

Assessing Article 65 of the Chinese Insurance Law 2015: Third Party Rights under Liability Insurance

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Abstract

This paper aims to provide a comprehensive study of issues related to the rights of third parties under Article 65 of the Chinese Insurance Law 2015. The issues that are identified and discussed include: whether or not there is any inconsistency between the first two paragraphs of Article 65; how to define the phrase "the insured delays making such a request", which gives a third party the right to claim indemnity; the rights of a third party to claim directly against the insurer; and the insurer's defenses against both the third party and the insured. The thorough investigation into all these issues shows that the existing Chinese law lacks clarity with respect to the rights of a third party under liability insurance.

1. Introduction

Liability insurance involves three parties, namely, the insured, the insurer and a third party. Numerous discussions confirm that the subject-matter insured under liability insurance is the insured's potential liability to a third party.¹ There are, however, other opinions that consider liability insurance should be taken either as all-risks insurance, or as property insurance, since the subject-matter lies in the assets of the insured that are covered against loss in the event of the insured's being liable to third parties.²

Article 65 of the Chinese Insurance Law 2015³ (hereinafter called the "Insurance Law 2015") defines liability insurance as being "...the type of insurance where the subject-matter insured is the insured's liability to compensate a third party in accordance with law." It is therefore clear that liability insurance is

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¹ John Birds, *Bird's Modern Insurance Law* (8th edn, Sweet & Maxwell 2010) 375; ER Hardy Ivamy, *General Principles of Insurance Law* (6th edn, Butterworths: London 1993) 12; Robert Merkin (ed), *Conlinvaux's Law of Insurance* (9th edn, Sweet & Maxwell 2010), at para. 20-006 and others.

² For more details, see Ling Zhu and Xiuhua Pan, "Compulsory insurance and its implications", [2016] LMCLQ 563, 567–568.

³ The first law in this respect was the Chinese Insurance Law 1995, which has since undergone three amendments, namely, in 2002, 2009 and 2015. For simplicity, this paper will consistently refer to the current version - the Chinese Insurance Law 2015.

insurance which has as the subject-matter insured the insured's legal liability to indemnify a third party under Chinese law.

Apart from defining liability insurance, Article 65 also lays down rules to regulate rights and obligations of related parties under it. To quote:

“The insurer *may* indemnify a third party directly for loss or damage caused by the insured under liability insurance in accordance with laws or as provided by the contract. [emphasis added]

Where the insured under liability insurance causes loss or damage to a third party and the liability for compensation to the third party is determined, the insurer *shall*, upon the request of the insured, make the indemnity payment directly to the third party. Where the insured delays making such a request, the third party is entitled to claim directly against the insurer for its portion of the compensation. [emphasis added]

Where the insured under the liability insurance causes loss or damage to a third party and the insured has not compensated the third party, the insurer shall not make the indemnity payment to the insured.”⁴

When it comes to a specific type of liability insurance, special laws and regulations may also be referred to.⁵ However, when examining the relevant provisions in them, it can be seen that they all commonly refer back to the provisions in the Insurance Law 2015.⁶ In addition, the Contract Law of the Peoples' Republic of China (PRC) (hereinafter called the “Contract Law”)⁷ contains general rules regulating contractual activities, and comes into play where clarifications are needed regarding certain issues under the Insurance

⁴ Article 65 of the Insurance Law 2015. Translated in the Johanna Hjalmarsson and Dingjing Huang (ed), *Insurance Law in China* (Informa Law from Routledge, 2014), 315.

⁵ For instance, The Road Traffic Safety Law of the People's Republic of China and Regulation on the Implementation of the Road Traffic Safety Law of the People's Republic of China covers liability insurance concerning motor vehicles involved in traffic accidents (in Article 17 under each document). The Special Maritime Procedure Law of the People's Republic of China lays down specific rules regarding liability insurance for oil pollution damage caused by ships (in Article 97). See also the Civil Aviation Law of the People's Republic of China, which requires that civil aviation operators take out liability insurance for the benefit of people on the ground (Articles 166–172).

⁶ For instance, Article 17 of the Road Traffic Safety Law of the People's Republic of China merely stipulates that motor vehicle insurance is a compulsory requirement for motor vehicles within the territory of China. Further clarification of certain aspects was said to be left to be decided on by the State Council; however, although the State Council promulgated the Supplementary Regulations on the Compulsory Liability Insurance of Motor Vehicles, 2006, these Supplementary Regulations simply make reference to certain provisions under the effective insurance law—which means Article 65 of the Insurance Law 2015.

⁷ The Contract Law, promulgated in 1999 by the National People's Congress, governs agreements made between individual persons, legal persons or other organizations as equal parties, for the establishment or modification of relationships involving civil rights and obligations of such entities (Article 2 of the Contract Law). See a full text of the Contract Law online http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm, last accessed on 22 June 2017.

Law 2015.⁸ Judicial interpretations related to the Contract Law can also be applied to clarify ambiguous issues under an insurance contract.⁹

This paper aims to provide a thorough study of the provisions and associated issues under Article 65. These mainly include: 1) The insurer's direct payment to third parties; 2) the third party's right to claim indemnity, especially when the insured delays in making a claim; and 3) the insurer's defenses against both the third party and the insured. This comprehensive discussion shows that the Insurance Law 2015 lacks certain clarity with respect to the rights of a third party under liability insurance.

2. Insurer's direct payment to third parties

The first and second paragraphs of Article 65 of the Insurance Law 2015, as stated above, provides for the insurer's direct payment to third parties under varying circumstances.

In general, privity of relativity or privity of contract, as recognized in Article 8 of the Contract Law, holds that a third party does not in principle have any rights or duties under a contract between others.¹⁰ However, at the same time, parties to the contract may also agree that the contractual obligation may be discharged by performance to a third party, which is known as a contract in favour of a third party.¹¹ In this regard, as a very distinctive example, Article 64 of the Contract Law provides that:

“[W]here the parties agree that a debtor shall perform the obligation to a third party, and if the debtor fails to perform the obligation to the third party or if his performance is not in conformity with the agreement, the debtor shall be liable to the creditor for breach of contract.”¹²

A contract in favour of a third party confers a right upon the third party, and after accepting the benefit of the contract, it is deemed that the third party essentially assumes the position of a creditor *vis-à-vis* the

⁸ Articles 123 and 124 of the Contract Law: Article 123 stipulates that if a special law provides specific provisions, then it shall prevail; and Article 124 reads that, where there lacks clarification on a certain issue, then the general rules of Contract Law shall accordingly apply.

⁹ Pursuant to the Legislation Law of the People's Republic of China (adopted by the 3rd Session of the Ninth National People's Congress in 2000), the National People's Congress has the authority to make or adopt judicial interpretations, and such documents shall have the same legal effect as that of laws made by the National People's Congress; it also entitles the Supreme People's Court to issue judicial interpretations to clarify issues arising from judicial trials. Despite doubts as to whether interpretations issued by the Supreme People's Court shall have the same legal effect as those issued by the National People's Congress, the fact is that judicial interpretations issued by the Supreme People's Court do play a significant role in judicial practice. See the full text of the “Legislation Law” online http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383554.htm (last accessed 22 June 2017).

¹⁰ The Contract Law, Article 8.

¹¹ Bing Ling, *Contract Law in China*, (Sweet & Maxwell Asia: 2002), 252-253, at para. 5.043-5.044.

¹² Translation is given by Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia: 2002), 477.

debtor, and that therefore the contractual obligation is discharged once the debtor performs its contractual duty.¹³

The provisions in the first and second paragraphs are largely consistent with the rules established in the Contract Law. It accordingly eliminates situations where the insurer compensates the insured for the amount of loss he claims to have suffered, but where the insured does not actually pay the third party in full and/or in a timely manner. In this way, the situation of a third party is greatly improved.¹⁴

The question nevertheless arises as to whether there is any inconsistency between the two paragraphs of Article 65. According to the first paragraph, the insured's liability to a third party is determined either by law or by contract; the insurer "*may* indemnify a third party directly..." In contrast, the situation under the second paragraph reads that the insurer *shall* make direct payment "...upon the request of the insured...", in contrast with the word *may* in the first paragraph. Therefore, the scope of both paragraphs seems to be identical, but the legal consequences imposed on the insurer seem to be different. However, if the two paragraphs are read more closely, it can be seen that the first paragraph in effect imposes a general duty on the insurer to indemnify a third party directly if there exist relevant law provision(s) or a contractual agreement; whereas the second paragraph merely describes a special situation in which a third party can bring an indemnity claim directly. Thus, as long as the situation falls within one of the following: 1) The insured causes loss or damage to a third party; 2) liability of the insured to the third party is determined; or 3) the insured makes such a request, then the insurer is obliged to make a direct payment. Accordingly, the first paragraph intends to lay down just a general duty, whereas the second paragraph provides for a situation which is worthy of a special provision. There is, therefore, no inconsistency between these two paragraphs.

3. Third party's direct claim against the insurer

3.1 In general

As mentioned above, the privity of contract principle is one of the basic principles of contract law in both common law and civil law countries.¹⁵ Under this principle, only the original parties may enforce or be bound by the terms of that contract. However, in the second paragraph of Article 65 of the Insurance Law 2015, a third party's direct claim against the insurer is an exception to this principle.

¹³ Bing Ling, *Contract Law in China*, (Sweet & Maxwell Asia: 2002), 253–255, para.5.044 and 5.045.

¹⁴ Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia: 2002), 254; any reference omitted.

¹⁵ As to the common law authorities, see Stephen Graw, *An Introduction to the Law of Contract* (6th edn, Thomson 2008), 8.1.1; N C Seddon and M P Ellinghaus, *Law of Contract* (7th edn, Butterworths:1997), [7.1] and others; as to the Chinese law authorities, please see Wang Liming, "On the Privity of Contract", [1996] Issue 4 China Legal Science 63 (in Chinese) and others.

There has been constant discussion about the theoretical basis of a third party's right to make direct claims against the insurer. The views of many Chinese scholars are rooted either in civil law principles or common law practice. According to them, a third party's direct action may be related to one of three theories: 1) Statutory acquisition of rights; 2) avoidance of the insured's shifting liability; and 3) the statutory transfer of rights.

The statutory acquisition of rights was introduced in the Insurance Contract Law of France 1930, where the theory maintains that the right of a third party against the insurer is granted by legislation and is thus a statutory right.¹⁶

The second theory mentioned is derived from German insurance law. Its justification is based on the assumption that people are selfish and inclined to avoid their liability, however incurred, and that therefore any disadvantage should be prevented by imposing the obligation to compensate on the insurer, and by making the insured and the insurer jointly and severally liable, which is also deemed to be the purpose of liability insurance.¹⁷

A third theory, which is widely acknowledged in common law, is the statutory transfer of rights; it has also been confirmed in the UK Third Parties (Rights Against Insurers) Act 1930, in which, under certain circumstances, the insured's rights against the insurer under the contract shall be transferred to and vested in third parties to whom the liability was so incurred.¹⁸

Be it any of these, such a right is deemed to be a great step forward in protecting third party rights in liability insurance, and in accelerating claims proceedings so that the insured's delay or failure to make a request will not be a substantial obstacle to the rights of third parties.¹⁹

3.2 What does “delay in making such a request” mean?

Under Article 65, the right of a third party to claim directly against the insurer is associated with the insured's delay in making a request; what actually amounts to a delay is, however, not specified in either

¹⁶ Zhuyong Li, “Study on Issues of Liability Insurer's Defense” (Doctor's Dissertation, China University of Political Science and Law 2011) (in Chinese), 59-60; also Qingyue Shen, “Victims of Liability Insurance and its Direct Claim” (Master's Dissertation 2007) (in Chinese), 5-7.

¹⁷ Examples can be located in ss 115–117 under the Insurance Contract Act 2008 in Germany.

¹⁸ Section 1 of the UK Third Parties (Rights Against the Insurer) Act 1930. However, this Act 1930 has been repealed by the Third Parties (Rights Against Insurers) Act 2010, under which statutory transfer of rights have been amended: see ss 8-9 for more details.

¹⁹ Fei Chen, “On the perfection of the legislation of liability insurance in China”, [2011] Vol. 5 Science of Law (Journal of Northwest University), 191 (in Chinese), 193; Yishun Ren, Yeying Wang and Qin Wang, ‘Judicial interpretation on the “insured's delay in making claim” under the liability insurance’ [2011] 7 Insurance Studies 109 (in Chinese); see also Ying Zheng, “On the third party's right to claim the compensation under the liability insurance” [2015] 1 Journal of Hubei University (Philosophy and Social Science), 129 (in Chinese).

the Insurance Law 2015 or its later Judicial Interpretation.²⁰ Therefore, the foremost question in this context concerns the exact meaning of the phrase in Article 65—“the insured delays making such a request”.

It should be noted that Article 73 of the Contract Law provides for a situation involving “delay”. Article 73 of the Contract Law provides that:

“If the debtor ***neglects to exercise his claim that has matured***, thereby causing damage to the creditor, the creditor may apply to the people’s court for exercising, by subrogation and in his own name, the debtor’s claim, unless the claim is exclusively personal to the debtor...”²¹ [emphasis added]

This has been further clarified in Article 13 of the Judicial Interpretation I of the Supreme People’s Court on Certain Issues Concerning the Application of the Contract Law of the People’s Republic of China,²² which provides:

“...[T]he phrase ‘[I]f the debtor neglects to exercise his claim that has matured, thereby causing damage to the creditor’ as mentioned in Article 73 of the Contract Law, means a situation where the debtor fails to perform his obligation to the creditor that is due, and also fails to assert through litigation or arbitration against his debtor his own claim which has matured and involves payment of money, thereby rendering the creditor’s matured claim incapable of satisfaction.”²³

Such ‘neglect’, as is being described in Article 73, includes a situation where the debtor delays in exercising its matured creditor’s rights.

Can the same understanding be applied to “the insured delays making such a request” in Article 65 of the Insurance Law 2015? It is widely accepted by many Chinese scholars that it is reasonable to understand the phrase “the insured delays making such a request” in the same way,²⁴ which means that the insured could have made a claim against the insurer, but declines to do so on purpose in order to infringe on a third party’s right to compensation in a prompt manner.

²⁰ The Supreme People’s Court has issued three legal documents—The Judicial Interpretation on Several Issues Regarding the Insurance Law of PRC 1, 2, and 3, in 2009, 2013 and 2015, respectively—none of which included any clarification of the phrase “insured’s delay” under Article 65.

²¹ The Contract Law, Article 73; translated by Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia: 2002), 478.

²² This Interpretation was adopted at the 1090th meeting of the Trial Committee of the Supreme People’s Court on December 1, 1999.

²³ Translation is given by Bing Ling, *Contract Law in China* (Sweet & Maxwell Asia: 2002), 523.

²⁴ Yishun Ren, Yeying Wang and Qin Wang, ‘Judicial Interpretation on the “Insured’s Delay in Making a Claim” under the Liability Insurance’ [2011] 7 Insurance Studies (in Chinese), 109 and 112–113.

3.3 The objective impossibility for the insured to perform such a request

In general, a third party's right may be hindered either by: 1) the insured's delay in making a request, or 2) the objective impossibility for the insured to perform such a request.²⁵ A delay in making a request arises when the insured does not perform its contractual obligation within the agreed period of time; whereas an objectively impossible performance is a situation where the insured cannot perform its obligation due to the existence of certain facts.²⁶ In actual fact, it is commonly seen that the insured delays making a request to the insurer due to an objectively impossible performance. However, there is no clear stipulation in Article 65 about the legal consequence in such a situation.

This dilemma can be elaborated on by considering a case concerning the compulsory liability insurance of a motor vehicle in a traffic accident.²⁷ This case concerned a company driver who, while driving to deliver cargo back to his company, collided with a pedestrian in the middle of a zebra crossing, causing severe injuries to the pedestrian. After investigation by the traffic authority, the driver was held to be fully responsible for the accident. The vehicle in question was covered by compulsory motor vehicle liability insurance arranged by the company. Unfortunately, however, before the victim received any compensation, the company's creditors filed a petition for bankruptcy, due to the company's failure to pay off its due debts. Once the bankruptcy process was launched, the victim had no choice but to declare his right through the declaration of claims, and waited for the distribution process on the ground of each debt and each priority.²⁸ Accordingly, the pedestrian's right of claim, as an unsecured debt, could only be satisfied when all the other secured debts had been realized, and this situation put him at great risk, since the bankrupted enterprise did not have enough assets to pay off all its debts, which meant that lower ranking debts were less likely to be paid off, or to be just partly paid off. However, if the insured's bankruptcy leading to his "objectively impossible performance" could be recognized as one of the situations that fall within "delay in

²⁵ This is a civil law principle under Chinese Law with regard to the various kinds of contract performance. A contract is either performed or is not performed by the contractual parties. In case of performance, the performing party is assumed to perform its obligation fully in conformity with the contractual term. However, it sometimes happens that the performing party delays in performing its contractual duty. In the case of non-performance, the performing party may, in some circumstances, be unable to perform its obligation due to objective/subjective factors, depending upon whether such hindrance is due to the performing party itself or other factors. It is noted that the objectively impossible performance does not cover situations like force majeure, under which both parties to the contract shall not be held liable for non-performance of the contract.

²⁶ For details, see Wang Liming (ed), *Civil Law* (5th edn, China Renmin University Press 2010) (in Chinese), 317–319.

²⁷ This case is analyzed in: Fei Chen, "On the Perfection of the Legislation of Liability Insurance in China", [2011] Vol. 5 Science of Law (Journal of Northwest University) (in Chinese), 191.

²⁸ Relevant requirements and procedural issues are laid down in the Enterprise Bankruptcy Law of the People's Republic of China (hereinafter called the "Bankruptcy Law"). Articles 44–58 of the Bankruptcy Law concern relevant issues regarding the declaration of claims. Articles 111–119 elaborate on the distribution of debts among creditors, with Article 113 in particular providing a specific sequence of the distribution among various creditors.

making such a request”, the third party would be entitled to claim against the insurer directly for indemnification in the first place.

Apart from bankruptcy, the insured’s death, disappearance, absconding, or any other unknown whereabouts can also lead to the objectively impossible performance of the insured making a request. Can these situations also fall within the broad meaning of “delay in making such a request”? Similar situations occasionally occur, and the customary practice commonly accepted by the insurance industry is that a third party cannot ascertain the insured’s delay in making a claim until and unless he first files a lawsuit against the insured, following which the delivery of the court judgment is deemed to be an approved evidence of the insured’s delay.²⁹ However, such a prerequisite can hardly be satisfied under the circumstances of the insured’s death, disappearance, absconding or any other unknown whereabouts.

4. Insurer’s defense against the third party

Pursuant to the “privity of contract” principle, the original parties are bound by contractual terms.³⁰ As a result, the insurer is entitled to defend against the insured’s claim for insurance compensation under certain circumstances. For instance, most countries’ laws and practice allow the insurer to defend against the insured’s claim for insurance compensation where the insured deliberately failed to disclose certain facts.³¹ The question arises, though, where the third party brings a direct action against the insurer. Article 65 of the Insurance Law 2015 remains silent on this question, and relevant Judicial Interpretations also fail to provide any clarification.

In general, opposing attitudes may be seen depending on whether the insurance is compulsory or voluntary insurance, both of which are deemed to be two typical types of liability insurance.³² Under voluntary insurance, it is held that the insurer is entitled to defend against third parties under circumstances in which he is entitled to defend against the insured. The rationale is that voluntary liability insurance is based upon the parties’ autonomy, and that the third party rights, being subrogated from the insured, shall be subject to the words of the contract. In contrast, compulsory insurance is different, as the purpose of compulsory liability insurance is to protect third parties’ rights and to achieve certain objectives of public policy, and it is therefore justifiable to deny or limit the insurer’s right to certain defenses against third parties. This means that the insurer, under certain circumstances, cannot use particular defenses (e.g. the insured’s delay

²⁹ Youfei Yu, “On Analysis of the Third Party’s Claim under Compulsory Traffic Insurance” (in Chinese), available electronically at <http://202.119.108.161:93/modules/showContent.aspx?title=&Word=&DocGUID=d36ade73cd1340599b0c9a5163c3fcfa>, last accessed on 24th April 2017.

³⁰ Stephen Graw, *An Introduction to the Law of Contract* (6th edn, Thomson 2008), 8.1.1.

³¹ For instance, Article 16 of the Insurance Law 2015, and Section 8 of the UK Insurance Act 2015.

³² More information can be found at Jianhui Chen and Yanjuan Yi, “On Third Parties’ Right of Subrogation under Liability Insurance in China”, [2009] 7 Finance and Economy (in Chinese), 61; Ce Wang, “Study on the Third Party’s Direct Claim in Liability Insurance” (Master’s Dissertation, Dalian Maritime University 2014) (in Chinese).

in paying the premium) against third parties.³³ The fact that the Insurance Law 2015 makes no distinction between voluntary liability insurance and compulsory liability insurance, however, makes this issue a problematic one under Chinese insurance law.

Due to the lack of legal provisions, a third party may often choose to include the insured and the insurer as co-defendants in the same claim in Chinese judicial practice.³⁴ By doing so, the court can first evaluate the contractual relationship between the insured and the insurer, and then consider whether it is more appropriate to order the insured or the insurer to pay to the third party. As a result, this may avoid any complications involved in a claim, in particular the insurer's defenses against the third party; however, this will inevitably involve more insurers in potential lawsuits and increase the caseload of the courts.

5. The insurer's position when the insured has not indemnified a third party

The third paragraph of Article 65 contains a specific provision under which an insurer with a defense against the insured, in that the insured party under the liability insurance has not indemnified a third party, shall not be liable to reimburse the insured.

This contains two separate points, one with respect to the insured's pay-first obligation, and the other with respect to the insurer's obligation in this regard. Accordingly, on the one hand, the insured, prior to requesting reimbursement from the insurer, assumes the obligation to compensate third parties. On the other hand, the insurer bears an obligation to deny reimbursement where the insured fails to pay first. The insured's failure to make compensation to third parties triggers the insurer's obligation to deny reimbursement to the insured.

The application of the rule here can be shown by cases in judicial practice. There was a case tried by a court of first instance in Lin'an, Zhejiang Province, concerning a dispute over compulsory liability insurance of motor vehicles.³⁵ The case concerned the victim, as the plaintiff in a traffic accident, who brought a lawsuit against the defendants, a company, as the owner of the car in question together with its liability insurer.³⁶ The problem in this case was that the company (the insured) did not make payment to the

³³ For details, please see Article 19 of *Supreme Court's Interpretation on certain issues regarding the application of law of compensation issue in trial of traffic accident cases*, available electronically at <http://www.chinacourt.org/law/detail/2012/11/id/146025.shtml>, last accessed on 17th June 2017.

³⁴ See an example of a motor vehicle compulsory insurance dispute tried by the Shanghai Huangpu District court, in which the third party filed a lawsuit against the insurer of the motor vehicle, and a motion to add the owner of the motor vehicle (also the insured) as a third party of the litigation, available electronically at <http://bit.ly/2s3ZPd3>, last accessed on 2nd June 2017.

³⁵ For the full judgment of the case (Case No. [2016] Zhe 0185 Min Chu 398), see <http://openlaw.cn/judgement/89123bdbcdf9418184513b7af19ba491?keyword=%E9%98%AE%E5%9B%BD%E5%8D%8E>, last accessed on 28th June 2016.

³⁶ Academic attitudes concerning the insurer's position toward parties outside the insurance policy are not in conformity with each other. One opinion is that the insurer, either by voluntarily applying or being compelled to join the court hearing, shall be in the same position as the insured; while others hold the view that in the case of the insured's dispute with parties other than the insurer, the insurer has no direct

victim, even though it had managed to get reimbursement for such from its insurer. The insured was absent from the court hearing, at which the insurer argued that its contractual obligation under the policy was fulfilled once it reimbursed the insured for the sum, regardless of whether the insured fulfilled its obligation to compensate or not. The court made judgment in favor of the third party, on grounds that basically followed Article 65, saying that the insurer, by making payment to the insured, was in breach of its obligation by law. The fact was that the insurer's payment to the insured, in the opinion of the courts, could in no way be interpreted as the fulfillment of its obligation, and hence the insurer should make payment of the same sum claimed by the plaintiff (i.e. a third party).³⁷ Apparently then, while providing better protection to the third party under this paragraph, the insurer is being put in a disadvantageous position when trying to avoid potential risks in handling its daily business.

6. Conclusion

This paper attempts to analyze issues of third party rights under liability insurance in the context of the Insurance Law 2015. The first issue discussed here is the possible inconsistency between the first two paragraphs of Article 65. It is now clear that the second paragraph describes a specific situation, whereas the first paragraph provides general rules related to an insurer's direct payment. The second issue involved is the confusion about the insured's delay in making a claim. As has been pointed out, the simple phrase used serves only to complicate the issue, rather than to protect a third party's rights under certain circumstances. Further clarification is thus needed, and in consideration of making correct clarification, relevant common scenarios should be taken into account, such as the insured's bankruptcy, disappearance, or even death.³⁸ Among these issues, the third one is under frequent criticism. The issue of the insurer's right to defend exists due to the lack of theoretical basis, and it is, therefore, necessary to ascertain whether the insurer can assert his right of defense against a third party, as otherwise the insurer is put at great risk, and such uncertainty will inevitably drag insurers into endless lawsuits. The last issue is about the insurer's position when the insured has not indemnified a third party. Although it is the intention of Article 65 to provide better protection for third parties, the insurer is inevitably put in an adverse position, since the insurer's payment to the insured may not be the end of the case.

relationship with a third party (in the sense of civil procedure), and thus shall be listed as an independent party to the court hearing. In practice, however, it is common for the insured and the insurer to be the co-plaintiffs or co-defendants.

³⁷ The same issue has been discussed by the 2nd Court of Appeal in Shanghai, for its judgment (Case No. [2016] Hu 02 Min Zhong 1149), see <http://openlaw.cn/judgement/e2573cc9a84c41118108cb0a3c871ae6>, last accessed on 5th April 2017.

³⁸ Under English Law, the "*Third Parties (Rights Against Insurer) Act 1930*", and the "*Third Parties (Rights Against Insurer) 2010*" (Amendment), lay down specific circumstances in which the insured's right can be transferred to a third party for the purpose of protecting such a third party's right, see s 1. Also, in Germany, Article 115 of the *Insurance Contract Act 2008*, in the case of a third party's direct claim, also lists specific situations rather than just using a generalized phrase. See https://www.gesetze-im-internet.de/englisch_vvg/englisch_vvg.html, accessed on 24th April 2017.