

## **Understanding who has an insurable interest in goods under multimodal transport in Chinese law**

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### *Abstract*

*The insurable interest doctrine is a long-established principle that distinguishes insurance policies from gambling. However, the current statutory provisions in China on insurable interest are too vague to determine whether a specific interest is insurable. To guide judicial practice, this doctrine was reinforced with an interpretation by the Supreme People's Court. Despite efforts made, though, current rules are still not entirely satisfactory for determining clearly who has an insurable interest under Chinese law. With the development of international commerce and multimodal transport, conflicts between the aim of preventing gambling and allowing legitimate business are increasing when applying the insurable interest doctrine. This article advocates a pecuniary interest approach to recognizing the insurable interest under property insurance. By employing this approach, it attempts to clarify the*

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*rightful parties having an insurable interest in goods under multimodal transport.*

## **1. Introduction**

Multimodal transport is a combination of at least two different means of transport for the carriage of goods, whether by sea, air, road, railway or inland water, and is an increasingly common approach to transporting goods in international trade.<sup>1</sup> As a sophisticated way of carrying goods, multimodal transport entails great risks that can arise during both cargo operation and storage when switching the means of conveyance.<sup>2</sup> To cover against those risks, cautious parties will consider purchasing insurance. One of the many options is cargo insurance, under which the assured can be indemnified with the full value of the insured goods. Parties involved in the multimodal transport of goods are multiple. In a typical carriage of goods in multimodal transport, three groups of parties are involved, ie the cargo interests (the seller or buyer,

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<sup>1</sup> “Development of Multimodal Transport and Logistics Services” UNCTAD Expert Meeting on the Development of Multimodal Transport and Logistics Services (Geneva, 24-26 Sep 2003).

<sup>2</sup> When underwriting cargo insurance, the employment of multimodal transport affects the insurer’s assessment of the risk. This is available at [http://media.cgd.swissre.com/documents/pub\\_marine\\_facultative\\_en.pdf](http://media.cgd.swissre.com/documents/pub_marine_facultative_en.pdf) (visited 7 Mar 2018).

depending on the type of trade), the carrier (and / or actual carriers), and the agent (the freight forwarder).

Whilst the parties are free to take out insurance, receiving the insurance indemnity is subject to strict constraints imposed by the insurable interest doctrine. Insurable interest is a recognised legal relationship between the assured and the insured subject-matter, so that in the event of loss upon the contingency insured against, the assured would suffer a loss which allows him to be indemnified under the insurance contract. In this way, insurance contracts are distinguished from gaming and wagering, under which the assured has a chance to benefit from insured incidents that would not harm his position or enjoyment.

The Insurance Law of the People's Republic of China (Chinese Insurance Law) is the general insurance legislation for matters of both personal and property insurance contracts. It was enacted in 1995 and has thus far undergone several amendments, in 2002, 2009 and 2015. Article 12 of the Chinese Insurance Law 2015 provides a definition of insurable interest, regrettably in a rather obscure fashion.

As a special law for matters relating to the marine insurance contract, Chapter 12 of the Chinese Maritime Code lacks a specific definition of the insurable interest. The Fourth Civil Tribunal of the Supreme People's Court (SPC) responsible for hearing maritime

cases expressed that such absence is an issue waiting to be resolved by the Chinese maritime law reform.<sup>3</sup> The activities of amending the Chinese Maritime Code, launched in recent years, have opened a window to address this problem.

So far, the SPC has promulgated three interpretations on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China. All three interpretations more or less contain provisions to address practical problems arising from the exercise of the insurable interest doctrine. Although these Interpretations from the SPC have effectively clarified several issues encountered in judicial practice, they leave one of the fundamental questions unanswered, that is, what types of legal relationship between the assured and the insured subject-matter are insurable—in other words, what the requirements are for a permissible insurable interest.

While a clear definition of insurable interest is still absent in Chinese law, Article 8 of the Consultation Paper of the SPC Interpretation IV complicates this issue even more by expressly declining the carrier's insurable interest in the goods carried. Without clarifying the scope of permissible insurable interest, it is

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<sup>3</sup> The media reply of the Fourth Court of the SPC on Provisions of the Supreme People's Court on Several Issues about the Trail of Cases Concerning Marine Insurance Disputes. Available at <http://old.chinacourt.org/public/detail.php?id=225273> (visited 7 Mar 2018).

difficult for the various stakeholders in multimodal transport to arrange cargo insurance and predict the certainty of being indemnified in the event of such cargo's damage or loss.

Given the above situation, this paper revisits the doctrine of insurable interest against the background of the insurance of goods in multimodal transport. It starts with illustrating the doctrine of insurable interest, with emphasis on the permissible interests under the current Chinese legal framework. Next, this paper investigates two approaches to recognizing the permissible interests in Chinese law. Through a comparative study of English law, this paper advocates a pecuniary interest approach to be recognised in Chinese insurance law. Lastly, the pecuniary interest approach is tested by applying it in addressing the major problems involved in the insurance of goods in multimodal transport.

## **2. Current regulations covering the insurable interest doctrine in China**

As a civil law country, the doctrine of insurable interest in China is mainly contained in a list of legislations and subsequent interpretations issued by the SPC.<sup>4</sup> This paper focuses on the law

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<sup>4</sup> For the laws on the insurable interest in goods in multimodal transport, China has promulgated both national legislations and judicial interpretations. For the national legislations, the National People's Congress and its Standing Committee have issued the Chinese Insurance Law 2015, the Chinese Contract Law 1999,

provisions applicable to the insurance of goods in multimodal transport.

The Chinese Insurance Law regulates both personal<sup>5</sup> and property insurance contracts.<sup>6</sup> The subject matter of the insurance of goods in multimodal transport is property; the section on property insurance contracts in the Chinese Insurance Law shall thus be applicable. The Chinese Contract Law sets the common provisions for all types of contracts, including insurance contracts. Without any relevant provisions in the Chinese Insurance Law and Chinese Maritime Code, the Chinese Contract Law shall apply.<sup>7</sup> Chapter 12 of the Chinese Maritime Code is designated to regulate marine insurance contracts. For issues relating to marine insurance contracts, Chapter 12 of the Chinese Maritime Code shall prevail.<sup>8</sup> An insurance contract for goods in multimodal transport may be

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and the Chinese Maritime Code 1992. As for the judicial interpretations, the SPC has promulgated Interpretation I, II and III on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China in 2009, 2013 and 2015 successively.

<sup>5</sup> According to Article 12(3) of the Chinese Insurance Law 2015, the insurance of a person is the type of insurance where the person's life and body are the insured subject-matter.

<sup>6</sup> Property insurance means the type of insurance where properties and the interests therein are the insured subject-matter, as per Article 12(4) of the Chinese Insurance Law 2015.

<sup>7</sup> Article 1 of the Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes.

<sup>8</sup> Article 182 of the Chinese Insurance Law 2015.

considered as a marine insurance contract subject to the employment of a “maritime plus” transport.<sup>9</sup>

Thus far there have also been three Interpretations, issued by the SPC in 2009, 2013 and 2015 respectively, relating to the insurable interest doctrine, to guide the trial of insurance disputes.<sup>10</sup> The consultation paper of the fourth Interpretation was released recently in September 2017, and its provisions are still under debate.

In property insurance, the insurable interest doctrine encompasses the following three key aspects: (1) what interests are insurable (the permissible interests); (2) when shall the party / parties have the insurable interest (the time when the interest is required), and (3) what are the consequences of insurance contracts that lack an insurable interest.

Before analysing the first question, it is necessary to first clarify the latter two. The time when the assured must have the insurable interest was first specified in Article 12 of the SPC Interpretation I 2009, that the assured of the property insurance contract shall have the insurable interest in respect of the insured subject-matter *when an insured event occurs*. This provision has since then remained in

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<sup>9</sup> “Maritime plus”, as its name suggested, consists of marine transport and other modes of transport. Multimodal transport does not necessarily include a sea voyage.

<sup>10</sup> The third Interpretations concerns issues arising from the contract of personal insurance, and thus will not be discussed in this paper.

the subsequent amendments of the Chinese Insurance Law.<sup>11</sup> In addition, Article 48 of the SPC Interpretation I 2009 firstly established that an assured of a property insurance contract that does not have an insurable interest is not entitled to an indemnity payment from the insurer. Article 48 of the Chinese Insurance Law of both 2009 and 2015 reiterated that the assured of a property insurance contract *may not make a claim to the insurer for indemnity payments* without an insurable interest.<sup>12</sup> Lacking an insurable interest does not impact the effectiveness of the insurance contract under Chinese law.<sup>13</sup>

### 3. Permissible interests in China

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<sup>11</sup> Chinese insurance law is largely affected by the laws of other countries in this regard. It is almost universal among the insurance laws of other jurisdictions in developed economies that the assured of property insurance (or indemnity insurance as it is so classified in other jurisdictions) must have an insurable interest at the time of loss. The discussion in this regard is often related to two kinds of timing: it could be the time when the assured actually suffers a loss, or the time when the insured event occurs. In most cases, the assured suffers an instant loss after the happening of the insured event. However, if the loss is not immediate but is postponed for a period after the occurrence of the insured event, it is unclear whether the time of loss is the time when the assured suffers a loss or when the insured event occurs. Chinese law specifies the time of loss as the moment when an insured event occurs under the property insurance contract.

<sup>12</sup> Although such consequence seems to be consistent with the law commonly adopted in many other jurisdictions, it has encountered many objections when firstly introduced to China. See Song Xiaoming, Liu Zhumei, Liu Chongli, "A Note on the Interpretation I of the Supreme People's Court on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China," *Guanyu shiyong baoxianfa ruogan wenti de jieshi yi de lijie yu shiyong* (关于适用保险法若干问题的解释一的理解与适用) (*People's Judicature*), Vol. 21, (2009), pp. 29-35.

<sup>13</sup> The majority of Chinese scholars hold this view. See Johanna Hjalmarsson and Dingjing Huang (eds), *Insurance Law in China* (Abingdon, Oxon: informa, 2015), p. 287.



Article 12 of the Chinese Insurance Law 2015 states that insurable interest is the legally recognised interest of the applicant or the assured<sup>14</sup> in the insured subject-matter. A literal interpretation of this definition highlights the legality of the insurable interest. However, not all legal relationships between the assured and the insured subject-matter are insurable, inasmuch as the loss of the insured subject-matter would directly prejudice the position or enjoyment of the assured. The legality test is too broad to provide guidance as to what kinds of interest are insurable and what are not. This confusingly simplistic test has raised different understandings of the permissible interests in Chinese law, which will be discussed later on in this paper.

As the special law for matters concerning marine insurance contracts, the Chinese Maritime Code prevails over the Chinese Insurance Law.<sup>15</sup> However, the Chinese Maritime Code does not contain an elaborated definition of insurable interest for marine insurance contracts. The intention of such absence was to leave the universally recognised insurable interest principle to the general

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<sup>14</sup> Article 10 and 12(5) of the Chinese Insurance Law provide that the applicant, sometimes called the proposer, is the party who enters into the contract with the insurer, while the assured is the party to be indemnified by the insurer. The applicant and the assured could be the same person or organization. Chinese insurance law uses the word “insured”. The difference between insured and assured is omitted in this paper.

<sup>15</sup> Article 182 of the Chinese Insurance Law 2015. There are 41 articles from the Chinese Maritime Code in Chapter 12 for issues relating to marine insurance contracts.

insurance legislation, namely, the Chinese Insurance Law.<sup>16</sup> There have been comments from the SPC that such absence in the marine insurance contracts is problematic and needs to be addressed in the future.<sup>17</sup> In fact, there has been an attempt to explain the insurable interest in the marine insurance contract. In the Answers of the SPC on the Practical Issues on Foreign-Related Commercial Maritime Trial I released in 2008, the SPC points out that the insurable interest in marine insurance contracts is the legal pecuniary connections between the assured and the insured subject-matter; parties with an insurable interest in marine insurance contracts include the owner, mortgagor, insurer of the ship, buyer, seller, insurer of the goods and the party with the right of lien on the bill of lading.<sup>18</sup> However, the attempt at clarification in the above documentation merely serves as practical guidance rather than the law for court practice. Thus, one still must refer to the general Chinese Insurance Law when explaining insurance interest in marine insurance contracts.

SPC Interpretation II 2013 clearly pointed out that when multiple assureds insure the same insured subject-matter, all the assureds are entitled to be indemnified within the scope of their respective insurable interest.<sup>19</sup> Interpretation II also acknowledges

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<sup>16</sup> Alberto Monti, “The Law of Insurance Contracts in PRC: A Comparative Analysis of Policyholder’s Right” (2001) 1 *Global Jurist Topics* 4, 10.

<sup>17</sup> n 3 above.

<sup>18</sup> Question 157 of the Answers of the SPC on the Practical Issues on Foreign-Related Commercial Maritime Trial I.

<sup>19</sup> Article 1 of the SPC Interpretation II.

the insurable interests of the user, leaser and carrier,<sup>20</sup> but it does not clarify their insurable interests in the property.

Since the definition of insurable interest is too vague to indicate the kinds of interests in property that are insurable, there have been arguments on the insurable interest of parties who, although they may not own the insured subject-matter, have legitimate needs to insure against their own risks arising from the occurrence of the insured contingencies.

#### **4. Different approaches to defining permissible interests: a comparative study**

In China, insurance was once an alien concept originating in foreign countries. Influenced by foreign law and practice, China has now established its own insurance legal framework, as illustrated above.

English insurance law has had a wide impact in other jurisdictions due to England's historical economic predominance and its continuing leading role in insurance placement. A comparative study of English law can provide a valuable reference to the development of Chinese insurance law. Thus, this section

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<sup>20</sup> The media reply of the Second Civil Court of the SPC on Provisions on the SPC Interpretation II 2013, available at <http://www.court.gov.cn/shenpan-xiangqing-5426.html> (visited 7 Mar 2018).

adopts a comparative study to investigate what types of interests are insurable in China.

#### 4.1 English approach

The permissible interests under English law have undergone many changes, ranging from a strict to a more liberal approach, especially with the development of case law in light of commercial needs and the enactment of the Gambling Act 2005.<sup>21</sup>

The classic definition of insurable interest was established in *Lucena v Craufurd*.<sup>22</sup> Lord Eldon provided a narrow test by restraining the permissible interests to *the property or the contractual right* on the insured subject-matter.<sup>23</sup> Noticeably, Lawrence J's *dictum* in the same case contemplated a wide test of insurable interest which allowed the *factual expectation* of benefit or loss.<sup>24</sup>

The Marine Insurance Act (MIA) 1906, which codifies previous case laws, prefers the narrow test given by Lord Eldon, yet with slight discrepancies. According to Section 5(2) of MIA 1906,

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<sup>21</sup> There is a divergence between marine and non-marine insurance law regarding the application of the insurable interest doctrine. See Gary Meggitt, "Insurable interest – the doctrine that would not die" (2015) 35 *Legal Studies* 280.

<sup>22</sup> (1806) 2 Bos v PNR 269.

<sup>23</sup> According to Lord Eldon, insurable interest is "a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party".

<sup>24</sup> Mr Justice Lawrence said that "to be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction".

insurable interest is a “*legal or equitable relation*” between the assured and the insurable property at risk, and in particular it includes relationships where the assured “may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof”.<sup>25</sup> The spectrum of permissible interests under this section is broader than a proprietary interest contemplated by Lord Eldon, since Section 5 also includes the legal rights conferred by common law or equity.<sup>26</sup> However, the definition in the MIA 1906 failed to cover all types of insurable interests, and the adopted legal and equitable test are commented on as “to be in need of review”.<sup>27</sup> Applying the test in Section 5 of MIA 1906, *Macaura v Northern Assurance Co Ltd*<sup>28</sup> held that the assured sole shareholder of the timber of a limited company had no insurable interest in the destroyed timber owned by the company because he had neither any right to the property as creditor nor any interest in the timber, regardless that the assured did actually have a real economic interest in the timber.

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<sup>25</sup> Section 5(2), MIA 1906.

<sup>26</sup> Meixian Song, “Insurable interest in the law of marine insurance” (2011) 1 *Southampton Student Law Review* 75, 76; Johanna Hjalmarsson, “Legal or equitable relationship to insured subject-matter as a determinant of insurable interest – the approaches of English and Swedish law” (2008) *Lloyd’s Maritime and Commercial Law Quarterly* 97, 98.

<sup>27</sup> John Birds, “Insurable interest – orthodox and unorthodox approaches” (2006) *Journal of Business Law* 224, 227.

<sup>28</sup> [1925] AC 619.

Notwithstanding the decisions in earlier cases, the courts have been reluctant to reject an assured's claim solely on the ground of lacking an insurable interest, not only to meet the needs of the changing insurance market but also fearing that insurers would abuse the narrow test of permissible interest and use it as a technical defence to resist claims from the assured without real merit.<sup>29</sup> Discussion and reforms have been carried out towards establishing a modern definition of insurable interest with a more liberal approach to the permissible interests.

In recent cases, the courts have demonstrated strong consideration for commercial convenience in recognition of the assured's insurable interest. *Feasey v Sun Life Assurance Co of Canada*<sup>30</sup> is the leading case in modern insurance law which established that the mere existence of *economic interest* is sufficient to establish an insurable interest. Lord Justice Waller grouped the authorities of insurable interest into four categories. In Group 4, he pointed out that "something less than a legal or equitable or even simply a pecuniary interest has been thought to be sufficient".<sup>31</sup> The test in *Feasey* is similar to the wide test of insurable interest in Lawrence J's *dictum* in *Lucena v Craufurd*.<sup>32</sup> Despite the criticisms

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<sup>29</sup> Brett MR in *Inglis v Stock* (1884) 12 QBD 564, p 571; *The Moonacre* [1992] 2 Lloyd's Rep 510; Mance J in *The Capricorn* [1995] 1 Lloyd's Rep 622, p 641.

<sup>30</sup> *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885.

<sup>31</sup> *ibid.*

<sup>32</sup> (1806) 2 Bos v PNR 269.

following the *Feasey* case, this case established a new trend in recognizing permissible interests.

The Gambling Act 2005, to a certain extent, reinforces the implications of the wide test of permissible interests.<sup>33</sup> By repealing Section 18 of the Gaming Act 1845, the Gambling Act 2005 unintentionally discarded the requirement of insurable interest in indemnity insurance contracts.<sup>34</sup> Given the new development in preventing gambling legislation, the test of permissible interest needs to be explained in a liberal and relaxed approach. In 2016, as part of the Law Commission's outcome in reforming English insurance law, the Draft Insurable Interest Bill was promulgated aiming to replace the previous strict definition of the insurable interest with a wide definition for insurance other than life-related.<sup>35</sup> Yet the proposal raised in the Draft Insurable Interest Bill awaits implementation.

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<sup>33</sup> It is noteworthy that the Gambling Act 2005 is not applicable to marine insurance contracts. For a detailed discussion on the impact of the Gaming Act 2005 on the insurable interest doctrine, see Chris Nicoll, "Insurable interest: as intended?" (2008) *Journal of Business Law* 432.

<sup>34</sup> Section 18 of the Gaming Act 1845 used to provide that indemnity insurances without an insurable interest were void; Section 335 of the Gaming Act 2005 states that "the fact that a contract relates to gambling shall not prevent its enforcement".

<sup>35</sup> Section 3(3) of the Draft Insurable Interest Bill 2016 stated that "the circumstances in which an insured has an insurable interest in a subject matter include, in particular, circumstances where the insured (a) has a right in it, (b) has a right arising out of a contract in respect of it, (c) has possession or custody of it, or (d) will suffer economic loss if the insured event relating to it occurs."

Despite the efforts made, doubts remain as to what kinds of interest in the insured subject-matter shall be allowed or excluded in English law, or in other words, there is no precise panacea for deciding on the permissible insurable interests.<sup>36</sup>

#### 4.2 Attempts in Chinese law

There are dissenting views from both law practitioners and academia about the rights that give rise to an insurable interest in Chinese law. One view is the *legal relationship approach*, where the relationship between the assured and the insured subject-matter should be legal, definite and pecuniary.<sup>37</sup> Under this view, the insurable legal relationship is similar to the narrow test in English law. It is believed that the purpose of the legislators in drafting Article 12 of the Chinese Insurance Law is to strictly limit insurable interest to a direct relationship with the insured subject-matter.<sup>38</sup>

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<sup>36</sup> There has also been discussions regarding the necessity of retaining the insurable interest doctrine in English law. See The Law Commission, Issues paper 4 on *Insurable interest*, available at [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/06/ICL4\\_Insurable\\_Interest.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/06/ICL4_Insurable_Interest.pdf) (visited 15 Mar 2018), and the The Law Commission and Scottish Law Commission, The Second Joint Consultation Paper on *Insurance Contract Law: Post Contract Duties and Other Issues*, available at <https://www.scotlawcom.gov.uk/files/3113/2429/7329/dp152.pdf> (visited 15 Mar 2018); See also n 21 above for a discussion about merits in retaining the insurable interest doctrine in English law.

<sup>37</sup> Wang Pengnan, *Haishang Boxian Hetongfa Xianglun (海上保险合同详论) (Marine insurance contracts)* (Dalian: Dalian haishi daxue chubanshe, 4th edn, 2017), pp. 28.

<sup>38</sup> Dong Kaijun, *Zhonghua renmin gongheguo baoxianfa shiyi (中华人民共和国保险法释义) (Interpretation on the Chinese Insurance Law)* (Beijing: Zhongguo jihua chubanshe, 1999), pp. 653.



Admittedly, the legal relationship approach can provide a clear and workable standard in judging the permissible interest so as to prevent gambling. But this approach is criticised as being too conservative<sup>39</sup> to allow legitimate business in the modern economy. On one hand, the emphasis on “a direct relationship” implies a rigid confinement that the insurable interest should be based upon the property right on the insured subject-matter, precluding the contractual relationship. Under this confinement, property rights of the owner, depositor, lessor, contractor, carrier, and mortgagor are direct interests in the insured subject-matter and are thus insurable; the creditors’ rights, which usually arise from the contract and tort, should not be insurable, since what they directly relate to are the debtor or debtor’s performance, rather than the insured property.<sup>40</sup> On the other hand, the requirement that permissible interests should be definite also excludes the legal expectation of the benefit or loss of the assured. This exclusion impedes a group of stakeholders who have actually suffered a pecuniary loss due to the happening of the insured incident from being indemnified by the insurer.

Another view is the *economic relationship approach*<sup>41</sup> or *pecuniary interest approach*. This approach mirrors the wide test of

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<sup>39</sup> n 13 above, p 97.

<sup>40</sup> When illustrating insurable interest, most examples given are interests arising from property rights, such as ownership, possession, mortgage and co-ownership, as well as the right of lien on the cargo and bill of lading.

<sup>41</sup> Si Yuzhuo, *Haishangfa zhuanlun (海商法专论) (Maritime Law Monograph)* (Beijing: Zhongguo renmin daxue chubanshe, 2007).

insurable interest in recent English law. Under this approach, the permissible interests can arise from property, contractual and pecuniary interest in the insured subject-matter.

Actually, there have already been several attempts towards establishing the pecuniary interest approach in China. An insight from the Legislative Affairs Commission of the Standing Committee of the National People's Congress reveals that the permissible insurable interest under property insurance should include "(1) the owner of or the manager who stands legally recognised as having pecuniary interests in the insured property; (2) the party who is legally entitled to possess the insured property, including the depository and the carrier; and (3) the party who, although not possessing the goods, has a legal expectation of obtaining pecuniary interest in the goods."<sup>42</sup> The first and third provisions support the pecuniary interest approach by admitting the legally recognised pecuniary interests and the party's legal expectation of pecuniary gain resulting from the safety of the goods. Also, a Consultation Paper from the SPC in 2003 suggested that insurable interest could arise from (1) property right, (2) contract

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<sup>42</sup> Bian Yaowu, Li Fei and Wang Chaoying (ed.), *Zhonghua renmin gongheguo baoxianfa shiyi* (《中华人民共和国保险法释义》) (*Interpretation of the Insurance Law of the People's Republic of China*) (Beijing: Falv chubanshe, 1996). This insight is based on the 1995 Chinese Insurance Law. However, the 2015 Chinese Insurance Law adopts the same definition of insurable interest as in 1995. Thus, this insight shall similarly apply to interpreting the permissible insurable interests under the 2015 Chinese Insurance Law.

and (3) civil liabilities;<sup>43</sup> accordingly, the permissible interests are not limited to property rights.

Regrettably, those attempts have not been officially adopted by the subsequent Chinese Insurance Law, nor by the SPC Interpretation 2013.<sup>44</sup> This was a missed opportunity for clarifying the meaning of insurable interest in Chinese law.

## **5. Pecuniary interest approach and its advantages**

Whilst most of the Chinese scholars seem to have reached a consensus that the insurable interest should be broadly defined to embrace economic interest so as to meet the needs of modern commerce,<sup>45</sup> there still lacks thorough discussion of the embedded components of permissible interests under the pecuniary interest approach. The unclear spectrum of permissible interests under this approach leads to confusion in practice, noticeably in complex

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<sup>43</sup> Article 1(2) of the Consultation Paper from the Supreme People's Court on several issues about the trial of cases concerning insurance disputes.

<sup>44</sup> Provisions of the Supreme People's Court on Several Issues about the Trial of Cases Concerning Marine Insurance Disputes.

<sup>45</sup> HY Yeo, Y Jiao and J Chen, "Insurable interest rule for property insurance in the People's Republic of China" (2009) *Journal of Business Law* 776, 792; Wang Darong, "Principle of economic interest should be applied in marine insurance in China," *Lun woguo haishang baoxian zhong ying queli jingjixing baoxian liyi yuanze* (论我国海上保险中应确立经济性保险利益原则) (*Annual China Maritime Law*), Vol. 12, (2001), pp. 32- 43.

scenarios where there are multiple stakeholders in the insured subject-matter.<sup>46</sup>

### **5.1 Analytical basis**

For the pecuniary interest approach to work smoothly in juridical practice, its components should be clear, compatible with other laws in China, and sensible. This paper considers the permissible interests which may consist of these two general categories:

#### **(a) Legally recognised right**

Within this first category of legally recognised right, it can arise from: 1) property rights, 2) contractual relationships, 3) liability, and 4) other legal pecuniary interest.

For the property rights, current arguments supporting the pecuniary interest approach are not clear about what types of property right are insurable, which results in confusion in practice in recognizing the insurable interest, for instance, that based on possession.<sup>47</sup> In fact, as specified in the Property Law of the People's Republic of China (Chinese Property Law), property rights are limited to ownership. However, others, including usufruct, guarantee and mortgage, pledgee's rights, and possession, should

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<sup>46</sup> See section 6.2 and 6.3 of this paper.

<sup>47</sup> See section 6.2 of this paper.

also be insurable. Moreover, the interests arising from contractual relationship and liability are equally insurable.

“Other legal pecuniary interest” is a catch-all component in the pecuniary interest approach in order to preserve some leeway for novel legal relationships arising from future commercial practice. In modern commerce, the relationship between a person and a property is no longer limited to property, contractual rights or liability.<sup>48</sup> For instance, a sole shareholder also has an insurable interest in the property of a company. There are other interests that may generate pecuniary interest. To strike a balance between preventing gambling and allowing legitimate business, there should be two strict constraints for other interests to be insurable: the interests should be legal, namely not against public interest or the mandatory law; and the interests should be pecuniary in nature so as to preclude having a purely emotional attachment with the insured subject-matter.

(b) Direct factual expectation

Apart from the above rights, permissible interests can also arise from a direct factual expectation where the assured reasonably expects to directly benefit from the existence of and be prejudiced by the destruction of the insured subject-matter.

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<sup>48</sup> Yeo Jiao and Chen (n 45 above), p 792.

The tests of the expectation of financial gain or loss of the assured are *direct* and *factual*. Firstly, the link between the expectation of the assured and the happening of the insured events should be direct. Consequential or remote loss by the assured is not insurable. Secondly, the expectation should be factual, so that any reasonable person under the same circumstances of the assured would expect the potential gain or loss attributed to the insured event. The judgment of insurable interest on this ground should not enjoy the benefit of hindsight after the happening of the insured peril.

## **5.2 Advantages**

The pecuniary interest approach is effective in achieving the goal of preventing gambling without hampering legitimate business. Firstly, the purpose of confining insurable interest to merely property rights in the insured subject-matter is not in any way expressed or implied within the Chinese Insurance Law. The property right approach is too narrow to include the parties whose direct expectation of financial gain is affected by the occurrence of the insured contingency. It discourages parties who have the legitimate purpose of using insurance to secure their potential risks. Should the permissible interests be confined to relationships that are already

protected by law, the insurance system becomes merely an alternative replacement for the remedy system in law.<sup>49</sup>

Secondly, the pecuniary interest approach is in line with the aim of insurance. The aim of insurance is to indemnify the assured, upon the loss of the insured subject-matter, for his expectation of obtaining direct pecuniary benefit should the loss not have happened. Hence, admitting the assured's pecuniary interest in the insured subject-matter as permissible in the first place ensures that the loss of such interest can be indemnified later by the insurer.

Thirdly, including pecuniary interest also reflects changes of Chinese judicial practice. As a matter of fact, a few Chinese courts have started treating the pecuniary interest as insurable.<sup>50</sup> A Consultation Paper from the SPC in 2003, as discussed above, revealed its inclination towards including a definable pecuniary interest into the spectrum of insurable interest.

Fourthly, the pecuniary interest approach can also serve its purpose in preventing gambling. Statistics have shown that the existence of legal or equitable relationships have not prevented the occurrence of fraud in insurance transactions.<sup>51</sup> Moreover, the

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<sup>49</sup> Wang Darong (note 45 above), pp. 38.

<sup>50</sup> For instance, in one case, the court admits the insurable interest of the unregistered bareboat charterer in the ship because of the charterer's pecuniary link with the insured ship. *See* Si (note 41 above), pp. 339.

<sup>51</sup> KS Lee, "Insurable interest in Singapore" (1997) *Singapore Journal of Legal Studies* 499, 503.

principle of indemnity ensures that only the assured is indemnified for his loss under the insurance policy. Thus, adopting the wider pecuniary interest approach does not relax its aim in combating gambling.

## **6. Application in the context of the insurance of goods in multimodal transport**

Multimodal transport of goods involves the interests of multiple parties. Such stakeholders are motivated and are able to purchase insurance against their respective risks in the goods, based on different grounds. In order to be indemnified by the insurer, the critical question is whether each party has an insurable interest in the goods. This section adopts the pecuniary interest approach to address the insurable interests of the seller or buyer, the carrier and the freight forwarder in the context of insurance of goods in multimodal transport.

### **6.1 Whether the seller or buyer has the insurable interest?**

As an absolute and exclusive property right, the ownership of the insured subject-matter is naturally insurable. However, in the meantime, the ownership is transferable. A typical scenario is the sale of goods. Along with the change of ownership, the seller who once had the insurable interest in goods may cease to have it and the



buyer would acquire the insurable interest. Chinese legislation is not clear about when the buyer acquires the insurable interest. Built upon two ways of interpreting the permissible interests as discussed above, Chinese judicial practice has also developed two approaches to ascertaining whether or not the seller or the buyer in the contract of sale, who may also be the shipper or consignee in the carriage contract, has an insurable interest.

(a) Two approaches

The first approach is related to the ownership or *title* to the goods. In one case, the court decided that the seller had the insurable interest because he held the original bill of lading at the time of loss when the insured event occurred,<sup>52</sup> despite the fact that the risk had been transferred to the buyer.<sup>53</sup> Since the bill of lading is a document against the presentation of which the carrier undertakes to deliver the goods, the holder of the bill of lading is assumed to have the title to the goods,<sup>54</sup> and thus the insurable interest. This approach focuses on the property right of the insured goods, which is virtually rooted in the *legal relationship approach* of the insurable interest as

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<sup>52</sup> Under Article 12(2) of the Chinese Insurance Law, the assured of property insurance shall have an insurable interest in respect of the insured subject-matter when an insured event occurs.

<sup>53</sup> *Shouguang City Dong Yu Hong Xiang Timber Company Ltd v PICC (Lianyungang)* (2014) *Hu Hai Fa Shang Chu Zi* (沪海法商初字) Number 620; another case also adopted the title of goods approach, ruling that the consignee has the insurable interest since he holds the original bill of lading. See also *Shanghai Jin Rong Xiang Development Ltd v China Pacific Insurance Company (Shanghai)* (2012) *Hu Hai Fa Shang Chu Zi* (沪海法商初字) Number 116.

<sup>54</sup> Article 71 of the Chinese Maritime Code 1993.

discussed above. However, it is only applicable when a document of title, such as the bill of lading, is issued during the carriage of goods. In multimodal transport, there may not always be a bill of lading; for instance, when the air carriage is included as part of multimodal transport, the air waybill may be issued,<sup>55</sup> yet the air waybill is not a document of title. Therefore, similar to the legal relationship approach to defining the insurable interest, the first approach here is arguably too rigid to apply to goods delivered under various documentation.

The second approach focuses on the possession or the *risk* of the goods. In *Mep Systems Pte Ltd v China Pacific Insurance Company*, it was held that the seller has the insurable interest since he bears the *risks* at the occurrence of the insured accident.<sup>56</sup> This second approach is actually consistent with the *pecuniary interest approach* in defining the permissible insurable interest, as discussed above. The risk is the obligation to continue performing the contract, either to deliver the goods by the seller or make payment by the buyer, in the event of the loss of goods without the fault of either party. In this circumstance, it is the party at risk who has no remedies under the contract of sale and will be directly prejudiced by destruction of the insured goods. Although the party at risk may not necessarily hold

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<sup>55</sup> Art 5, the Montreal version of the Amended Convention.

<sup>56</sup> (2013) *Hu Hai Fa Shang Chu Zi* (沪海法商初字第) Number 1371.

the title to the insured subject-matter, a reasonable person in this position would expect that his pecuniary interest will be prejudiced due to the occurrence of the cargo loss. Hence, it is more reasonable, as the pecuniary interest approach, that the party who bears the risk should have the insurable interest which allows him to be indemnified under the insurance contract.

(b) Transfer of risks in multimodal transport

Whether the buyer or the seller bears the risk is indicated by their respective consequences upon the non-delivery of goods without either party being at fault. The consequences are tangled by the parties' duties, rights and remedies under the contract of sale<sup>57</sup> in a subtle and complicated fashion. A more explicit way to specify the transfer of risks is to incorporate an express term between the seller and the buyer.

To adopt the International Commercial Terms (INCOTERMS) is a common way to specify the intentions of the parties to transfer the risks under international sale of goods contracts. The INCOTERMS have become voluntary standards in the international sale of goods. Recent versions were published in

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<sup>57</sup> Such as the seller's right to claim payment and the buyer's right to resist payment or to demand its return. See L S Sealy, "'Risk' in the law of sale" (1972) 31 *Cambridge Law Journal* 225, 226-227; in a normal situation, the buyer has an insurable interest from the moment when the risk passes to him; *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* [1991] 105 FLR 381, p 387.

2000 and 2010. Under Chinese law, INCOTERMS apply as international customs.<sup>58</sup>

Due to the dominance of seaborne trade, there have been many judicial cases regarding the insurable interest of goods sold using INCOTERMS for marine transport. Both “Cost, Insurance, and Freight (CIF)” and “Free on Board (FOB)” in INCOTERMS 2000 and 2010 are widely seen in the sale of goods carried by purely marine or “maritime plus” transport, the latter being the most common type of multimodal transport of goods. Under the CIF and FOB contract in INCOTERMS 2000, risks are not transferred from the seller to the buyer until the cargo has *passed the ship’s rail* at the port of shipment. Accordingly, it has been held that, without any agreement otherwise, the seller has the insurable interest before the cargo passes the ship’s rail, and the buyer has the insurable interest thereafter.<sup>59</sup> But in the new CIF and FOB in INCOTERMS 2010, the risk passes when goods are *on board the ship*, and the buyer would have the *prima facie* insurable interest in the goods by then. However, if a multimodal transport of goods does not include a sea leg, these common terms in INCOTERMS cannot apply in deciding when the risks pass, since there is neither a ship nor a ship’s rail involved in the transit.

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<sup>58</sup> Article 42(2)(3) of the Chinese Civil Law.

<sup>59</sup> *Anderson v Morice* (1876) 3 Asp MLC 290; *Inglis* (n 29 above).

With the development of containerised transport, INCOTERMS 2010 issued seven terms that can be used for any mode or modes of transport, which of course includes multimodal transport.<sup>60</sup> For example, Free Carrier (FCA) in INCOTERMS 2010 is particularly recommended for any trade employing multimodal transport.<sup>61</sup> Under FCA, the seller delivers the goods to either the carrier or another person nominated by the buyer at the seller's premises, or another named place. If the named place is the seller's premises, the seller's delivery is completed when goods have been loaded on the means of transport provided by the buyer; in any other cases, delivery is completed when goods are placed at the disposal of the carrier or other person nominated by the buyer on the seller's means of transport ready for unloading.<sup>62</sup> The seller is only responsible for the pre-carriage, which usually starts from a point of inland transport to the carriers. In contrast to FOB, the delivery in FCA is moved to the point where the goods are delivered to the carrier, either at his cargo terminal or to a vehicle sent to pick up the goods after they have been containerised or otherwise assembled in transport units at the seller's premises;<sup>63</sup> the buyer shall bear the risk after such delivery is completed. Therefore, the buyer has the

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<sup>60</sup> The seven INCOTERMS are EXW (Ex Works), FCA (Free Carrier), CPT (Carriage Paid To), CIP (Carriage And Insurance Paid To), DAT (Delivered At Terminal), DAP (Delivered At Place) and DDP (Delivered Duty Paid).

<sup>61</sup> Jan Ramberg, *ICC guide to Incoterms 2010: understanding and practical use* (Paris: ICC Services Publications, 2011), p 97.

<sup>62</sup> INCOTERMS 2010 FCA A4 (a) and (b).

<sup>63</sup> n 61 above, p 100.

insurable interest after the goods are delivered to the carrier or other nominees.

Multimodal transport of goods serves for international trade, which commonly involves buyer and seller. Meanwhile, the transfer of risk and transfer of property are the two related and highly important issues between the parties. Transfer of property right is an issue which is dealt with differently among different jurisdictions; in contrast, the transfer of risks is universally coordinated under INCOTERMS. As analysed above, the application of INCOTERMS is apparently in favour of the risk approach in recognising the insurable interest during the change of ownership of the insured subject-matter. As analysed above, the risk approach is consistent with the pecuniary interest approach in recognizing insurable interest. Thus, under the pecuniary interest approach, both the seller and buyer from different jurisdictions can better predict whether they would be indemnified from the insurance of goods, regardless of which national law the insurance contract is subject to.

## **6.2 Carrier's insurable interest in goods**

The carrier under a contract for the multimodal transport of goods refers to both the multimodal transport operator (MTO) with whom the shipper directly contracts for the delivery of the goods, and the actual carriers who personally perform one or multiple legs of the transport. When the carrier is the assured, it is of utmost importance

to identify whether the insurance policy in question is against the goods or for the carrier's liability.<sup>64</sup> Whilst it is commonly understood that the carrier's liability in relation to the goods is the carrier's main concern, the carrier's insurable interest in the goods should not be overlooked.

(a) Carriers as the bailee

In English law, several cases have established that the carrier as the bailee is entitled to insure the full value of the goods carried.<sup>65</sup> The carriers' insurable interest in goods is based on their right of possession.<sup>66</sup> The carrier can purchase insurance and recover the full value of the goods in case of loss or damage. In doing so, he meanwhile must hold any such additional sum recovered on trust for the bailor.<sup>67</sup>

The carrier's interest in insuring for the goods is not clear in Chinese law. There are two main reasons behind this. Firstly, the

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<sup>64</sup> It is a process of interpretation which mainly depended on the ordinary meaning of the words used, as well as any other evidence of intention to be found in the policy itself. See NE Palmer, *Bailment* (North Ryde: Law Book Co, 2009), p 1948.

<sup>65</sup> Lord Campbell explained that to enable the bailee to insure the goods in his trust would be commercially convenient (in *Waters v Monarch Fire and Life Assurance Co* (1856) 5 E&B 870, p 880).

<sup>66</sup> *Tomlinson v Hepburn* [1966] AC 451; *Petrofina v Magnaload* [1983] 2 QB 91, p 96 held that despite the fact that the bailee may by contract to exclude his legal liability for the loss or damage to the goods in particular circumstances, he is responsible for the goods in a general sense.

<sup>67</sup> *Waters* (n 65 above). In this case, the court held that the warehouseman is entitled to recover the full value of the goods, although the owner of the goods gave no orders to insure the goods and was unaware of their insurance. The warehouseman is regarded as trustees of the remainder for those parties who have the ulterior interest in the property.

Chinese legislations are ambiguous with regard to insurable interest based on possession. Although property rights are insurable, the current definition of insurable interest is unclear about whether such possession is insurable as a property right. Secondly, there is no equivalent mechanism of bailment as mature as it is in English law. In China, the possessory right is protected under the Chinese Property Law. But this is different from bailment in English law. In English law, the carrier as the bailee can not only insure goods under his possession, but can also hold the excess recovered beyond his interest in trust for the bailor, whereas the Chinese law on bailment is silent about the carrier's interest in the additional sum. Without clear justification, there is a danger that the carrier may gain extra benefit from the cargo insurance if he is indemnified for the full value of the goods, as this may be greater than his actual loss, depending on the extent of his liability.

While Chinese law practitioners continue to debate about the permissible interests, the SPC tends to decline the insurable interest of the carrier and other bailees in the insured property.<sup>68</sup> Recently, the Consultation Paper of Interpretation IV from the SPC also

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<sup>68</sup> In a similar situation regarding the bailee's insurable interest as reported in the 15th Group of Guiding Cases issued by SPC, the contractor of a building contract is held to only have the insurable interest in his liability arising from the building contract and thus he shall purchase liability insurance, [2016] Fa zi (法字) 449, Case Number 74.



inclines toward rejecting the insurable interest of the carrier.<sup>69</sup> According to Article 8 of the Consultation paper of SPC Interpretation IV, the court shall support the insurer's defence against the carrier's insurable interest in the goods.<sup>70</sup> Its underlying rationale is that a carrier who intends to purchase insurance to transfer his risks should take out liability insurance arising from the loss of goods, rather than property insurance. This is an unfortunate provision that confuses the insured subject-matter with regard to liability insurance and property insurance.

Firstly, the carrier also has a legally recognised insurable interest in the goods carried. If the pecuniary interest approach were to be applied, the legally recognised rights can arise from property rights, which include possession. Both legislations and judicial practice support such an implication. The possessory interest of the carrier is recognised in both the Chinese Property Law and the Chinese Contract Law.<sup>71</sup> In fact, a considerable amount of judicial practice also validates the insurable interest of the carrier and other parties having a possessory interest in the goods.<sup>72</sup> In this regard,

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<sup>69</sup> Consultation paper on the Interpretation IV of the Supreme People's Court on Several Issues concerning the Application of the Insurance Law of the People's Republic of China (Interpretation IV), available at <http://www.court.gov.cn/zixun-xiangqing-62352.html> (visited 7 Mar 2018).

<sup>70</sup> Nevertheless, the insurer shall be partially liable for his fault in underwriting cargo insurance for the carrier.

<sup>71</sup> Chapter 19 of the Chinese property law; Chapter 17, 19 and 20 of the Chinese Contract Law.

<sup>72</sup> In *CPIC Shanghai v Hanwen* (2007) *Hu Yi Zhong Min San Shang (Zhong) Zi* (沪一中民三商终字) Number 290, the court held that a storage company had an

then, Article 8 of the SPC's recent consultation paper does not truly reflect existing judicial practice, and also contradicts the prevailing legislations in China.

Secondly, the unnecessary confinement in the above-mentioned Article 8 creates a potential mix-up between the subject-matter of the property insurance and the liability insurance contract. There is a great difference between liability insurance and cargo insurance. The insured subject-matter in the former is the carrier's liability for the transport of goods, while in the latter type of insurance it is the goods in transit. Therefore, the basis for calculating their insurance premium would be different. Moreover, under liability insurance, the carrier is entitled to be indemnified when his liability, either contractual or in tort, has been established. In contrast, in cargo insurance, the carrier is to be indemnified upon the loss of or damage to the goods.<sup>73</sup> It is thus inappropriate and unnecessary for the law to intervene and confine the carrier's choice of insurance to liability insurance only. In fact, as early as in the SPC Interpretation II 2013, multiple interests in the same insured subject-matter is allowed.<sup>74</sup> There is nothing preventing the cargo owner from insuring on his

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insurable interest in the cargo by reason of its similarity to bailment. *See also* John Dunt (ed), *International Cargo Insurance* (Informa, 2013), p 441.

<sup>73</sup> For instance, in a case where the cargoes are damaged due to an Act of God, the carrier will exclude his liability under the carriage contract, referring to Article 4(2)(d) of the Hague Visby Rules, if applicable. In contrast, cargo damage or loss due to an Act of God is normally not excluded under an "all risks" insurance policy.

<sup>74</sup> Article 1 of the SPC Interpretation II.

goods in conjunction with the carrier's insurance on the same shipment of goods.

(b) the pervasive interest of actual carriers as the performing party

If the MTO does not personally deliver the goods to the destination, the party personally performing such carriage is known as the actual carrier, the sub-carrier, or the “performing party”.<sup>75</sup> As discussed above, being the bailee of the goods, an actual carrier can take out separate insurances against the loss of goods actually carried by him, or the MTO could effect a single cargo policy to cover the whole transport for each actual carrier. Effecting a single policy achieves commercial convenience,<sup>76</sup> but it would however invite discussion about the actual carrier's insurable interest in goods for the whole multimodal transport. The answer to this question is pivotal for subrogation, and for the insurer's defence to decline the claim based on wilful misconduct of the actual carrier, since the actual carrier

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<sup>75</sup> The performing party means a person other than the carrier that performs or undertakes to perform any of the carrier's obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control. *See* Art 6(a), the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules).

<sup>76</sup> *Petrofina* (n 66 above).

could be the assured of the insurance of goods in multimodal transport.<sup>77</sup>

There is a lack of guidance in Chinese law for this issue, since the carrier's insurable interest in the goods is still under discussion. In English law, the courts recognise the pervasive interest of sub-contractors. Pervasive interest exists in a composite policy<sup>78</sup> when separate interests are nonetheless pervasive and relate to the entire property, albeit from different angles. The issue of pervasive interest was raised, yet not thoroughly discussed, in a marine insurance case in English law.<sup>79</sup> This issue however has been thoroughly discussed in terms of construction insurance, another scenario concerning the insurable interest of sub-contractors, where the head contractor often effects insurance on the whole

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<sup>77</sup> *Netherlands v Youell & Anor* [1997] CLC 938. This is an insurance for the building of two submarines, where both the navy and the shipyard are named as the assured in the insurance policy. The insurer alleged that the damage to the submarines was due to the wilful misconduct of the assured shipyard, which excludes the liability on the insurer according to section 55(2)(a) and 78(4) of the MIA 1906.

<sup>78</sup> A composite policy combines the separate interests into one insurance contract, such as in the case of a mortgagee and owner; in contrast, joint insurance concerns only one joint interest, and often exists in the case of joint owners of a property. *Commonwealth Construction Co Ltd v Imperial Oil Ltd* (1977) 69 DLR (3rd) 558, p 139E; Sir Wilfred Greene MR in *General Accident Fire and Life Assurance Corporation Ltd v Midland Bank Ltd* [1940] 2 KB 388, pp 404-405. See also Michael J Mustill Sir, Jonathan CB Gilman and Joseph Arnould Sir, *Arnould's Law of Marine Insurance and Average* (London: Stevens, 18th edn, 1981), para 341.

<sup>79</sup> *Netherland* (n 77 above). In this case, the court considered whether there is a pervasive interest between the navy and the shipyard in an insurance of the building of two submarines. Judge Lloyd was not sure whether it is common ground that such insurance policies are likewise policies on property under which each of the co-assured has a pervasive interest to claim up to the total value of the submarines.

construction site for himself and the sub-contractors. In *Petrofina v Magnaload*, the court upheld the pervasive interest of all sub-contractors throughout the construction site. The pervasive interest of sub-contractors is built upon legal precedents showing that the bailee is entitled to insure the full value of the insured subject-matter even if he may have no liability to the owner.<sup>80</sup> The position of a sub-contractor in relation to the whole contract works is sufficiently similar to that of a bailee in relation to goods bailed. Moreover, allowing sub-contractors to be able to insure the loss of or damage to the whole contract works in a single policy also makes sense from a commercial point of view. Otherwise, each sub-contractor would be compelled to take out his own separate policy. This would mean, at the very least, extra paperwork; at worst it could lead to overlapping claims and cross claims in the event of an accident.<sup>81</sup> Nevertheless, the establishment of a pervasive interest is subject to rigorous qualifications. In *Deepak Fertilisers and Petrochemical Corporation v ICI Chemicals & Polymers Ltd*,<sup>82</sup> the court held that the subcontractors have a pervasive interest if they might lose the opportunity to do the work and to be remunerated for it if the property were damaged or destroyed. There are also arguments on the need for establishing an additional link between the

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<sup>80</sup> *Waters* (n 65 above); *Tomlinson* (n 66 above).

<sup>81</sup> *Petrofina* (n 66 above), p 96.

<sup>82</sup> [1999] 1 Lloyd's Rep 387, p 399.

subcontractor and the insured subject-matter other than potential liability.<sup>83</sup>

Applying the pecuniary interest approach, it is plausible that in China the actual carriers in multimodal transport also have a pervasive interest in the goods.<sup>84</sup> Admittedly, allowing all actual carriers to jointly insure goods in multimodal transport would achieve commercial convenience, which is believed to be the true basis of pervasive interest.<sup>85</sup> Moreover, each actual carrier's interest in the goods is separate for their respective transport leg, but "pervasive" for the entire carriage. Multimodal transport, in most cases, is a joint project between all actual carriers having one common goal, which is the safety of the goods during the transit period. Given the difficulties in locating the loss, should it occur in one particular transport leg, the loss of goods in this particular leg would jeopardise the opportunity of the actual carriers of other legs to perform their duties and be remunerated for it, subject to the

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<sup>83</sup> *Feasey* (n 30 above).

<sup>84</sup> As yet, examples of a pervasive interest in cargo insurance are rarer than in construction insurance. There are two main reasons behind this. Firstly, the carriage of goods in multimodal transport may be subcontracted more than once, even after the conclusion of the multimodal transport contract, particularly in land transport. In practice, it is very challenging to name all subcontractors in the policy when effecting the insurance. Secondly, naming all sub-contractors as the assureds means that the insurer cannot enjoy his subrogation right against the liable sub-contractor. The insurer's high exposure to the risk will thus be eventually reflected in the premium. It is uneconomic to jointly insure for all actual carriers in a single cargo policy. Accordingly, a more common approach is for the MTO to take out cargo insurance for the entire multimodal transport, and for the sub-carriers to purchase insurance for their own accounts and purposes.

<sup>85</sup> Ahmed T Olubajo, "Pervasive insurance interest: a reappraisal" (2004) 20 *Constructive Law Journal* 45.

construction of the policy; this would account for a direct and factual expectation under the pecuniary interest approach.

Nevertheless, the real problem here is that the legal basis for having a pervasive interest under Chinese law is not as solid as it is under English law. The actual carrier who was subcontracted by the MTO enjoys the property interest of the insured goods based on possession. But, as discussed above, Chinese law lacks a mechanism justifying an additional sum insured that exceeds the carrier's liability. It is still open to debate as to whether the carrier is entitled to insure the full value of the insured property. Whereas in English law the pervasive interest is built on legal precedents that the carrier is entitled to insure the goods up to their full value, there is no such legal basis in China for the pervasive interest of actual carriers.

### **6.3 Freight forwarder**

The freight forwarder can be an intermediary between the cargo interest and the carrier. He arranges carriage of goods on behalf of his customer. Very often, under the same veil, the freight forwarder acts as the agent to purchase cargo insurance on behalf of the shipper.<sup>86</sup> But in this case, the assured is the shipper. The focus of this paper is whether the freight forwarder has an insurable interest

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<sup>86</sup> For example, in *Granville Oils and Chemicals Limited v Davies Turner & Co Limited* (2002) QBD, the freight forwarder arranges insurance cover for the goods of his customer, a paint manufacturer, under ICC (A) terms from Kuwait to the manufacturer's premises in UK.

in the goods in multimodal transport based on his own connection with the insured subject-matter.

Neither the Chinese Insurance Law nor the Chinese Maritime Code expressly recognise the insurable interest of freight forwarders. This ambiguity in the law is partly due to the different identities of the freight forwarder in the carriage contract. The freight forwarder is sometimes regarded as the carrier, rather than the agent of the cargo interest;<sup>87</sup> in this case, he has an insurable interest in goods carried based on possession under the pecuniary interest approach. The advent of multimodal transport has induced freight forwarders to take on greater responsibilities. Some forwarders have started to engage in businesses which have traditionally been provided by the carrier, such as tallying, weighing, packing, warehousing, pick-up, delivery, and physical distribution.<sup>88</sup> They may even organise the whole transport as a carrier. The boundary between freight forwarder and carrier is thus blurry in multimodal transport. When the freight forwarder is regarded as the carrier, he has the insurable interest in the goods as the bailee.

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<sup>87</sup> The Chinese Supreme Court issued an interpretation to determine whether a marine freight forwarding contractual relationship is established. *See* Provisions of the Supreme People's Court on several Issues concerning the trial of cases of disputes over marine freight forwarding, *Fa Shi* (法释) (2012) Number 3.

<sup>88</sup> Ralph D Wit, *Multimodal transport: carrier liability and documentation* (London: LLP, 1995), p 21.



The freight forwarder's insurable interest in goods as an agent is plausible in existing Chinese judicial practice. In *Orient Building Materials Supply America v PICC Yichang Wujia District*, the Wuhan Maritime Court stipulated that the freight forwarder of the cargo does not possess an insurable interest in the goods.<sup>89</sup> In this case, the freight forwarder acted as the agent of the shipper to insure the goods carried. However, without disclosing the shipper to the insurer, the freight forwarder entered into the insurance contract with the insurer in his own name. The court declined the insurable interest of the freight forwarder.<sup>90</sup> Nevertheless, sufficient explanations were lacking in this case. No reported cases can be found of other courts declining the insurable interest of freight forwarders. The prospects for the freight forwarder's insurable interest remain unclear. The basis for the freight forwarder's insurable interest in goods as an agent depends very much on the underlying contract between the freight forwarder and his customer. Even applying the pecuniary interest approach, it is necessary to look into the rights and obligations of the freight forwarder on the

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<sup>89</sup> (2011) *Wu Hai Fa Shang Zi* (武海法商字) Number 8.

<sup>90</sup> However, the court still found the insurer liable to indemnify the loss of the goods. After denying the insurable interest of the freight forwarder, the court however decided that the insurance contract should be regarded as directly entered into between the shipper and the insurer and that the freight forwarder did not break the duty of non-disclosure by not disclosing the shipper to the insurer. Since the shipper has the insurable interest in the goods, the insurer is therefore still liable for indemnifying the loss of the goods.

delivery of the goods in order to decide whether the freight forwarder has contractual or other legal pecuniary interests.

## **7. Conclusion**

Having an insurable interest is one of the prerequisites of being indemnified by the insurer. However, the insurable interest doctrine in China is regrettably simplistic for determining whether a specific interest is insurable. The various stakeholders in multimodal transport are sometimes confused by the inconsistent judicial practices regarding their insurable interests in the goods.

This paper provides an analytical basis for the pecuniary interest approach, which is a more sensible approach that caters to commercial reality. Application of the pecuniary interest approach to cargo insurable under multimodal transport is also able to effectively justify the insurable interest, not only of the cargo interest itself, but also of the carrier and the freight forwarder.

The development of commercial insurance products is inseparable from the support of a clear and amicable legal and insurance regulation. To efficiently support the development of multimodal transport, it is important for Chinese law to consider the pecuniary interest approach, which, as discussed in this paper, is more compatible with present commercial reality.