable assets, auctioning of the assets, etc.

Are subrogation actions against co-insureds allowed under Nepalese law?

The rights and liabilities of an insurer are generally governed by the contractual provisions. Hence, if the contract permits such a right, a subrogation action may be brought against a co-insured as well.

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New Zealand

What is the law on subrogation in New Zealand?

In the insurance context, subrogation is the process by which an insurer becomes entitled to “stand in the shoes” of an insured in relation to a third party who has caused loss to the insured. The insurer does not acquire an independent cause of action against the third party but rather sues on the insured’s cause of action. The insurer is entitled to receive the benefit of the insured’s rights against the third party. The New Zealand courts have described these principles as the “fundamental nature of subrogation” in this country.

In New Zealand, there is an inherent right of subrogation in all non-marine contracts of indemnity insurance. Express subrogation clauses are also common.

When does an insurer’s right to subrogate arise in New Zealand?

The insurer’s right to subrogate arises where the insurer has fully satisfied its liability to the insured, unless of course there has been some contractual variation in the policy conferring subrogation at an earlier stage. Some cases have proceeded on the assumption that the insurer, prior to full payment, has the limited right to ensure that its future subrogation rights are not prejudiced by the insured’s conduct. An insured who has received only a partial indemnity is free to commence proceedings against the wrongdoer. Where an insurer has commenced proceedings in circumstances where the insured has not been fully indemnified, in the absence of anything in the policy to the contrary, the insured controls the proceedings.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

The New Zealand Companies Office (www.companies.govt.nz) provides a comprehensive database of all companies, company directors, and shareholdings (as well as incorporated societies, charitable trusts, and registered unions) in New Zealand. The Personal Properties Security Register (PPSR) (www.ppsr.govt.nz) contains a searchable register of registered personal security interests. The Insolvency Register provides details of bankruptcies, no assets procedures, and Official Assignee administered liquidations from four years ago to the present day. The Summary Instalment Order Register lists individuals who have made formal arrangements with creditors to repay debt over time. The latter are both available at www.insolvency.govt.nz. Whilst these resources are useful in providing information regarding the assets of a potential defendant, private enquiries are also able to be carried out to acquire publicly available information.

The usual mechanisms exist to prevent dissipation of assets. Freezing orders are a subset of injunctive relief available under New Zealand's procedural rules with or without notice in respect of assets either in New Zealand or overseas. Interests in personal property can be protected by registration on the PPSR, whilst interests in land can be protected by registering a caveat against the title to the property.

Is the insured required to cooperate in a subrogated action in New Zealand?

Obligations to assist and cooperate are usually set out as a condition of a policy, but are also implied at law. An insured is under an obligation not to do anything that may prejudice the insurer's right to claim against a third party. If an insured, for example, refuses to produce relevant documents for the purposes of discovery, the courts will intervene and require that the insured do so.

What is the limitation period for a subrogated action in New Zealand and when does the limitation period begin to run?

Any limitation applicable to the insured's action under New Zealand's limitation legislation also applies in respect of an insurer exercising subrogation rights. Acts or omissions occurring after 1 January 2011 fall under the Limitation Act 2010, whereas acts or omissions occurring before that date are covered under the 1950 version of the Act. There are subtle differences between the two versions. A claim in tort or contract based on an act or omission occurring after 1 January 2011 must be brought within six years from the date of the act or omission on which the claim is based (not the date on which the cause of action accrued, as under the old law). Claims can also be brought within a further three years after the date the claimant knew or ought reasonably to have known certain facts giving rise to the claim. This is referred to as the "late knowledge period". However, in no circumstances can a claim be brought more than 15 years from the date of the act or omission on which the claim is based (the "longstop period").

Who is responsible for costs in a subrogated action in New Zealand?

The position depends on whether the insurer has fully indemnified the insured or not. Where full indemnification has occurred and proceedings are on foot, the insurer bears the costs burden of the litigation. The insurer also indemnifies the insured against costs incurred. However, where the insured has suffered an uninsured loss and has sued in respect of both the insured and uninsured losses, the parties are understood to have agreed to pro rata the costs between them. Of course, the parties may choose to contract for some other form of arrangement.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Full enforcement processes are available under the rules of the court in which judgment is obtained. The courts can make a range of enforcement orders, including: an attachment order, which is a charge against the judgment debtor's salary or wages; a charging order, which charges the judgment debtor's property with a debt of the amount of the judgment; a sale order, which compels the sale of that property by an enforcing officer (an agent of the Crown); and a possession order, which requires an enforcing officer to deliver possession of the land or chattels described in the order to the judgment creditor. The party seeking to enforce the judgment is entitled to its costs and expenses in respect of and incidental to the enforcement process.

Are subrogated actions against co-insureds allowed under New Zealand law?

If the insureds are jointly insured, subrogation is not available. Subrogation may, however, be available under a composite policy. The English cases focus on the nature of the interests of the insureds in drawing the joint/composite distinction. For example, where the insureds are joint owners of property or partners, the insurance is joint; if the insureds are landlord and tenant, the insurance is composite, as the insureds have different interests. In New Zealand there is some uncertainty as to the process by which the joint/composite distinction is to be determined. However, unlike in England, it appears that the most important question will be the wording of the policy itself, with the parties' property interests being a part of the matrix within which construction of the policy takes place.

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Philippines

What is the law on subrogation in The Philippines?

The Philippine Civil Code provides for the legal subrogation of the insurer into the rights of the insured in cases where insured property is destroyed or damaged through the fault or negligence of a third person. Upon payment of indemnity to the insured, the insurer is subrogated to the rights of the insured to recover from the third person, but only to the extent that the insurer has been obligated to indemnify the insured. In the event that the amount paid by the insurer does not fully cover the loss, the insured may still recover the deficiency from the third person causing the loss.

The insurer is thus entitled to all the rights and remedies belonging to the insured against a third person with respect to any loss covered by the policy. The insurer's subrogated claim is also subject to the defences that the third person may have against the insured. However, where the insurer pays the insured for a loss which is not a risk covered by the policy, the insurer has no right of legal subrogation against the third person liable for the loss.

When does an insurer's right to subrogate arise in The Philippines?

The insurer's right to subrogate accrues, by operation of law, upon payment of the insurance claim. Payment by the insurer to the insured operates as an equitable assignment of all remedies which the latter may have against the third person whose negligence or wrongful act caused the loss. The right of subrogation does not depend upon, nor does it grow out of, any written assignment of claim.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

A background check on the defendant may be undertaken prior to instituting a court action. In the case of a corporate entity, this may also include an examination of the corporation's corporate records and audited financial statements filed with the appropriate government agency, which are generally available to the public. The Philippines has strict bank secrecy laws which disallow other persons from obtaining information on the deposits and bank transactions of persons, except under special circumstances provided by law. With respect to real property (real estate), there are property registries where title checks can be made.

A plaintiff, at the commencement of the suit or at any time before judgment, and under specific circumstances, may attach property of the defendant, including real property, stocks or shares, debts and credits, or any personal property capable of manual delivery, as security for the satisfaction of any judgment that may be rendered in favour of the plaintiff. A temporary restraining order or writ of preliminary injunction may also be obtained for the purpose of prohibiting or alerting the commission to specific acts by the

defendant which may lead in the dissipation of assets. In both instances, the plaintiff will need to file an application with the court and establish its entitlement to these remedies, and will also be required to post a bond in favour of the defendant in the event that the application is granted by the court.

Is the insured required to cooperate in a subrogated action in The Philippines?

The insured is not required by Philippine law to cooperate with the insurer in pursuing an action against the third party who caused damage to the insured property. However, insurance contracts may impose specific obligations on the insured allowing the insurer to access or secure relevant evidence in the possession or control of the insured. There are also compulsory processes available to compel attendance of witnesses.

If the insured acts in a manner that compromises or prejudices the subrogated claim of the insurer, the insured may be held liable to the insurer for any damage which may be suffered by the insurer arising from the acts of the insured.

What is the limitation period for a subrogated action in The Philippines and when does the limitation period begin to run?

The insurer's subrogated action is subject to the same prescriptive periods that would apply to the insured and would depend on the source of the third party liability.

If the defendant's obligation to pay for the loss arises from a written contract or an obligation created by operation of law, then the action must be brought within ten (10) years. If the obligation to pay arises from an oral contract or a quasi-contract, the action must be commenced within six (6) years. If however the defendant's liability arises from an injury to the rights of the insured or a quasi-delict, the action must be commenced within four (4) years. In all cases, the prescriptive period begins to run from the day that the insured had the right to legally claim against the third party defendant.

Who is responsible for costs in a subrogated action in The Philippines?

Unless otherwise provided in the insurance policy, an insurer who has been subrogated to the rights of the insured is responsible for pursuing an action in its own name against the third person responsible for the damage to the insured property and shall bear the costs of instituting that action. Upon subrogation, the insured is deemed to have lost any right or personality to institute and pursue the action against the third person.

There is no procedural rule or law in The Philippines governing the sharing of costs in cases where the action is jointly instituted by an insurer and an insured partially indemnified for the loss.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

If a judgment is obtained from a Philippine court declaring the defendant liable to the insurer in a subrogated action, the judgment may be executed as a matter of right within five (5) years if no appeal is taken within the period provided to appeal. If an appeal is pending, execution may be issued only upon good reasons, when the interest of justice so requires and after due hearing. In all cases, a motion must be filed, either with the judgment court or the appeal court, depending on the circumstances of the appeal. After five (5) years from the lapse of the period provided to appeal or the final resolution of an appeal, additional steps will have to be undertaken to revive the judgment before it may be executed.

A court sheriff will enforce or execute the judgment for a sum of money by: (i) demanding immediate payment from the defendant of the full amount stated in the judgment and all lawful fees; (ii) levying upon properties of the defendant and selling said properties through public auction until the amount derived is sufficient to satisfy the judgment and all lawful fees; or (iii) levying upon the debts and credits of the defendant by directing the debtors of the defendant, including banks possessing deposits in the name of the defendant, to report on and deliver to the court sheriff such deposits and credits in the name of the defendant as would be necessary to satisfy the judgment and all legal fees.

Are subrogated actions against co-insureds allowed under Philippine law?

Under Philippine law, a contract of insurance taken by a co-owner of common property is presumed to exclude the interest of his co-owners over the common property. If two or more co-owners obtain insurance over the same property, they would each be deemed to be insured only as to their respective share or interest therein, unless the contract expressly states otherwise. In the event that one of the co-owners wilfully or negligently causes damage to the whole property, the co-insured innocent co-owners may recover from the insurer as to the extent of their interest in the property, and the insurer shall be subrogated to all the rights of the innocent co-owners against the responsible co-owner. In this case, there is no prohibition under Philippine law which bars the insurer from exercising the rights of the innocent co-owners to institute an action against the responsible co-owner.

V&A Law



Singapore

What is the law on subrogation in Singapore?

An insurer has the right, after settling an insured's claim, to "stand in the shoes" of its insured and exercise any rights of recovery the insured may have against the party who caused the loss. Subrogation only arises in the context of indemnity insurance and does not apply to contracts of life insurance and personal accident insurance.

The right of subrogation has been codified in the Marine Insurance Act (Cap 387). In addition, the Third Parties (Rights against Insurers) Act (Cap 395) also allows a third party to claim proceeds from the insurer where the insured has become insolvent.

When does an insurer's right to subrogate arise in Singapore?

In order for the right of subrogation to arise, several factors must be satisfied: the policy must be a policy of indemnity; the insurer must have indemnified the insured; and, the right of subrogation must not be excluded by a term of the policy. The insurer will then be entitled to sue in the name of its insured pursuant to the right of subrogation. Alternatively, an insurer can elect to sue in its own name if there is an assignment of the insured's cause of action. The exception is where insurers compensate an injured employee in accordance with Section 18(b) of the Work Injury Compensation Act. In such an event, insurers would be given a statutory right to sue the third party responsible for causing the workman's injuries in insurers' own name.

Insurers will not be conferred broader rights than those available to the insured. As the insurer is taking the place of the insured, it will be limited to the causes of action available to the insured and the third party can raise any defences against insurers which it could have raised against the insured.

What investigations can be undertaken prior to commencing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Various investigations can be undertaken to determine whether a potential subrogation target is worth pursuing. These include:

- litigation searches – sets out the legal suits pending (and/or concluded) against a potential subrogation target
- winding up/bankruptcy searches – sets out whether a potential subrogation target has been wound up and/or is bankrupt. Also sets out whether there are pending winding up/bankruptcy proceedings against a potential subrogation target
- company searches – sets out information about companies registered in Singapore, including share capital, annual returns and audited accounts. These can be obtained from the Accounting and Corporate Regulatory Authority of Singapore to ascertain perceived credit-worthiness
- land title searches – to verify the registered proprietor of a specified property.

To ensure that any assets are not dissipated before a judgment is enforced, an insurer can obtain a Mareva injunction (ie freezing order). Such an injunction restrains the defendant from disposing or dealing with his assets. In order to obtain such an order, the insurer will inter alia need to establish that it has a valid cause of action against the defendant and that there is a real risk of the assets being dissipated if such an order is not granted.

Is the insured required to cooperate in a subrogated action in Singapore?

The insured's cooperation in a subrogated action is usually provided for expressly in the terms of the insurance contract. However, in the absence of such a provision, the insured still has a duty to assist insurers under the common law principles. Generally, the insured would be obligated to make certain documents available to insurers and to provide access to key employees who may be called to give evidence in the subrogated action.

The insured is under a duty not to prejudice insurers' subrogation rights. If the insured breaches this duty, for example by waiving its rights of recovery against a responsible third party, insurers can seek to recover damages from the insured (if insurers can show they would have been able to recover certain sums from a third party absent the insured's action or waiver). However, the amount claimed cannot exceed the amount that the insurers have already paid to the insured.

What is the limitation period for a subrogated action in Singapore and when does the limitation period begin to run?

The Limitation Act (Cap 163) prescribes a limitation period of six years from the date on which the cause of action accrued for actions in contract (ie six years from the date of the breach of contract) or in tort (ie six years from the date the loss is suffered). In respect of latent injuries and damages, the limitation period may be three years from the date of knowledge of the loss if this period expires later than the six year period. The same limitation periods apply in a subrogated action because insurers have the same rights as the insured.

Who is responsible for costs in a subrogated action in Singapore?

The default position in Singapore is that in a subrogated recovery action against a third party, the insurer is obliged to bear all legal costs. However, the liability for such legal costs may be subject to a condition in the insurance policy requiring the insured to make contributions to the payment of such legal fees with such contribution usually capped at a certain pre-determined limit. Where insurers pursue both insured and uninsured losses in a subrogated recovery action, insurers commonly agree with the insured to apportion the costs of the action.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

There are several modes of enforcement available to the insurer who has obtained judgment. These can be carried out simultaneously and include:

- examination of Judgment Debtor – a process where the Judgment Debtor is required to set out all its assets to enable the Judgment Creditor to ascertain how to enforce the judgment
- garnishee proceedings – sums due and owing by a third party to the judgment debtor (eg funds in bank accounts) may be garnished in satisfaction of the judgment sum
- writs of seizure and sale – a process where movable or immovable property, or securities, is seized and subsequently sold to satisfy the judgment sum
- commencement of winding up/bankruptcy proceedings.

Are subrogated actions against co-insureds allowed under Singapore law?

As a general rule, insurers have no right of subrogation against a person named as co-insured under the policy. However it may, in limited circumstances, be possible for an insurer to exercise its right of subrogation against a culpable co-insured where the co-insureds are insured under the policy for different interests. In order for such a claim to be possible the culpable co-insured must not be insured for the loss under the terms of cover and provided the underlying contract between the co-insureds does not, on its true construction, prevent such an action.

RPC Premier Law



South Korea

What is the law on subrogation in South Korea?

The law applicable to subrogation in the Republic of Korea (Korea) is based on statutory law. Article 681 of the Korean Commercial Act addresses the insurer's right of subrogation into the insured's rights/title to the insured property. Article 682 addresses the same into the insured's rights/claims against third parties. Excerpts of the Articles 681 and 682 are provided below:

Article 681 (Subrogation by Insurer concerning Subject Matter Property)

"If the subject matter property is totally destroyed, an insurer who has paid the whole insured amount shall acquire the rights of the insured relating to the subject matter property; provided, however, that in cases where only a portion of the insurable value of such subject matter property has been insured, the rights which are to be acquired by the insurer shall be determined based on the proportion of the insured amount to the insurable value."

Article 682 (Subrogation by Insurer against Third Parties)

"If any loss has occurred due to actions by a third party, an insurer which has paid the insured amount shall acquire, to the extent of the amount paid, the rights of the insured against such a third party; provided, however, that if the insurer has paid part of the insured amount, it may exercise such rights in so far as the rights of the insured are not prejudiced."

When does an insurer's right to subrogate arise in South Korea?

The insurer's right of subrogation arises upon the insurer's payment to the insured under the insurance policy.

In the case of an insurer's subrogation into the insured's rights/title to the insured property, as stipulated in Article 681 of the Korean Commercial Act, the insurer is required to pay the insured amount in full.

On the other hand, in the case of an insurer's subrogation into the insured's right/claims against a third party, the insurer is not necessarily required to pay the insured amount in full. In the event of a partial payment of the insurance claim, however, the insured's claim and the insurer's subrogation claim would co-exist while the former would have priority over the latter as against such a third party who is liable for the insured loss.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Before initiating a subrogation action, the insurer may undertake investigations into the subrogation target in the following manners.

For a subrogation target that is listed on the Korean Stock Exchange, the insurer may conduct a corporate survey by reviewing the external auditor's report that is publicly available in the Data Analysis, Retrieval and Transfer System (DART) operated by the Korean Financial Supervisory Service (the FSS). The external auditor's report contains detailed information on the target company's assets and financial status.

On the other hand, for a non-listed subrogation target, as information regarding its assets and financial status will not be available on the DART, the insurer usually hires a private surveyor to check the financial status and assets of the subrogation target. However, such investigation may be limited to non-financial assets of the subrogation target such as real estate, autos and office lease, due to the statutory restrictions on release of banking information.

To ensure that assets of the subrogation target are not dissipated before the enforcement of a judgment, the insurer may apply for a pre-judgment attachment against the subrogation target's assets thereby prohibiting the subrogation target from selling, transferring or otherwise disposing of its assets. Under the Korean Civil Enforcement Act, the insurer can undertake this pre-judgment attachment before filing a subrogation claim against the subrogation target.

Is the insured required to cooperate in a subrogated action in South Korea?

The Korean Commercial Act does not expressly provide for an insured's or policyholder's obligation to cooperate with the insurer in a subrogation action. However, most insurance policies impose duties on the insured to assist the insurer in the subrogation action against the subrogation target(s), and to refrain from taking any action that might prejudice the insurer's right of subrogation.

What is the limitation period for a subrogated action in South Korea and when does the limitation period begin to run?

The length and starting point of the limitation period for a subrogated action depends on the type, cause and ground of the insured's claim against the subrogation target.

For instance, if the insured's claim is based on the subrogation target's breach of contract, then the limitation period for the subrogated action will be five years from the date on which the insured's claim against the subrogation target has arisen. On the other hand, if the insured's claim is based in tort, then the limitation period will be 10 years from the date on which the tortious act by the subrogation target took place or three years from the date on which the insured became aware of the tortious act and its resultant loss or damage, whichever comes first.

Who is responsible for costs in a subrogated action in South Korea?

In principle, the losing party in a subrogation action will be liable for part of the court costs (including legal fees) incurred by the opposing party. In the event that the court renders a judgment partially in favour of a party in a subrogation action, the court costs are apportioned between the parties in proportion to the respective ratio of victory.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Once a judgment is obtained in favour of the insurer in a subrogation claim, if the subrogation target fails or refuses to voluntarily make the payment in accordance with the judgment, the insurer may obtain an enforcement order from the court which would entitle the insurer to seize the subrogation target's assets in accordance with the Civil Enforcement Act. The insurer may then proceed to put the seized property up for a court auction and recover its loss from the sale proceeds.

Are subrogated actions against co-insureds allowed under South Korean law?

Subrogated actions against co-insureds are not allowed under Korean law. For reference, in the case of a third party insurance contract, the insurer can undertake action against the policy holder if the insured event has occurred due to a reason attributable to the policy holder and caused loss or damage to the insured (third party beneficiary).

Lee & Ko



Taiwan

What is the law on subrogation in Taiwan?

The basic provision of subrogation in Taiwan is paragraph 1 of Article 53 of the Insurance Act which states: “If an insured has a right to claim indemnification from a third party due to occurrence of loss for which the insurer bears insurance liability, the insurer may, after paying indemnification, be subrogated to the insured’s right of claim against the third party. However, the amount of the subrogated claim may not exceed the amount of the indemnification.” If the third party referred to in Article 53 is a family member or employee of the insured, the insurer has no right of claim by subrogation. However, this rule is not applicable when the loss has resulted from the wilful misconduct of such third party.

However, under Articles 103, 130, 135 and 135-4 of the Insurance Act, life, health, personal injury and annuity insurers may not be subrogated to a right of claim of the proposer or the beneficiary against a third party, where such claim arises out of the occurrence of an insured peril.

When does an insurer’s right to subrogate arise in Taiwan?

The insurer’s right to subrogate may automatically arise after the insurer has paid an indemnity to the insured (see Article 53 above). However, the insurer and the insured may also transfer or assign the claim against the third party by mutual consent.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Prior to issuing subrogated proceedings against a third party, it is advisable for insurers to conduct searches of public information in respect of that third party (eg, corporate registration information available on government websites). For searches on detailed property information of a third party from the tax authorities, a writ of execution is required (eg, a final judgment or a court’s freezing order). Insurers may also consider retaining a private investigator to conduct preliminary searches on certain kinds of property.

To ensure that assets are not dissipated before a judgment can be enforced, insurers may file with the applicable court for a provisional attachment (freezing order) on the assets. After obtaining the court’s approval, insurers may further file for exercise of the provisional attachment in accordance with the Compulsory Enforcement Act. A security (normally in the form of cash or bank deposit certificates or other securities acceptable to the court) is usually required for exercise of the provisional attachment (the amount of security shall be decided by the court, and usually will be equivalent to 1/3 to 100% of the claim amount).

Is the insured required to cooperate in a subrogated action in Taiwan?

Whether the insured is required to cooperate in a subrogated action in Taiwan will usually depend on what the parties agree to in the insurance documents. In Taiwan, subrogation receipts usually provide that the insured shall cooperate in a subrogated action.

What is the limitation period for a subrogated action in Taiwan and when does the limitation period begin to run?

The limitation period and the time that the limitation period begins to run in a subrogated action will depend on the nature of the insured's original claim against the liable third party. For example, if the insured's original claim is based in tort, the limitation period for the claim under the subrogated action will begin to run two years from the date when the insured knew of the loss and the identity of the liable third party, or it will run for ten years from the date when the tort was committed, whichever expires first.

Who is responsible for costs in a subrogated action in Taiwan?

The court fees in a subrogated lawsuit are usually borne by the losing party. As to other costs (eg, attorney's fees), each party of the lawsuit is usually responsible for its own costs.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

Once a final judgment or a judgment in which the court grants provisional execution is obtained, insurers may use such a judgment to file for enforcement against the liable third party's assets in accordance with the Compulsory Enforcement Act.

The methods of enforcement will depend on the nature of the assets. Under the Compulsory Enforcement Act, there are different procedures of enforcement on real property, personal property, ships, aircrafts, debts and other properties.

Are subrogated actions against co-insureds allowed under Taiwanese law?

Taiwanese law is not very clear on this issue. We tend to think that insurers may not exercise the right to subrogate against the other co-insureds if the other co-insureds have an identical insurance interest. This interpretation is based on the spirit of paragraph 2 of Article 53 of the Insurance Act which indicates that: "If the third party referred to in paragraph 1 of Article 53 is a family member or employee of the insured, the insurer has no right of claim by subrogation".

Lee and Li



Premier legal advisor to the insurance sector



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Thailand

What is the law on subrogation in Thailand?

The law of subrogation in Thailand is set out in the Civil and Commercial Code (the CCC) Sections 226 – 232 and Section 880. Section 880 of the CCC is specifically in relation to insurance.

The general provisions on subrogation provide that:

- “A person who is subrogated to the rights of a creditor is entitled to exercise in his own name all the rights which the creditor had in respect of the obligation including any security for itself.” (S226).
- “When a creditor has received as compensation for damage the full value of the thing or right which is the subject of the obligation, the debtor is, by operation of law, subrogated into the position of the creditor with regard to such thing or right.” (S227).

Section 880 provides that: “If the loss is caused by the act of a third person, the insurer who pays compensation is subrogated, up to the amount paid by him, to the rights of the insured and of the beneficiary against such person. If the insurer has paid part only of the compensation, he cannot exercise his right to the prejudice of the right of the insured or of the beneficiary to claim from the third person for the remainder of the loss.”

When does an insurer’s right to subrogate arise in Thailand?

In Thailand, the right to subrogate happens automatically when certain conditions have been met. The right to subrogate does not happen by virtue of contract or agreement but through operation of law. As set out above under Section 880, an insurer’s right to subrogate arises after compensation has been paid to the insured under the policy.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Thailand does not have any central database listing a person’s assets, nor will the legal execution officer or other law enforcement officers assist the insurers in an investigation of the subrogation target’s assets. The investigations are performed by either hiring lawyers or private investigators. All investigations must be conducted manually by visiting: (i) the Land Office to search for land and building ownership; (ii) the Transport Department for vehicles; or (iii) the Ministry of Industry for machines or other industrial property.

Interim relief orders are available in the Thai courts, and may be given by the court prior to the court judgment in order to freeze assets identified by the insurer. The interim relief request can be filed together with the complaint. However the court usually requires a high standard of proof to establish that the debtor intends to relocate, transfer or dispose of assets in order to escape court enforcement.

Is the insured required to cooperate in a subrogated action in Thailand?

The insured's cooperation in a subrogated action is usually included in a provision of an insurance contract as a condition to providing an indemnity. Thai laws do not specify that the insured has the duty to assist. However if an insurer requires the insured to give testimony or to disclose some important documents that are with the insured they may ask for a court summons and subpoena and serve these upon the insured.

What is the limitation period for a subrogated action in Thailand and when does the limitation period begin to run?

The general limitation period in which to bring a claim against a third party in Thailand is one year. An insurer will be bound by the same limitation period. Time begins to run when the insured (not the insurer) had knowledge of the wrongful act and the identity of the wrongdoer.

Who is responsible for costs in a subrogated action in Thailand?

The insurer is responsible for costs in a subrogated action, subject to any clauses to the contrary in the policy. Where the insured has uninsured losses the insurer and the insured may agree to apportion the cost of the subrogated claim.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

After obtaining the court judgment in its favour, the insurer shall be deemed a creditor of the defendant. If the defendant is not present when the court reads the judgment, the insurer will be required to serve the court judgment on the defendant. Should the defendant fail to perform within the deadline given by the court, the insurer can then apply for a writ of legal execution. After obtaining the writ of legal execution a legal execution officer can be appointed.

The insurer must obtain a proof of ownership of the assets to prove that such assets belong to the defendant. This can be obtained by manual search. After the insurer obtains the proof of ownership, it must submit a request to the appointed legal execution officers, and then later take the legal execution officer to the location of the assets to manually seize the asset. For land, the seizing can be done at the legal execution office. The request to seize must comprise of (at least) the proof of ownership, the pictures or the map to the assets and the estimated price of the assets. After the assets of the defendant have been seized, the legal execution officer will conduct a public auction. The proceeds of the auction will be paid to the insurer's account.

In Thailand, seizing land and buildings is usually the most effective method. Because Thai law requires the legal execution officer

to actually seize the assets, seizing movable property such as cars or trucks is extremely difficult. Seizing bank accounts can also be effective if the insurer knows details of the defendant's bank account or at least the branch of the bank and the name of the bank where the monies are deposited.

Are subrogated actions against co-insureds allowed under Thai law?

There are no specific provisions under Thai law relating to subrogation against co-insureds, and the ability to do so will depend on the facts of the situation and any specific policy provisions. In the context of a first party liability policy, it will normally be possible to subrogate against a co-insured in the absence of any waiver of subrogation or similar policy term.

In the context of a third party liability policy, the insurer will often be covering the co-insured for the acts or omissions which are alleged to have caused the loss, meaning that a subrogation action would be circular and therefore not allowed.

However, Thai law specifically provides that the insurer shall not be liable for any loss caused by the bad faith or gross negligence of the insured or beneficiary. Therefore, if it can be shown that the claim against one insured was caused by the bad faith or gross negligence of the co-insured, the insurer may, in the absence of any express policy provision to the contrary, be able to subrogate against the co-insured.

Tilleke & Gibbins



Vietnam

What is the law on subrogation in Vietnam?

From 1 January 2017 the law on subrogation applicable to insurance contracts is set out in the Insurance Business Law (for general insurance contracts) and the Maritime Code (for maritime insurance contracts).

Pursuant to the Insurance Business Law (Articles 17.1(e) and 49) and the Maritime Code (Articles 247, 248, 326 and 327), an insurer shall be entitled to request reimbursement from a third party of the indemnity amount paid or compensated to the insured if that third party has caused damage to the insured.

It should be noted that under Article 37 of the Insurance Business Law, where the personal injury (ie death, injury or illness) of an insured person was caused directly or indirectly by a third party, the insurer will not have subrogation rights against the responsible third party and will not be able to seek reimbursement of the indemnity amount paid to the insured person.

When does an insurer's right to subrogate arise in Vietnam?

Pursuant to Articles 17.1(e) and 49 of the Insurance Business Law, an insurer's right to subrogate will only arise after the insurer has paid the insurance indemnity to the insured. This means that the insurer shall have to pay the insurance indemnity in full to the insured, before exercising the right to subrogate against the third party.

What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Prior to issuing subrogated proceedings, insurers are not entitled to request the court or competent authority to conduct any investigation in relation to the assets of a third party. However, under Article 111 of the 2015 Civil Procedure Code, after or at the time of submission of the application to initiate subrogated proceedings, insurers are entitled to request the court to apply temporary emergency measures, such as freezing the bank account and/or assets of the third party. For submission of an application for a temporary emergency measure, the applicant shall comply with certain legal procedures as to the form and content of the application, paying particular attention to the reasons for the requested measure. Whether an investigation on a potential subrogation target is conducted is subject to the decision of the court. However, private investigation prior to the submission could be undertaken within the applicable law.

Is the insured required to cooperate in a subrogated action in Vietnam?

Pursuant to Vietnamese law, the insured has the obligation to provide the insurer with all available information, documents, and evidence and to take necessary measures to assist with the insurer's subrogated action against a third party.

With respect to maritime insurance contracts, the 2015 Maritime Code (Articles 327.1/2) expressly provide that, if the insured fails to cooperate or commits a violation that results in the failure of the insurer to exercise the insurer's right of subrogation, the insurer is exempted from paying the full compensation amount or is entitled to a reasonable reduction.

What is the limitation period for a subrogated action in Vietnam and when does the limitation period begin to run?

Pursuant to Articles 429 and 588 of the 2015 Civil Code, the statutory time limit for filing a subrogated claim is three (3) years from the date at which the persons who have the right to claim become aware or must be aware of the fact that their legal rights and interests are violated.

Who is responsible for costs in a subrogated action in Vietnam?

Any costs arising from a subrogated recovery action shall be incurred by the insurer (for example, legal fees, disbursements and other litigation costs). If the insured wishes the insurer to also pursue its uninsured losses that are not covered by the insurance policy in the subrogated recovery action, the costs may be apportioned between the insurer and the insured accordingly. However, it should be noted that the insurer is not required to pursue any uninsured losses that are not covered under the relevant insurance policy in a subrogated recovery action.

Once a judgment is obtained what steps are required to enforce the judgment and what methods of enforcement are available to insurers?

When a judgment is made, the insurer (the judgment creditor) is required to submit a request for enforcement to the competent enforcement authorities in order to enforce the judgment. Based on this request, enforcement authorities shall issue an enforcement decision and send the request for voluntary judgment performance to the judgment debtor to voluntarily perform the judgment within 10 days from the receipt of the enforcement decision or the time the judgment debtor was validly informed of the enforcement decision. Depending on the assets of the judgment debtor, enforcement authorities shall have the right to:

- deduct money from accounts
- collect, handle money and valuable documents of the judgment debtor
- make deductions from the income of the judgment debtor
- seize and handle assets of the judgment debtor, including assets being held by third parties
- utilize the assets of the judgment debtor
- cause the transfer of objects, property rights, and papers
- require the judgment debtor to perform or not to perform certain activities.

Articles 111 and 114 of the 2015 Civil Procedure Code also provide mechanisms to ensure effective enforcement of the court's judgment and to prevent asset dissipation by the judgment debtor. This is achieved through the application of temporary emergency measures against the assets of the judgment debtor, such as freezing bank accounts and/or other assets of the judgment debtor and prohibiting the person or entity concerned from conducting certain activities.

Are subrogated actions against co-insureds allowed under Vietnamese law?

In practice, some Vietnamese insurance policies are underwritten on a co-insured basis. However, Vietnamese law does not have any specific provisions relating to subrogated claims between co-insureds.

Normally, where there are co-insureds, the coverage afforded to each co-insured is specified in the insurance contract. When an insured event occurs, the insurance company shall indemnify the co-insureds in accordance with the coverage provided to each co-insured as stipulated in the insurance contract. Where the insured event occurs due to the fault of one of the co-insureds, such co-insured shall not be indemnified by the insurer due to the carve-out provision excluding insurance responsibility specified in the insurance contract. Once the other co-insureds have been indemnified, the insurer can commence a subrogated action against the co-insured who caused the damage to recover the indemnity amount(s) that have been paid out to the other co-insureds.

YKVN

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Mark leads RPC's insurance and reinsurance practice in Singapore. He specialises in advising insurers and reinsurers on coverage issues, disputes and recoveries, with a focus on large commercial and industrial property, power and energy, engineering and construction and associated BI/DSU/ICOW claims. Having been based in Singapore for over 15 years, Mark has experience of most major issues encountered by insurers and reinsurers across Asia during that time. He has significant arbitration experience (in Singapore and internationally) and acts as coordinating counsel on subrogated recovery actions internationally. Mark is consistently ranked in Band 1 by Chambers Asia Pacific, who have reported that: "Mark Errington is the guy to go to for very big property disputes and first-party losses. He has proven himself to be head and shoulders above the rest for that work".



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Iain moved to Singapore from the London market in 2010 and has developed a strong regional profile in the marine and offshore sectors. Working in the marine insurance market for over 18 years, Iain covers the full needs of the insurance sectors – providing casualty response and investigations, salvage, coverage, product development and recovery work. In the offshore energy sector Iain has worked on a number of high profile regional losses in Asia, the Middle East and Africa and further afield.



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Summer specialises in resolving large, complex, cross-border insurance and reinsurance disputes arising from property, power generation, energy (onshore and offshore), mining and construction risks. Summer advises on all aspects of claims, coverage issues and subrogated recoveries and has significant international arbitration experience. Over the last several years Summer has advised on subrogated recoveries involving property, construction and power risks across Asia, including in China, Indonesia, Pakistan, Singapore, Cambodia and Malaysia.



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Will has extensive experience advising insurers and reinsurers in a number of different business lines including marine, property, construction, engineering, professional indemnity and trade credit. The majority of his work consists of advising on marine and energy; as well as complex property related losses worldwide ranging from advising on coverage to dealing with liability issues and subrogated recovery actions.

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Antony is a partner in RPC's Hong Kong office, specialising in advising clients on a myriad of high value and complex claims with a particular focus on property and BI, construction and engineering and professional indemnity. Antony has experience of dealing with large scale commercial disputes in Hong Kong, China, London and globally. In addition, Antony has significant international arbitration experience and has acted as coordinating counsel on subrogated recovery actions around the region. Antony is ranked in band one in Chambers Asia Pacific directory. "He is described as 'a very engaging partner' who is appreciated for remaining closely involved in the matters he oversees." – Chambers Asia Pacific 2017



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Carmel is an insurance lawyer specialising in financial lines and professional indemnity matters, she handles a range of insurance-related disputes and advisory work. Advising on a variety of complex, high value insurance claims, Carmel has extensive experience in defending large scale insurance disputes. She advises on policy coverage issues and acts as monitoring counsel on behalf of insurers for claims brought against their insureds all over the world. Carmel is regularly instructed by insurers to review, approve and draft insurance policy wordings across various lines of insurance business. Carmel manages and runs our Female Insurance Group Asia (FIGA) in Hong Kong.



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Samuel is a commercial disputes lawyer with experience advising on all aspects of claims and subrogated recoveries on behalf of insurers, as well as the related coverage issues. He has recently completed a six month secondment at a major international insurer in Hong Kong. Sam speaks English, Cantonese and Mandarin.



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Rebecca is a Hong Kong and Australian (New South Wales) qualified lawyer and has experience advising insurers and reinsurers on a range of commercial disputes in the Asia Pacific region. She has a particular focus on construction insurance matters, both in the field of Construction All Risks and construction PI, particularly involving architects and engineers. Rebecca also has experience in defending insureds in contentious claims across various lines of business. She advises on all aspects of claims, coverage issues and subrogated recoveries. Rebecca is fluent in English and Cantonese.

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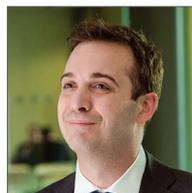
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