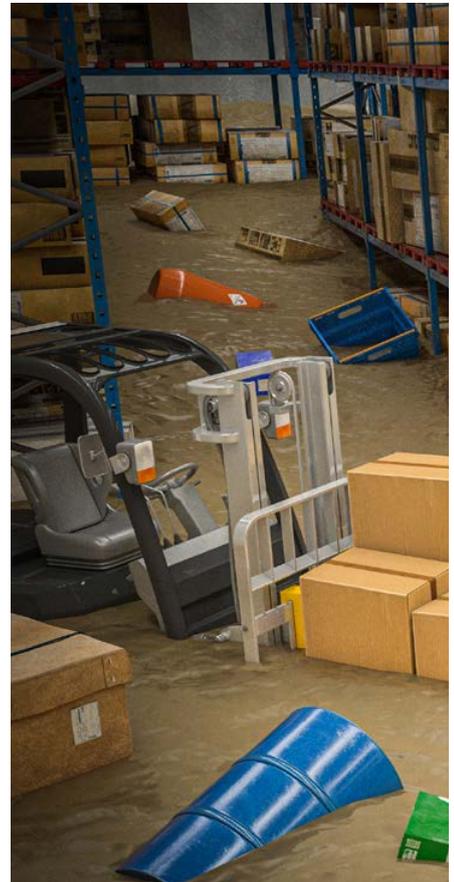
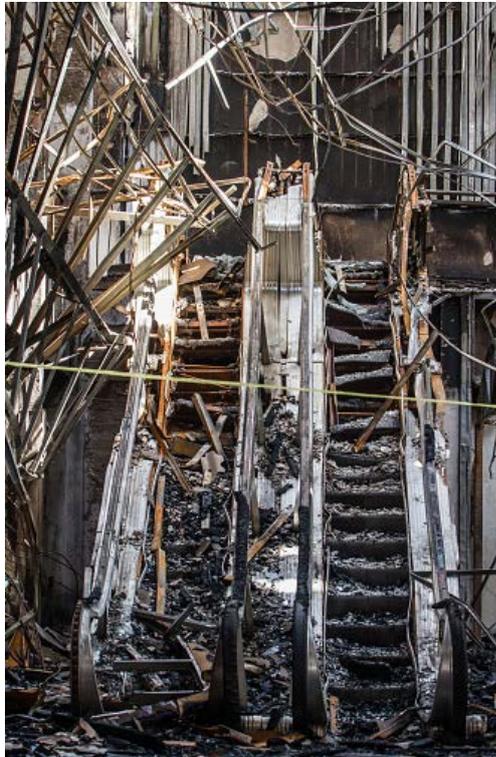




**RPC** PREMIER LAW

# Subrogated Recoveries – Asia Pacific





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# Introduction

**Insurers are increasingly conscious of the importance of “getting something back” following indemnifiable losses and the value which recoveries can have to their balance sheets. However, over time, the emergence of new and developing markets with rising levels of insurance penetration and the increasing complexity of global supply chains, has meant that insurers must consider potential recoveries in a wide range of jurisdictions, with very different legal systems.**

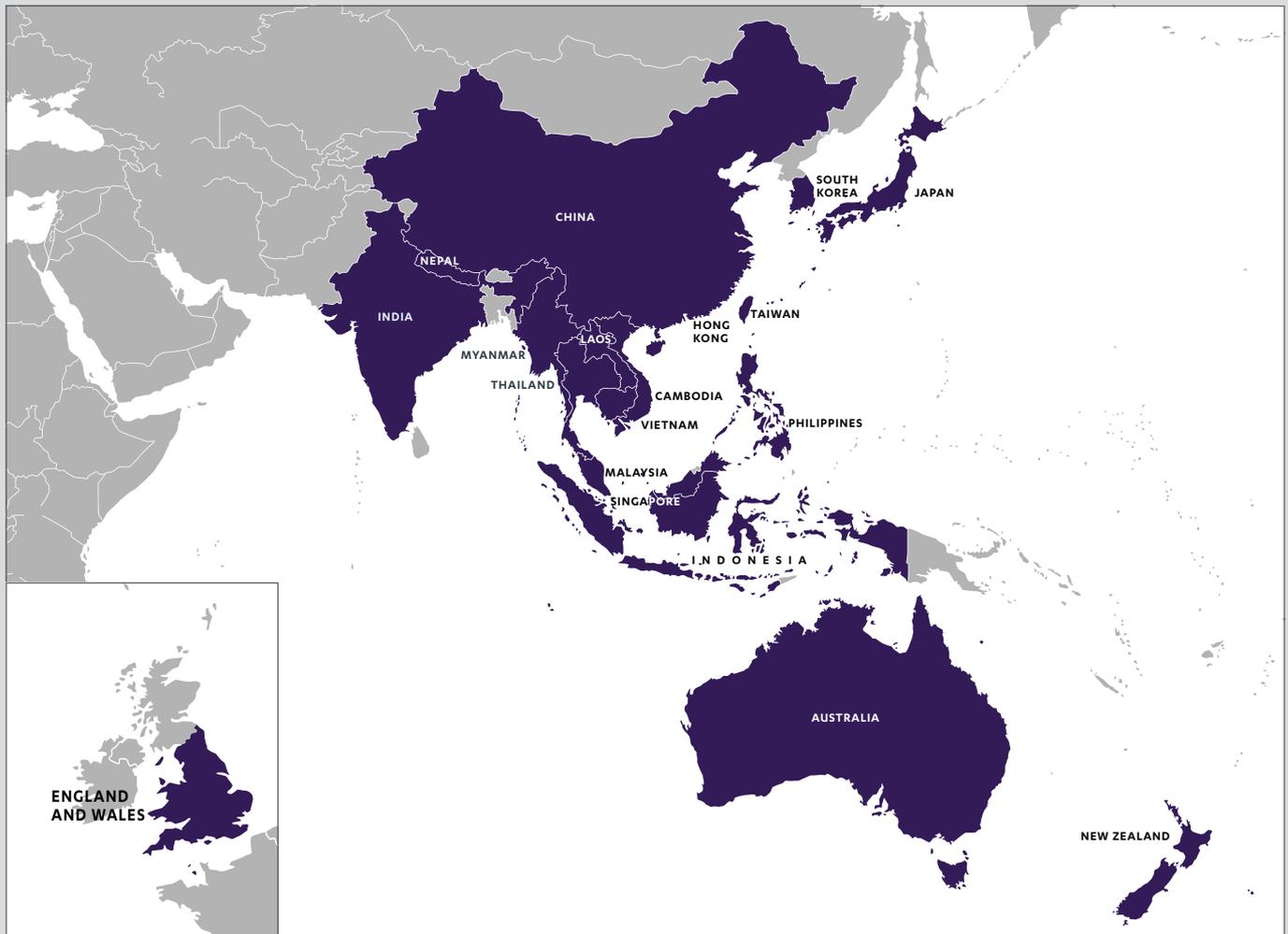
The principle of subrogation is recognised and enshrined in many legal systems, particularly in the context of insurance relationships. Common law practitioners often refer to insurers “standing in the shoes” of their insureds to take the benefit of their rights and remedies against third party wrongdoers.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

While many international claims professionals will consider they have a good understanding of policy provisions relevant to subrogation and how recovery actions are likely to proceed, this understanding may often be founded on principles of systems they are familiar

with (such as English law). However, courts in different legal systems can approach the application of contractual terms and potential tortious remedies in an incongruous manner, sometimes with surprising) results.

In jurisdictions with less mature legal systems, the absence of developed legal principles relevant to specific issues, a lack of specialist judges and a range of other factors, may lead to greater levels of uncertainty of outcome. An appreciation of such factors and their impact should be considered at the outset so as to assist insurers in deciding whether to pursue recoveries and, where they do so, in adopting the most appropriate strategies.

Subrogated recovery actions are more complex than regular commercial



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

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

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

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

Other issues such as: costs (whether or not a “loser pays” principle is applied); allocation of recovery proceeds; weight given (or not given) to independent expert evidence; and whether actions against co-insureds are permitted, can all have a significant bearing on how (and indeed whether) recoveries are pursued.

Parties to litigation should, of course, consider the scope for commercial settlement (at the outset but also in parallel with any proceedings). The recognition, or otherwise, of concepts such as “without prejudice” will have a bearing on the manner in which any settlement overtures are made.

Within the confines of a comparative booklet of this size, it is not possible to provide a definitive statement of all law and procedure relevant to subrogation in 18 jurisdictions across Asia Pacific (this refreshed 2022 brochure includes new sections for Myanmar, Cambodia and Laos) not to mention our “starting point”, England and Wales. However, working with our friends and colleagues in leading regional legal practices, we have endeavoured to provide an accessible reference point to assist insurers with some immediate considerations, prior to seeking more substantive advice. We hope that this is useful and informative.

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## England and Wales

### What is the law on subrogation in England?

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

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

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

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

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

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

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

- i. company searches – Companies House searches will show annual returns

and company accounts; (ii) reveal existing and unsatisfied mortgages and charges; and (iii) confirm whether the company has gone into liquidation, administration or been dissolved

- ii. winding-up searches – a register of all winding-up petitions issued in England and Wales is maintained by the Companies Court
- iii. bankruptcy searches – where the subrogation target is an individual, a bankruptcy search may be carried out. This can be undertaken using the Land Charges Register or the Individual Insolvency Register
- iv. Land Registry searches – a search will allow an insurer to find out whether the company is the owner of any land or building and if there are any restrictions on the land (i.e whether a mortgage on it has been discharged).

In the event that a target is insolvent, enquiries should be made under the Third Parties (Rights against Insurers) Act 2010 as to whether the target has insurance in place that would respond to the claim.

This Act enables a claimant to directly claim against the insurers of the insolvent target, to the same extent the insolvent target would have been entitled to recover from the insurers, under its policy of indemnity.

In order to ensure that assets are not dissipated, an application may be made for a freezing order. Such an order prevents the defendant from disposing of or dealing with their assets. It also ensures that any 'pot' of assets remains available to enforce a judgment if the claimant is successful at trial. The court has discretion on whether to make such an order. The primary consideration of which is whether the granting of the order is "just and convenient".

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

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

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

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

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

Under the Limitation Act 1980, for a contractual claim the limitation period is six years from the date of the breach of contract, for a tortious claim it is generally six years from the date of the damage.

However, in the case of latent damage, the limitation period may be three years from the date of the claimant's knowledge of the loss, if that period expires later than the general six year period.

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

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

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

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

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

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

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

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

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

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# Australia

## What is the law on subrogation in Australia?

The doctrine of subrogation is a widely known and accepted part of Australian law, shaped by common law, equity, contract and legislation including the Insurance Contracts Act 1984 (Cth). As with other common law jurisdictions, subrogation arises where one person or entity becomes entitled to exercise the rights of another. It applies in a number of legal relationships including contracts of indemnity and insurance (including most general insurance contracts but not normally life or personal accident cover) where an insured is entitled to be indemnified against loss.

In the insurance context, rights of subrogation allow an insurer to 'stand in the shoes' of an insured and exercise, in the name of the insured, rights against third parties in respect of the insured loss.

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

Once an insurer has indemnified an insured in accordance with the policy it will generally be subrogated to the insured's rights. However, it is important to note that the insurer's rights of subrogation will be subject to the terms of the policy. An insurer's ability to exercise its rights of subrogation may not require a complete indemnity of the insured for all losses. For example, insureds are often required to pay an excess and policies are subject to monetary limits of liability that might not cover all of an insured's loss.

From a practical perspective, insurers can, with the agreement of the insured, still take steps to investigate and pursue subrogated claims against a third party before an insured's claim is fully indemnified or finalised. Agreements about such actions are not usually controversial because the insured can benefit from recovery of uninsured losses and a reduced claims loss history. However, where an insurer's entitlement to exercise its subrogated

rights is yet to crystallise under the policy, it is important to obtain the insured's agreement to steps being taken in its name, whether issuing letters of demand, commencing proceedings in court or other actions.

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

An insured can often have useful information regarding a subrogated recovery target. Where there is a commercial relationship between the insured and the recovery target, the insured might have information regarding its trading status, business activities and likely attitude to a subrogated claim.

Where the recovery target is a corporation, company searches with the Australian Security and Investments Commission can be conducted to ensure that it remains

registered and not insolvent in liquidation or external administration. Similarly, bankruptcy searches can be undertaken for individuals to ensure there is no such obstacle to commencing proceedings against them.

Assessing the likely availability of responsive insurance for a recovery target is an important step in deciding whether to pursue subrogated recovery. Many professionals (whether they are trading as an individuals, as part of a partnership or through a corporation) are required to hold insurance covering the services they perform. Likewise, many business operators and building owners are required to hold insurance covering risk of damage and injury. An insured may have obtained insurance information of a recovery target (such as a certificate of cover) during the course of their dealings, or may otherwise be entitled to request such information. Though not necessarily conclusive evidence of the availability of cover for a recovery target, a response to a claim by an insurer, a loss adjuster or specialist insurance lawyers will suggest a responsive policy may exist.

Asset and property searches of a recovery target can also be undertaken through state titles offices or personal property security registers. For corporate recovery targets, financial documents (such as annual reports) can be obtained from the Australian Securities & Investments Commission. Finally, asset investigations can be undertaken by private investigators.

If there is a legitimate basis for suspecting that assets may be dissipated before a judgment can be obtained and enforced, freezing orders and property preservation orders may be sought from the court seeking restraint of assets. Other court orders are also available to prevent the sale of real assets and dissipation of funds. However, courts will not make such orders lightly and evidence to support the suspicion will be required.

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

An insured must not prejudice an insurer's rights of subrogation and is also generally under a duty to cooperate in a subrogated claim. Such obligations are often express terms of a policy but otherwise arise by law.

Courts have found that such duties arise as an implied term in contract and equity and pursuant to the duty of utmost good faith.

If an insured breaches this duty, the insurer may seek to reduce the amount payable to the insured or equivalent damages which reflect the extent of the prejudice suffered. However, in such cases courts often take a lenient view about prejudice and the authorities also indicate that the prejudice must be capable of being assessed in monetary terms. In practice, this makes cases of failed cooperation difficult to prosecute. If necessary, orders for specific performance and injunctive relief can be sought to obtain cooperation.

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

There is no separate limitation period in Australian jurisdictions concerning the exercise of subrogated rights. As the insurer must bring its claim in the insured's name rather than its own, the applicable limitation periods are those affecting the insured's primary claim against the recovery target. In most Australian states, the typical limitation period for a contract claim is six years from the date of the breach, and for a negligence claim six years from when the damage occurred. However, certain types of dispute (for example building disputes) have different limitation periods, as do causes of action other than negligence and contract (for example claims for misleading and deceptive conduct under consumer and fair trading legislation).

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

Responsibility for payment of costs of a subrogated action is often determined by the terms of the policy. Where the policy is silent on this issue, the Insurance Contracts Act provides that where an insurer conducts the recovery it is entitled to priority in recovery of amounts paid under the policy plus its costs and expenses of the recovery. Where an insured conducts the recovery, the Insurance Contracts Act provides that it is entitled to priority in recovery of uninsured loss plus its costs and expenses of the recovery. However, there is no prohibition on contracting out of the terms of the policy or the subrogation provisions

of the Insurance Contracts Act and the parties can agree their own costs regime.

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

In the event judgment is obtained but not paid by the recovery target, a variety of enforcement options exist. Where judgment is obtained against a company, statutory demands can be issued and, if not complied with, the target can be wound up with a liquidator appointed. As for individuals, bankruptcy notices can be an effective way of procuring payment. Where specific assets, incomes or debt credits are known, warrants of seizure and sale as well as attachments of earnings and account can be obtained by court order. However, to avoid the risk of a judgment not being satisfied, it is prudent to consider a recovery target's ability to pay before embarking on a subrogated recovery action.

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

There is no blanket legislative bar to making subrogated claims against co-insureds under Australian law. However, issues of circuitry of cover mean that courts can be reluctant to allow such claims. To the extent that a subrogated claim is made against a co-insured, that claim can fall within the scope of the policy under which the co-insured is also entitled to cover. Further, in many cases a policy will contain a clause prohibiting recovery against a co-insured.

Finally, the Insurance Contracts Act limits subrogated claims where there is a family or other personal relationship between the insured and the third party or where the third party is an employee of the insured (save for if the loss occurred in the course of employment and was not serious or wilful misconduct).

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## Cambodia

### What is the law on subrogation in Cambodia?

The Law on Insurance (“Insurance Law”), Chapter 3, Section 2 and Section 3, is the main law that addresses subrogation in the context of insurance. In addition, provisions related to subrogation can also be found under the Cambodian Civil Code (“Civil Code”); the Code of Civil Procedure of Cambodia (“Civil Procedure Code”); and Law on the Implementation of the Civil Code.

The main provisions concerning subrogation are set out in Article 25 of the Insurance Law, which relates to general insurance, and which provides :

*“When the insurer has paid the claim, the Insured shall give the subrogation rights to the insurer to claim from the third party that caused the damage and claim for refund of the claim amount already paid. However, the insurer shall not claim against the descendants, ascendants, relatives by marriage, manager and workers or employees who are living in*

*the residence of the Insured, except in the case that the insurer has uncovered the intention to fraud with proofs and evidences by anyone of them.” (Article 25 of Insurance Law)*

With regards to life insurance, Article 27 of the Insurance Law states that after the insurer pays a claim for life insurance, the insurer shall not claim any subrogation right from the contracting party or beneficiary for the purpose of suing any third party.

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

In Cambodia, an insurer’s right to subrogate arises only after the claim has been paid to the insured (Article 25). The right to subrogate does not happen by virtue of contract or agreement but through operation of law.

### What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential

### subrogation target is worth pursuing? What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

Cambodia does not have any comprehensive central databases that list a person’s assets, except for immovable properties that have been registered in a new online platform through the Ministry of Land Management, Urban Planning and Construction. Generally, law enforcement officers will not assist an insurer in an investigation of the subrogation target’s assets. Investigations are normally carried out by lawyers or private agents hired by the insurance company. All investigations must be conducted manually by visiting the Ministry of Land Management, Urban Planning and Construction, or local land offices to search for land and building ownership information or through an online search (only for the immovable properties that have been registered in the online system). In certain circumstances, there may not be any mechanism to carry out an official search.

Preservative relief orders are available through the Cambodian courts and may be given by a court (prior to a court judgment) in order to freeze assets identified by the insurer. If there is a risk that the compulsory execution of the claim will become impossible or extremely difficult due to alteration of the property by the debtor, or that significant damages or imminent risk will arise affecting the status of one of the parties in respect to the rights in a dispute, a party seeking to preserve its rights may apply for preservative relief (Article 530, Civil Procedure Code). The party who requests the preservative relief must however prove the necessity of the preservative relief (Article 541, Civil Procedure Code)

#### **Is the insured required to cooperate in a subrogated action in Cambodia?**

Cambodian law does not specifically impose an affirmative obligation on the insured to cooperate in a subrogated action. However, the insured's cooperation in a subrogated action is usually included in a provision of an insurance contract as a condition to indemnify the insured. Practically, if an insurer requires the insured's personnel to give testimony or to disclose important documents that are within the custody of the insured, they may seek a court summons and serve this upon the insured.

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

The time limit for the insured to make a claim is five years from the date that the claim is capable of being exercised (Articles 481 and 482, Civil Code). Time begins to run when the insured (not the insurer) had knowledge of the wrongful act and the identity of the wrongdoer. An insurer will likely be bound by the same limitation period.

#### **Who is responsible for costs in a subrogated action in Cambodia?**

Cambodian laws do not specify who is responsible for costs in a subrogated action. In practice, a person who initiates the subrogated action should be responsible for costs. Therefore, the insurer will typically be responsible for costs in a subrogated action, unless the insurer and the insured agree otherwise in the policy or insurance contract. Where the insured has uninsured losses, the insurer and the insured may agree to apportion the costs of the subrogated claim.

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

The Insurance Law and its delegated legislation do not address the method of enforcement of insurance related judgments. The enforcement of any judgment will be based on the Civil Procedure Code. Once a judgment is final and binding, it will achieve a conclusive and binding effect (Article 194, Civil Procedure Code). A judgment may be enforced once it becomes final and binding in accordance with the provisions of Article 194 (Article 195, Civil Procedure Code).

After obtaining the court judgment in its favour, the insurer will be deemed a creditor of the defendant. The insurer may then file for compulsory execution. The compulsory execution is implemented, when the court judgment is finally rendered, in order to seize the property and to apply the sales proceeds to satisfy the winning party's claims.

The compulsory execution must be in writing and conducted according to the title of execution with an execution clause. The title of execution may refer to a court judgment, a ruling, a notarized document, and other records in the court proceedings that carry the same effect as the court's decision (Article 350, Civil Procedure Code).

Compulsory execution is carried out in the form of a sale, being either an auction or a tender, and if the sale cannot be carried out by these means, the sale may be carried out by methods prescribed by the Execution Court (Article 436, Civil Procedure Code). The court will set the date, the time and the place of sale, and have the bailiff carry out the sale (Article 436, Civil Procedure Code). The court will also set a date for a ruling on sale and issue a declaration as to whether the sale is permitted (Article 440, Civil Procedure Code). Once the ruling permitting the sale becomes final and binding, the purchaser is required to pay the sales price to the court within the required period (Article 447, Civil Procedure Code). The proceeds received by sale will be allocated to the creditor and for procedural fees and any residuals will be paid to the debtor. (Article 398 and 399, Civil Procedure Code).

#### **Are subrogated actions against co-insureds allowed under Cambodian law?**

There are no specific provisions under Cambodian law relating to subrogation against co-insureds. Therefore, the ability to do so will normally depend on the language in the insurance contract or specific policy provisions.

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## China

### What is the law on subrogation in China?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If a final judgment is not honoured, the winning party may file an enforcement application indicating which property is subject to enforcement. The methods of enforcement include sealing up, distraining, freezing and auctioning and/or selling off the targeted property. Chinese courts may also exercise discretion

(responding to specific applications) and issue restraining orders against the legal representatives of the target company so as to impose restrictions on their movement, including a prohibition on travelling abroad. In addition, the courts may also inform the media of the target company's failure to abide by and comply with the judgments.

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

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

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## Terrorism, Political Violence and War Risks

RPC's international risk team is regularly sought out by international (re)insurers to advise on complex coverage issues relating to terrorism and political violence under specified perils policies covering terrorism and political violence as well as under all risks property policies. Our team is particularly skilled in assessing policy response, including business interruption, as a result of politically motivated incidents.

We handle disputes globally, with particular experience in jurisdictions across Asia,

Africa, the Middle East and South America. We work seamlessly across all our offices and operate as an integrated unit.

Our expertise and reputation in the market provides us with the credibility to manage market-wide issues and to implement and maintain a market agreed strategy. Our team regularly works alongside local lawyers, specialist loss adjusters, forensic accountants and investigation companies (utilising open source and human intelligence) on major market losses.

We have considerable experience of managing international coverage investigations and coordinating markets. We conduct litigation, arbitration and mediation where English law or jurisdiction applies, to resolve disputes and we also monitor and assist local counsel with international litigation and dispute resolution.



## Hong Kong

### What is the law on subrogation in Hong Kong?

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

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

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

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

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

The right of subrogation arises by operation of law in indemnity insurance contracts

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

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

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

There are a number of preliminary investigative steps that the insurer can take to establish whether it might be worthwhile pursuing a potentially culpable third party. These include searching the Companies Registry, where the third party is a corporate entity, or undertaking a bankruptcy search where the third party is an individual. These searches will highlight any insolvency issues which is the first step in determining whether the target has the means to satisfy a potential claim. If there is information indicating that the target owns any property, a title search can be conducted to verify the ownership. A civil litigation search may also reveal whether the target is subject to any court proceedings in Hong Kong.

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

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

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

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

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

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

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

Under Hong Kong law, limitation periods are imposed by statute, usually the Limitation Ordinance (Cap 347). There are different limitation periods for different types of claim. For example, the limitation period for a contract claim is six years from the date of the breach and for a negligence claim (excluding personal injuries) six years from when the damage occurred.

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

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

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

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

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

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

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

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

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## India

### What is the law on subrogation in India?

Indian law recognises the common law concept of subrogation both under statute and through case law. Subrogation is seen as a form of substitution of one person for another, whereby that person is allowed to stand in the shoes of another and assert its rights and remedies against a third party. An insurer, upon indemnifying an insured for a loss under an insurance cover, can pursue recoveries against any third party liable for causing the loss. In pursuing such recoveries, the insurer is entitled to exercise all rights available to the insured against any third party. Subrogation applies in cases where the insurance is a contract of indemnity. It does not arise in life and personal accident insurance cases.

As far as the statutory recognition is concerned, the right of subrogation is set out at Section 79 of the Marine Insurance Act 1963 (largely modelled on the English Marine Insurance Act 1906). Further, Section 140 of the Indian Contract Act 1872 deals with the principle of subrogation with reference to the rights of a surety under

a contract of indemnity. Section 92 of the Transfer of Property Act 1882 also confers a right of subrogation on a party to enforce, in his own name, the rights of a mortgagee to whom payment is made by that party.

As regards case law, one of the foremost cases dealing with subrogation is the Supreme Court's decision in *Economic Transport Organisation v Charan Spinning Mills (P) Ltd* (2010) 4 SCC 114. This case examined the principles of subrogation in India in detail and classified it under three broad categories:

- i. Subrogation by equitable assignment: This arises automatically when the insurer settles the claim of the insured for the loss. This type of subrogation is based on the principle of equity and does not require to be explicitly set out in an instrument or letter of subrogation between the parties. The recovery action is pursued in the insured's name. Pursuant to any recovery proceeding, the insured is entitled to first appropriate the recovery proceeds

towards the loss for which it has not been indemnified under the Policy, and the insurer is entitled to the balance amount thereafter

- ii. Subrogation by contract: As the name suggests, it occurs by way of a contractual arrangement such as a letter or deed of subrogation between the insured and insurer. Upon execution of such letter or deed, the insurer's right to recover is governed by the terms of the letter or deed. Any action to recover can be filed in the name of the insured, or jointly in the name of the insured and the insurer and
- iii. Subrogation-cum-assignment: In this case, the insured assigns the claim to the insurer who can sue the third party in its own name. The insured is not left with any right or interest in the recovery. Indian law prohibits a transfer or assignment of a mere right to sue and such assignment necessarily needs to be linked with the right of subrogation (which usually exists in the insurance context).

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

The right of subrogation arises once the insurer has indemnified the insured claim under the insurance policy. Ordinarily, a subrogation right cannot be waived. In some cases, however, the insurer and insured can contractually agree to waive subrogation entirely or in relation to specific parties.

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

The nature of the investigation to determine whether a potential subrogation target is worth pursuing depends largely on the form (for eg, a publicly listed entity; a private company; partnership firm; sole proprietorship) of the target. For companies, especially listed entities, the insurer will have more access to publicly available material such as the company accounts, annual reports, financial statements, existing charges, and status of ongoing litigations/investigations against the company, which can help

determine whether to pursue a recovery. Furthermore, searches for any insolvency proceedings against the target also assist in identifying not just whether pursuing a recovery is worthwhile, but also whether a different legal process would need to be followed for it.

The insurer can also assess the target's insurance position (which information in some instances is provided to the insured under a contract) to identify if the target has available insurance that may respond to the proposed claim.

Indian law, and in the main the Code of Civil Procedure 1908, has provisions to protect assets from dissipation before a judgment is enforced through which the insurer can seek interim relief such as injunction orders or, in fit cases, order of attachment of property before judgment, from a court. In the recovery is being pursued in the insured's name through an arbitration, then similar protective orders can be sought under the (Indian) Arbitration and Conciliation Act 1996.

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

The insured is required to cooperate in a subrogated action in India and is obligated not to prejudice the insurer's rights of recovery under the policy. Insurance policies or deeds/letters of subrogation typically set out the obligations of the insured in relation to subrogated recovery actions. The insured is also generally expected to take all necessary steps to protect the insurer's rights and may even be required, in some cases, to assist the insurer in pursuing the subrogation claim. Also, Regulation 19(3) of the Insurance Regulatory and Development Authority of India (Protection of Policyholders' Interests) Regulations 2017 mandates the policyholder to assist the insurer in any prosecution, proceedings or in the matter of recovery of claims by the insurer against third parties.

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

There is no separate prescribed period of limitation for subrogated actions in India. Since the insurer is entitled the exercise the rights of the insured, the limitation

period for a subrogated recovery will be the same as the limitation period for the underlying cause of action, which depends on the specific nature of the claim.

The period of limitation for legal proceedings before Indian courts is laid down in, and governed by, the Limitation Act 1963. The Schedule to the Act specifies the period of limitation and computation of the time from which such period begins to run. As general guidance, most cases would entail a 3-year limitation period from when a contract is breached or when the right to sue first accrues. Insurers must therefore bear in mind the trigger date for the original loss to the insured to judge when the limitation period for pursuing any recovery would expire.

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

Generally, the costs of a subrogated action are borne by the insurer if the claim is fully indemnified. In cases where the subrogated action involves the recovery of insured and uninsured claims, the costs are often apportioned between the insurer and the insured as per the terms of the subrogated deed/letter.

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

Under Indian law, upon obtaining a judgment or decree, the court has no obligation to automatically enforce it. The insurer/insured (judgment creditor) is required to file execution proceedings before the appropriate court/authority within the stipulated limitation period. Execution proceedings are governed by the Code of Civil Procedure 1908. The general rule laid down is that the decree may be executed either by the court which passed it or by any court to which such decree is sent for execution. There are various modes of execution of decrees available to insurers such as:

- i. delivery of any property which is specifically mentioned in the decree, which can be for movable and immovable property
- ii. attachment and sale of property, including land, houses/buildings, goods

- and money, bonds, debts, etc. as laid down in the Code of Civil Procedure
- iii. sale without attachment of property
- iv. arrest/detention of the judgment debtor, subject to the express provisions of law and
- v. appointment of a receiver for management and protection of the property, collection of rents and profits, execution of documents, and other duties specified by the court.

The execution is complete when the insurer/insured is satisfied as to the enforcement of the decree against the judgment-debtor, ie the insurer/insured receives the awarded amount of money or property, as the case may be.

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

Generally, the equitable nature of subrogation does not permit an insurer to exercise the right of subrogation against the insured or a co-insured. The rationale for this rule is that if the insurer accepts the insured may cause loss, then it ought not to consent to that risk in exchange for the premiums received for the obligation to compensate. Although insurance policies often do not contain an express waiver of subrogation towards co-insureds, it flows from the principle that the insurer "steps into the shoes" of the insured and can only exercise those rights which the insured could have, prior to subrogation.

There is however no definitive bar to making subrogated claims against co-insureds under Indian law and there is limited precedent on this point in India.

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## Indonesia

### What is the law on subrogation in Indonesia?

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

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

When the insured suffers a loss which is caused by a third party, it has two options to obtain compensation, either: (i) from the insurer; or (ii) from the third party who has caused the loss. If the insured has received compensation from the insurer in accordance with the insurance policy/ insurance agreement between the insurer and the insured, the insured cannot ask such third party to pay the compensation, since the insurer replaces the position of the insured in terms of the ability to claim against such third party. The right of

subrogation entitles the insurer, having paid the insured’s claim, to “step into the shoes” of the insured and assume the insured’s rights and remedies against such third party.

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

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

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

### What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing?

### What mechanisms exist to ensure that any assets are not dissipated before a judgment is enforced?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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## Japan

### What is the law on subrogation in Japan?

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

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

Article 25 states that an insurer, having paid a claim to the insured, shall by operation of law step into the shoes of the insured and may enforce a claim held by the insured against the third-party tortfeasor responsible for causing the loss, to an amount up to the lesser of:

- i. the payout made by the insurer or

- ii. the amount of the insured’s claim against the third-party (provided, however, that where the amount of the insurer’s payout is less than the amount of loss incurred by the insured, this amount shall be reduced by the amount of this shortfall).

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

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

**What investigations can be undertaken prior to issuing subrogated proceedings to determine whether a potential subrogation target is worth pursuing? What mechanisms exist to ensure that**

### any assets are not dissipated before a judgment is enforced?

In cases involving high value property or liability claims, insurance companies will typically engage a loss adjuster to:

- i. estimate the amount of loss
- ii. investigate causation, and level of culpability. The insurer will consider the loss adjuster’s reports, consult with its own legal counsel, and take appropriate measures to secure its subrogation right.

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

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

It depends on the nature of the insurance provided and the terms and conditions of the relevant insurance policies. In a case involving liability claims, for example, the insurer will generally require the insured

to provide the information necessary for it to determine the existence of liability of the insured. During this process, the insurer will naturally acquire ancillary information, which may enable it to exercise subrogation rights against third parties. The required cooperation from the insured will generally be limited to the provision of information.

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

A subrogated recovery action simply means the transfer of the right held by the insured to claim damages against the tortfeasor to the insurer, by operation of law. In Japan, the statute of limitations that is applicable to the original claim held by the insured against the third-party tortfeasor and will continue to apply in the same way to the insurer. As long as the insurer initiates a litigation process by the expiration of the relevant limitation period,

the claim will not be barred. No additional limitations will apply simply because the claim is one of subrogation by operation of law.

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

Insurers must initiate any subrogation action at their own cost.

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

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

insurers first identify the assets of the tortfeasor that they are wishing to enforce the judgment against.

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

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

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## Laos

### What is the law on subrogation in Laos?

Subrogation is a statutory right in Laos. The right is set out in a number of different pieces of legislation, including the Law on Insurance (2019), the Instructions of the Ministry on the Implementation of the Law on Insurance no.538/MOF (2014) (the Instructions) – the Civil Code (2018), and the Law on Civil Procedure (2012). The definition of the right can be broad and not always similar to the concept of subrogation as understood in other jurisdictions. For example, the Civil Code provides that if one debtor does not bring a claim against its debtor, the creditor of the first debtor can stand in its place and bring a claim against the second debtor (Article 369).

In the context of insurance, the right of subrogation is set out in the Law on Insurance, which was last amended in 2019. Under the current version of the law, the right of subrogation is set out in a general provision on the rights and obligations of insurers and policy holders. It briefly provides that insurers have a right “to

*request the payment from a third-party, which is the cause of the damage”* (Article 82, Section 6). There are no specified conditions for the exercise of such a right. By contrast, the prior version of the law (2011), had a specific provision on subrogation which provided that, in cases of damage caused by a third party, the insurer must first indemnify the insured before being subrogated to a claim against a third party that caused the loss (Article 61).

The Instructions were issued in 2014 to supplement the 2011 version of the law. Section 19 of the Instructions provide that if an insured suffers damage from an uninsured third party and the insured was indemnified by the insurer, the insurer had a right to *“take over the right of the insured and file a claim for reimbursement of money equal to the insurance indemnities paid from a third person who is the cause of the damage”*. The Instructions further provide that, such claims could not be brought if the third party was an ascendant, descendant,

spouse, employee, or person permanently living in the house of the insured, unless the damage was caused intentionally.

The differences between the 2011 and 2019 versions of the Law on Insurance leave some uncertainty as to the scope of the right of subrogation in the insurance context. Nevertheless, it is possible that the Ministry of Finance, the supervisory authority for insurance matters in Laos, would rely on the more detailed provisions in the Instructions, which remain in force.

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

The Law on Insurance does not currently specify the precise circumstances in which an insurer’s right to subrogation will arise. The Instructions, if applied, would suggest that the right to subrogation only arises where damage is caused to an insured by an uninsured third party and the insurer has indemnified the insurer in respect of said damage.

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

In relation to land, a land registry is maintained by the Ministry of Natural Resources and Environment and the relevant District Office for the area in which the land is located. The Law on Land (2019) provides that individuals or legal entities can access information in the national land information system at the relevant office in which the land is located (Article 91). Laos does not yet have a computerised registry available to third parties and requests must be made in person. On occasion, officers may refuse to provide information without the consent of the landowner.

In relation to moveable properties, there is no database other than for moveable assets subject to a pledge, which are supposed to be registered with the Department of Finance (i.e. the Registry Office of Security Interest in Moveable Property), as required under the Civil Code (Article 562). The search can be made via an online portal available to third parties.

The Law on Civil Procedure provides “guarantee measures”. Courts can order guarantee measures, such as an order that preserves an asset in relation to a dispute. Article 122 of the Law on Civil Procedure provides that it is possible to file a petition with the Lao People’s Court. To do so, however, it is a requirement that the exact type and quantity of the assets that are supposed to be subject to the guarantee measure is identified. Such measure would include the seizure of assets that are relevant to the dispute brought before the court, if there are any risks that such assets disappear, or any assets relevant to ensure the payment, say, of a debt.

**Is the insured required to cooperate in a subrogated action in Laos?**

Under Lao law there is no obligation on the insured to cooperate in a subrogated action. However, such an obligation may be provided in the insurance policy as a condition of indemnity. In addition, if an insurer requires the insured to give

testimony or to disclose some important documents in their possession, the insurer may request a court summons to serve upon the insured.

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

The Civil Code provides that the limitation period for bringing a civil action before the Lao People’s Court is three years from the date on which the claimant is “capable” of bringing the claim (Articles 52 and 57). This is understood to mean from the time the claimant becomes aware of the infringement, although the text of the legislation leaves room for interpretation.

**Who is responsible for costs in a subrogated action in Laos?**

Lao laws do not specify who is responsible for costs in a subrogated action. In practice, the person who initiates the subrogated action will likely be responsible for costs. Therefore, the insurer will be responsible for costs in a subrogated action, unless the insurer and the insured agreed otherwise in the policy or insurance contract. In the event of a litigation, it is possible to request the losing party to pay for costs. A costs award can be made against the losing party at the discretion of the judge.

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

The procedure for enforcing a judgment of the Lao People’s Court is prescribed in the Law on Civil Procedure and the Law on Court Decision Enforcement (2008).

Law on Civil Procedure provides that officers from the Judgment Enforcement Office are responsible for the enforcement judgment (Article 309). In order for a judgment to be fully enforceable, it must be certified by a Judgment Enforcement Officer in the Ministry of Justice. The Judgment Enforcement Office will then take the appropriate measures to ensure the implementation of the judgment, with the cooperation of the police, if necessary. The Judgment Enforcement Office can also issue orders to seize the assets of a person who has been found

liable in a judgment rendered by the Lao People’s Court.

Once a final judgment has been obtained, it must be sent to the Judgment Enforcement Office within 30 days from the date of the judgment, or from the date on which the litigants are informed of the judgment. Upon receipt of the judgment, the Judgment Enforcement Office will study the judgment, summon the litigants to notify them of the terms of the judgment, and encourage them to comply as soon as possible.

The Law on Court Decision Enforcement provides that if the parties comply with a judgment within 60 days, the enforcement of the judgment will be deemed complete, and the Judgment Enforcement Office will issue a certificate (Article 28). If, after 60 days, the parties have not fully complied with the terms of the judgment, the Judgment Enforcement Office may take further steps as necessary to secure enforcement, including investigating and listing the assets of the liable party for selling them off, or issuing fines.

With a court judgment in its favour, the insurer will be deemed a creditor of the defendant. The insurer may file for compulsory execution. The compulsory execution is implemented when the court judgment is finally rendered, in order to seize the property, and to apply the sales proceeds to satisfy the winning party’s claims.

**Are subrogated actions against co-insureds allowed under Lao law?**

There are no specific provisions under Lao law relating to subrogation against co-insureds. Therefore, the ability to do so will normally depend on the language in the insurance contract or specific policy provisions.

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# Malaysia

## What is the law on subrogation in Malaysia?

The principle of subrogation in Malaysia, refers to the transfer of rights from the insured to the insurer, to take action against a third party who had caused loss to the insured. Generally, a person has the right to claim compensation for the loss it suffered from the person who caused the damage. However, since the person has an insurance policy, it will usually claim from its own insurer and not from the person who caused the damage. After being paid by the insurer, the insured will transfer its right to the insurer to claim from the person who caused the damage. The insurer will then take this right and claim from the person who caused the damage to recover the amount paid by the insurer to the insured.

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

Subrogation arises due to the principle of indemnity, since a party who indemnifies another for a loss is entitled to step into the shoes of the indemnified party who had been indemnified and take over whatever

right it may have against the third party who was responsible for that loss. Malaysia takes the English law position that an insurer may only have the right to recover from the third party by way of subrogation if the insurer has already indemnified the insured first. Thus, the insurer may only proceed with a subrogated action if the rights are assigned to it by the insured.

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

A company search with the Companies Commission of Malaysia (otherwise known as Suruhanjaya Syarikat Malaysia ("SSM")) can be done to investigate the company's financial standing, such as its assets, liabilities and whether the company has been wound up. For an individual, a New Registration Identity Card ("NRIC") search and a bankruptcy search with the Malaysian Department of Insolvency ("Mdl") can be

carried out on the individual to help the insurer determine whether or not a potential subrogation target is worth pursuing.

The usual mechanism used in Malaysia to ensure that any assets are not dissipated before a judgment is enforced is to apply for a Mareva injunction in court to freeze the assets of the third party.

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

Yes, the insured is required to cooperate in a subrogated action in Malaysia. There is usually a common claims cooperation clause in the insurance policy between the insurer and the insured requiring the insured to cooperate with the insurer by providing all information and evidence relating to the insured's loss.

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

The limitation period for a subrogated action in Malaysia (the same as other actions of contract and tort in Malaysia) is six years

running from the time in which the cause of action arose, which is the date of the insured's loss.

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

The costs of a subrogated action will be borne by the insurer.

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

The insurer can first issue a letter of demand to be served to the third party, together with a copy of the judgment obtained, to ensure that the third party, complies and pays to the insurer the sum within the prescribed / demanded period. If the third party fails to comply with the letter of demand, the insurer can carry out a few methods / modes of enforcement / execution proceedings which are available to the insurer, for example:

- i. Winding-Up (against a third party company provided that the sum exceeds RM50,000.00)
- ii. Bankruptcy (against a third party individual provided that the sum is RM100,000.00 and above)
- iii. Writ of Seizure and Sale
- iv. Judgment Debtor Summons
- v. Garnishee Proceedings and
- vi. Order for Committal Proceedings.

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

If the insured's loss is caused by one of the co-insureds, the insurer usually has no rights in subrogation against that co-insured who caused the loss. The rule is that an insurer may not exercise subrogation rights against its own insured and this includes instances where the third party is insured under the policy as a co-insured. However, following the English law position, the rule against subrogation where there is co-insurance

does not apply if the co-insured has ceased to be covered by the insurance policy.

To illustrate, in a situation where there are two co-insureds, ie A & B in an insurance policy, if A had caused loss to B, the insurer shall not be allowed to take a subrogated action against A after indemnifying B for the loss. However, in the event that A ceases to be a co-insured under the insurance policy, the insurer can then proceed to take the subrogated action against A. This is because A is no longer covered by the insurance policy and the rule against subrogation where there is co-insurance does not apply anymore.

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## Myanmar

### What is the law on subrogation in Myanmar?

The principle of subrogation allows an insurer who has made indemnity payments to an insured person to “stand in the shoes” of the insured and exercise any right of recovery the insured may have against a third party that caused the loss. The laws of Myanmar, including the law relating to subrogation, have been heavily influenced by English law. As in many common law jurisdictions, the right of subrogation is derived from common law, contract law and equity. In certain contexts, it has also been given statutory expression.

The right of subrogation is recognised under the Contract Act 1872 (section 140) in respect of sureties under a contract of guarantee. Myanmar observes the Marine Insurance Act 1906 and the right of subrogation defined therein (section 79). Moreover, the Transfer of Property Act 1882 (section 92) provides a right of subrogation to sureties and other concerned parties in the context of mortgages. By contrast, although the Third-Party Liability Insurance Rules 2003 require mandatory third-party

liability insurance for all motor vehicle owners, no provision is made about subrogation.

The insurer’s right of subrogation, to the extent that it exists at common law or in statute, can be modified by the express terms of the insurance policy or a letter of subrogation.

Notwithstanding the above, the insurance market in Myanmar has gone through a series of changes since 2019, including the liberalization of the insurance sector and the opening up of the insurance market to foreign providers. There is little precedent on the right of subrogation under this changed system.

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

At common law, an insurer’s right to be subrogated only arises once they have indemnified the insured in full to the extent required by the policy. However, this may be varied or further restricted by the express terms of the contract of indemnity. Under

the Marine Insurance Act 1906 (Section 79), the insurer will be subrogated once they have paid for the total or partial loss, as the case may be. Under the Transfer of Property Act 1882 (Section 92), the surety will be subrogated upon their redemption of the mortgaged property.

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

In Myanmar there is no central database listing the assets of an individual or a legal entity, and public bodies or law enforcement officers will not assist insurers in an investigation of the assets of a target. Investigations may be carried out by engaging a lawyer or private investigator. Investigations must be conducted manually and would involve requesting any non-confidential records from public bodies, such as the Land Authority for records of land ownership, the Road Transport

Administration Department for any vehicles owned by an entity, or the Myanmar Investment Commission for information on the investors in a legal entity.

For companies registered in Myanmar, searches may also be made through the website of the Directorate of Investment and Company Administration (DICA) for any information on the winding up, liquidation or insolvency of a company.

If an insurer has instigated a civil claim against the target, they can apply to the court under Order 39 of the Code of Civil Procedure for a temporary injunction on the assets/property of the target if there is a risk that such assets will be transferred or dissipated.

#### **Is the insured required to cooperate in a subrogated action in Myanmar?**

There is no statutory requirement for an insured to cooperate with an insurer in any subrogated action. To the extent that such a duty exists, it will arise from the express terms of the contract between the insurer and the insured or at common law. Moreover, in a subrogated action brought by the insurer, a court order may be sought requiring the insured to testify or disclose information pertaining to the claim.

#### **What is the limitation period and when does the limitation period begin to run?**

Limitation periods are set by the Limitation Act 1909. A subrogated insurer can bring any claim against a third party that the insured could bring, and will be subject to the same limitation periods. The actual limitation period will vary depending on the type of claim. For a claim of breach of contract, the limitation period is six years from the date of the breach if the contract is in writing registered, or three years if the contract is not in writing registered (Paragraphs 115 and 116 of the First Schedule). For a claim brought by a surety against a principal debtor, the limitation period is three years from the date on which the surety pays the creditor (Paragraph 81). In case of tort claims, the limitation period is mainly based on the nature of claim and varies from one year to three years.

#### **Who is responsible for costs in a subrogated action in Myanmar?**

As a general rule, the insurer will be responsible for the costs in a subrogated action unless otherwise provided in the insurance contract. In civil litigation, the court will typically require the losing party to cover the costs of the winning party.

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

Under the Code of Civil Procedure 1909, once a court has issued a decree, the decree-holder must make an application to the court for the execution of the decree. The decree may be executed by the court by which it was issued or by the court to which the application for execution is made. According to Section 51 of the Code, execution of a decree may take the form of:

- delivery of property
- attachment and sale or sale without attachment of any property
- arrest and imprisonment
- appointment of a receiver or
- such other manner as required by the nature of the relief that was granted.

#### **Are subrogated actions against co-insureds allowed under Myanmar law?**

Whether an insurer has a right to bring a subrogated action against a co-insured will depend, first and foremost, on the express terms of the insurance policy. The position is less clear where no express provision is made. The law on subrogation is relatively underdeveloped in Myanmar and there are few precedents. However, contract law in Myanmar is derived from English law and, as such, it may be presumed that the right to bring a subrogated action against a co-insured would be limited where the co-insured have joint insurance in a common interest.

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## Nepal

### What is the law on subrogation in Nepal?

The law on subrogation in Nepal is governed by the Country Civil Code 2074 (2017 AD) (Civil Code), a unified code which came into effect on August 17, 2018 by repealing the predecessor Contract Act 2056 (2000 AD) (Contract Act). The Civil Code incorporated all provisions relating to subrogation into it that were prescribed in the predecessor Contract Act, except for minor changes.

Section 572 of the Civil Code, which incorporates the law relating to subrogation in the Nepali legal system, provides that, if an insured enters into a contract of insurance relating to their property, facilities or rights enjoyed by them or benefits resulting from the business, against loss or damage caused by a third party, the insurer must indemnify the loss irrespective of whosoever cause the loss or damage. In such circumstances, the insurer then has the right to pursue the third party who caused the loss or damage.

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

Sub-section 572(2) of the Civil Code provides that an insurer is obliged to pay to the insured a fixed sum or compensation for the loss or damage in the event the contract specifies the sum or compensation. Where the sum is not specified in the contract, a reasonable sum or compensation shall be paid to the insured and their heirs by the insurer. Sub-section 572(3) of the Civil Code provides that the right of subrogation of an insurer to recover the loss or damage shall arise upon the payment of the fixed sum or a reasonable amount in lieu of the fixed sum in the contract. The Sub-section does not provide any reference about partial payment, as such, it should be understood that the insurer's right to subrogate shall arise upon full payment by the insurer.

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

Prior to initiating subrogation proceedings, background investigations such as, company searches, asset searches, etc may be undertaken by lawyers to determine whether a potential subrogation target is worth pursuing. Basic information about registered companies is available publicly on the website of the Office of the Company Registrar. Financials of only listed companies are available publicly on the website of Nepal Stock Exchange (NEPSE). Financials of closely held companies (private limited companies) and public companies which are not listed at NEPSE are not available publicly and therefore would be difficult to obtain. With respect to asset searches such as land and buildings, vehicles etc, investigations must be carried out by way of manually

examining the records during a physical visit to the relevant government agencies. Records relating to land and buildings can be searched at the Land Revenue Office, which maintains records of land and building according to its geographical location. Records relating to vehicles are available for search at Transport Management Service Office.

In order to prevent the dissipation of assets prior to a judgment being awarded, an application can be made to the Court. The Court may then issue an order preventing the subrogation target from dissipating the assets as well as an attachment order to the relevant authorities to specific assets until the final judgment is given.

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

The law relating to subrogation does not specifically impose an obligation upon the insured to cooperate with the insurer in a subrogated action. Obligations of the insured will be governed by the insurance contract or the Deed of Release and Discharge. This will therefore depend upon whether the insurance contract or Deed of Release and Discharge provides for any obligation for the insured to cooperate in a subrogated action. In the absence of a contractual obligation under the insurance contract or Deed of Release and Discharge, the insured does not have an obligation to cooperate with the insurer in a subrogated action, either under the law or contract, unless the insurer identifies the insured as a witness in the proceedings and the court issues a subpoena requiring the insured to testify in the proceedings.

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

Section 574 of the Civil Code prescribes for the limitation period for subrogated claims, which is two years from the date when the cause of the action has arisen. The period of limitation begins to run once the insurer is liable to pay compensation to the insured under the contract of insurance. In most cases, it arises from the date of the accident or incident triggering the insurance claim.

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

It is the responsibility of the party initiating a subrogated action to bear all court costs (court fees) for such action. However, pursuant to Section 83 of the Country Civil Procedure Code 2074 (2017 AD) (Civil Procedure Code), if the subrogated action is successful, the court fees of such action may be recovered from the third party who caused the loss or damage provided that the insurer submits sufficient evidence and justification for the same.

Awarding court fees (government mandated fees paid by parties while lodging their plaint) to a winning party is at the discretion of the court and there is therefore no right to recovery of the same. On the other hand, subject to limited exceptions, legal (attorney) fees incurred by parties in disputes (including subrogated recovery actions) are generally not recoverable, except where this has been agreed in writing by the parties.

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

Under Section 205 of the Civil Procedure Code, once the court renders the final judgment and notifies the parties, the parties to the case, generally, shall have a time period of 30 days to file their appeals with a higher court. Further, under Section 223 of the Civil Procedure Code, the party who wishes to file the appeal may seek 15 days' additional time to file the appeal upon demonstration of circumstances beyond their control which has never been denied to our knowledge. Therefore, seeking an additional 15 days' to file the appeal has been established as the matter of right of the parties. If parties don't file an appeal within the specified time period, then the judgment becomes final and the successful party or parties can proceed further to enforce the judgment.

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

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

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



## New Zealand

### What is the law on subrogation in New Zealand?

The principle of subrogation allows one party to “stand in another’s shoes” to seek recovery for a loss caused by a third party. It can occur in other contractual situations, but arises most commonly in insurance law. The insurer does not acquire an independent cause of action against the third party but rather sues on the insured’s cause of action. The insurer is entitled to receive the benefit of the insured’s rights against the third party.

New Zealand has adopted the principles set down by the House of Lords, and more recently affirmed by the UK Supreme Court, in which subrogation creates implied obligations on the insured to:

- take proceedings against the wrongdoing third party to reduce their loss
- account to the insurer for the proceeds of any such action

- allow the insurer to use the insured’s name to proceed against the third party if the insured does not do so and
- act in good faith in proceeding against the third party.

In New Zealand, there is an inherent right of subrogation in all indemnity insurance policies. The policies also regularly include a contractual right of subrogation. In that situation, the scope of the right, including the duties of both the insurer and the insured, will be determined by the terms of the policy.

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

The right to subrogate arises once an insurer has indemnified the insured in accordance with the indemnity policy. An insured who has received only a partial indemnity is free to commence proceedings against the wrongdoing third party.

In practice, and particularly where limitation periods are an issue, the insurer and insured may cooperate in bringing proceedings prior to the insured being indemnified. If proceedings are commenced against the third party in circumstances where the insured has not been fully indemnified, and in the absence of anything in the policy to the contrary, the insured controls the proceedings. However, this is subject to a duty to act in good faith in the proceeding against the third party, including in the settlement of any claim. Any action by the insured in the conduct of the proceedings which is not in good faith, and which prejudices the insurer’s rights, will give the insurer a cause of action against the assured.

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

To confirm a third party is worth pursuing, searches can be conducted on the New Zealand Companies Office website to ensure a company is still registered, and has not been placed into liquidation, receivership, or administration. For an individual, the website of the New Zealand Insolvency and Trustee Service allows searches to check whether a person is bankrupt or the subject of a no asset procedure.

Registered property professionals can search Land Information New Zealand to find whether a third party owns any land in New Zealand. The Personal Properties Security Register contains a searchable register of security interests that are registered over items of personal property. While these resources are useful in providing information regarding the assets of a potential defendant, private enquiries can also be made through credit check agencies and licensed private investigators to acquire publicly and other available information.

If there is reason to believe that assets will be dissipated, freezing orders may be obtained against assets either in New Zealand or overseas. However, these orders are only available if there is a real risk of the dissipation of assets, rather than a mere suspicion or belief. If the

third party owns land, a pre-judgment charging order could be obtained to prevent the land being sold. Such orders are discretionary.

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

An insured is obliged to assist the insurer in a subrogated claim. This is implied as part of the duty of good faith, but is also usually expressly included as a term in a contract of insurance.

If an insured does not cooperate, they may be required by the court to do so, including by providing all relevant documents, allowing access to insured property for inspections, and being compelled to give evidence in court.

An insured who prejudices the insurer's claim against the third party because of a failure to cooperate may become liable to the insurer for damages.

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

An insurer has "stepped into the shoes" of an insured when bringing a subrogated claim, which means that the limitation period for the insured to bring a claim also applies to the insurer. In New Zealand the usual limitation period is six years from the date of the event, but some claims (such as those under the Fair Trading Act) have shorter limitation periods.

In limited circumstances, where the insured was not aware they had a claim, proceedings can be brought after the six-year limitation period. In those cases, claims can be brought within a further three years after the date the claimant knew or ought reasonably to have known certain facts giving rise to the claim. This is referred to as the "late knowledge period". However, in no circumstances can a claim be brought more than fifteen years from the date of the act or omission on which the claim is based (the "longstop period"), or ten years in cases involving building defect claims.

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

The question of whether the insurer or the insured is responsible for costs is usually dealt with in the contract of insurance. Ordinarily, the costs of a subrogated claim will be paid for by the insurer. The insurer will also indemnify the insured against any costs awarded made by the court.

If the claim against the third party includes elements of both insured and uninsured losses, the insurer and insured will generally enter into a costs-sharing agreement proportionate to their respective interests in the claim.

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

A judgment can immediately be enforced without requiring any additional steps.

The most common way of enforcing a money judgment against a company is to issue a statutory demand. If the company does not pay the amount demanded within 15 working days, the company is deemed to be unable to pay its debts as they fall due. The judgment creditor can then make an application to the High Court that the company be put into liquidation. A similar process in bankruptcy applies to individual debtors.

There are a number of alternative options for enforcing court judgments and orders. These differ slightly depending on whether enforcement is sought in the District Court (for claims of less than NZD\$350,000) or the High Court (for claims of NZD\$350,000 or more) and include:

**Attachment order** – An attachment order has the effect of directing that money owed under the judgment is to be paid from the salary or wages of the judgment debtor. Once the employer has been served with the attachment order, it must deduct from the judgment debtor's net earnings a specified sum that is to be paid directly to the judgment creditor.

**Charging order** – A charging order has the effect of preventing an owner of land or other types of property from selling that property until the payment owed under the judgment is paid.

**Sale order** – In the High Court a judgment creditor can apply for a sale order at any time after a money judgment has been sealed. A sale order authorises and commands the enforcing officer to seize all of the judgment debtor's chattels, except for their "necessary tools of trade" or "necessary household furniture and effects", including clothing.

**Seizure of property** – A person who has obtained a judgment for the recovery of certain chattels can request the court to issue a warrant that will direct a bailiff or constable to seize the chattels referred to in the warrant and deliver them to the person referred to in the warrant.

**Garnishee order** – A person (A) who owes money to a judgment debtor (B) can be directed to pay that money directly to the person who has obtained a judgment (C). Garnishee orders are made at the court's discretion.

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

If the co-insureds are jointly insured for common identical interests (such as co-ownership), then subrogation against one of the co-insureds is not available. This is the result of the common law principle that a person may not sue themselves.

If the co-insureds are insured under a composite policy, where each person is insured in respect of their own interests (such as landlord and tenant), then whether a subrogation action can be brought will depend on the contract between any co-insureds and the insurance policy. Subrogated claims are prevented in most cases of co-insurance.

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# Philippines

## What is the law on subrogation in The Philippines?

Insurers rights of subrogation arise under the Philippine Civil Code where insured property is destroyed or damaged through the fault or negligence of a third party. Upon payment of indemnity to the insured, the insurer is subrogated to the rights of the insured to recover from the third party, but only to the extent that the insurer has been obligated to indemnify the insured. In the event of an uninsured loss (ie the claim is over the policy limit) the insured may still recover those losses from the third party.

Insurers are entitled to the same rights and remedies as the insured against the third party, in respect of any loss covered by the policy. This also means the third party may advance the same defences that it has against the insured. However, where the insurer pays the insured for a loss which is not a risk covered by the policy, the insurer has no right of legal subrogation against the third party liable for the loss.

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

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

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

A background check on the defendant may be undertaken prior to commencing a court action. In the case of a corporate entity, this may also include an examination of the corporation's corporate records and audited financial statements filed

with the appropriate government agency, which are generally available to the public. The Philippines has strict bank secrecy laws which do not permit third parties to obtain information on the accounts and bank transactions of another party, except under specific circumstances prescribed by law. With respect to real property (real estate), there are property registries where title checks can be made.

At the commencement of any claim, or at any time before judgment, the plaintiff may apply for security for any judgment by way of attachment order to the defendant's property, including real property, stocks or shares, debts and credits or any personal property capable of manual delivery, as security for the satisfaction of any judgment that may be rendered in favour of the plaintiff. A temporary restraining order or writ of preliminary injunction may also be obtained for the purpose of prohibiting or alerting the commission to specific acts by the defendant which may lead to the dissipation of assets. In both instances, the

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

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

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

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

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

The insurer's subrogated action is subject to the same limitation periods that apply to the insured's claim and therefore depends upon the type of claim against the third party.

If the claim arises out of breach of written contract or operation of law, then the action must be brought within ten years. If the claim arises out of a breach of oral contract or a quasi-contract, the action must be commenced within six years. If however the defendant's liability arises from an injury to the rights of the insured or a quasi-delict, the action must be commenced within four years. In all cases, the prescriptive period begins to run from the day that the insured had the right to legally claim against the third party defendant, and is not counted from the day that the insurer was subrogated to the rights of the insured.

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

Unless otherwise provided in the insurance policy, an insurer who has been subrogated

to the rights of the insured is responsible for pursuing an action in its own name against the third party responsible for the damage to the insured property and shall bear the costs of instituting that action. Upon subrogation, the insured is deemed to have lost any right or personality to institute and pursue the action against the third person.

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

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

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

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

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

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

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## Singapore

### What is the law on subrogation in Singapore?

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

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

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

In order for the right of subrogation to arise, several factors must be satisfied: the policy must be a policy of indemnity; the insurer must have indemnified the insured; and the right of subrogation must

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

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

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

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

- litigation searches – to reveal the legal suits pending (and/or concluded) against a potential subrogation target
- winding up/bankruptcy searches – to reveal whether a potential subrogation target has been wound up and/or is bankrupt. Also sets out whether there are pending winding up/bankruptcy proceedings against a potential subrogation target
- company searches – to obtain information about companies registered in Singapore, including share

capital, annual returns and audited accounts. These can be obtained from the Accounting and Corporate Regulatory Authority of Singapore to ascertain perceived credit-worthiness

- land title searches – to verify the registered proprietor of a specified property.

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

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

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

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

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

The Limitation Act (Cap 163) prescribes a limitation period of six years from the date on which the cause of action accrued for actions in contract (ie six years from the date of the breach of contract) or in tort (ie six years from the date the loss is suffered). In respect of latent injuries and damages,

the limitation period may be three years from the date of knowledge of the loss if this period expires later than the six year period. The same limitation periods apply in a subrogated action because insurers have the same rights as the insured.

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

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

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

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

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

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

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

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## South Korea

### What is the law on subrogation in South Korea?

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

#### Article 681 (Subrogation by Insurer concerning Subject Matter Property)

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

#### Article 682 (Subrogation by Insurer against Third Parties)

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

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

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

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

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

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

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

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

On the other hand, for a subrogation target that is neither listed nor subject to external auditing, as information regarding its assets and financial status will not be available on the DART, the insurer usually therefore hires a private surveyor to check the financial status and assets of the subrogation target. However, such investigation may be limited to non-financial assets of the subrogation target such as real estate, autos and office lease, due to the statutory restrictions on release of banking information.

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

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

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

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

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

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

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

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

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

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

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

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



## Taiwan

### What is the law on subrogation in Taiwan?

The basic provision of subrogation in Taiwan is paragraph 1 of Article 53 of the Insurance Act which states:

*“If an insured has a right to claim indemnification from a third party due to occurrence of loss for which the insurer bears insurance liability, the insurer may, after paying indemnification, be subrogated to the insured’s right of claim against the third party. However, the amount of the subrogated claim may not exceed the amount of the indemnification.”*

If the third party referred to in Article 53 is a family member or employee of the insured, the insurer has no right of claim by subrogation. However, this rule is not applicable when the loss has resulted from the wilful misconduct of such third party.

Under Articles 103, 130, 135 and 135-4 of the Insurance Act, life, health, personal injury and annuity insurers may not be subrogated to a right of claim of the

proposer or the beneficiary against a third party, where such claim arises out of the occurrence of an insured peril.

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

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

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

Prior to issuing subrogated proceedings against a third party, it is advisable for insurers to conduct searches of public information in respect of that third party (eg, corporate registration information available on government websites).

For searches on detailed property information of a third party from the tax authorities, a writ of execution is required (eg, a final judgment or a court’s freezing order). Insurers may also consider retaining a private investigator to conduct preliminary searches on certain kinds of property.

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

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

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

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

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

ten years from the date when the tort was committed, whichever expires first.

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

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

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

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

The methods of enforcement will depend on the nature of the assets. Under the Compulsory Enforcement Act, there are

different procedures of enforcement on real property, personal property, ships, aircrafts, debts and other properties.

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

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

#### Taiwan

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# Thailand

## What is the law on subrogation in Thailand?

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

### General provisions on subrogation from the CCC provide as follows:

*“A person who is subrogated to the rights of a creditor is entitled to exercise in his own name all the rights which the creditor had in respect of the obligation including any security for itself.”*  
(Section 226 of the CCC).

*“When a creditor has received as compensation for damage the full value of the thing or right which is the subject of the obligation, the debtor is, by operation of law, subrogated into the position of the creditor with regard to such thing or right.”*  
(Section 227 of the CCC).

### The CCC provision on subrogation in an insurance contract provides as follows:

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

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

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

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

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

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

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

Whether an insured's cooperation in a subrogated action is required depends on the conditions specified in the insurance contract/policy. Under Thai law the insured does not have a duty to assist.

In general, standard insurance policies in Thailand usually require the insured to provide assistance as necessary or as required by the insurer, in order for the insurer to claim for compensation from a third party.

If an insurer requires the insured to give testimony or to disclose some important documents that are with the insured, they may ask for a court summons and/or subpoena and serve these upon the insured.

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

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

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

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

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

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

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

In Thailand, seizing land and buildings is usually the most effective method. Because Thai law requires the legal execution officer to actually seize the assets, seizing movable property such as cars or trucks is extremely difficult. Seizing bank accounts can also be effective if the insurer knows details of the defendant's bank account or at least the branch of the bank and the name of the bank where the funds are deposited.

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

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

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

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

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## Vietnam

### What is the law on subrogation in Vietnam?

The regulations on subrogation applicable to insurance contracts are stipulated in: (i) the Law on Insurance Business No. 24/2000/QH10 issued on 09 December 2000 amended and supplemented in 2008 and 2019 (the “**Insurance Business Law**”) for general insurance contracts; and (ii) the Vietnam Maritime Code No. 95/2015/QH13 issued on 25 November 2015 (the “**Maritime Code**”) for maritime insurance contracts. In addition, general principles regarding the transfer of rights which are provided in the Civil Code No. 91/2015/QH13 issued on 24 November 2015 (the “**2015 Civil Code**”) can also be applicable to insurance contracts.

Pursuant to the Insurance Business Law (Articles 171(e) and 49) and the Maritime Code (Articles 247, 248, 326 and 327), the insurer is entitled to request reimbursement from a third party of the indemnity amount paid or compensated to the insured, if that third party caused damage to the insured.

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

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

Pursuant to Articles 171(e) and 49 of the Insurance Business Law, an insurer’s right to subrogate arises when the insurer has paid the indemnity to the insured under the insurance policy. The insurer cannot seek to recover any funds by way of subrogation unless it has satisfied the indemnity to the insured. This means that the insurer shall have to pay the insurance indemnity to the insured in order to exercise the right to subrogate against the third party.

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

To investigate a potential third party for a subrogated recovery action, insurers can instruct a professional service provider to ascertain its company status and financial capacity.

Under the Vietnamese legal system, there is no separate mechanism by which to prevent the third party from dissipating assets ahead of any judgment award. Often, the insurer will therefore need to bring a claim and (either at the same time as the statement of claim or just afterwards) an application for a specific measure, such as a freezing injunction/order, against the third party’s assets or bank account to ensure the third party can satisfy any judgment awarded. In order for such an application to succeed, it must comply with specific requirements as to form and content, as well as satisfying the burden

of proof that such an order is necessary. The Court may also require a payment or counter-security is provided.

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

The Insurance Business law does not specifically require the Insured to cooperate in a subrogated action. The Insured is obliged by law to notify the insurer of any occurrence of an 'insured event' and carry out any appropriate measures to mitigate the loss. However, in practice, the insurance policy itself will set out the cooperation obligations of the insured.

In contrast, the Maritime Code (Articles 327.1 and 327.2) expressly provides that, if the insured fails to cooperate or commits a breach resulting in the failure of the insurer to exert the insurer's rights of subrogation, the insurer is exempt from paying the full indemnity to the insured or is entitled to a reasonable reduction.

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

Vietnamese law does not provide for specific limitation periods for subrogated actions. Instead, the limitation period for a subrogated action is the same as that for the insured's claim against the responsible third party (if the insured's claim against the third party is time-barred, the insurer's claim on the basis of the subrogation would also be time-barred). The actual time bar depends on the nature of the claims of the insured against the third party. For example:

- i. if the claim against the responsible third party in tort claim, generally the limitation period could be three years from the date at which the insured became aware or must be aware of the fact that its legal rights and interests were violated
- ii. if the claim against the responsible third party is based on a commercial contract, the limitation period could be two years from the time of infringement of lawful rights and interests under Article 319 of the Commercial Law No. 36-2005-QH11 and

- iii. if the claim arises out of a civil contract, the time bar could be three years from the date upon which the insured became aware or must be aware of the fact that its legal rights and interests were violated.

It should be noted that Vietnamese law provides for many different applicable limitation periods for disputes arising out of different types of relationships (for example some special time limitations are set out for logistics activities or maritime activities).

Accordingly, the limitation period for a subrogated action should be assessed on a case-by-case basis with due consideration of the nature of the claims of the insured against the third party.

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

Under Vietnamese Law there is no specific provision dealing with the costs of a subrogated action. The costs arising from a subrogated recovery action are usually borne by the insurer (eg legal fees, disbursements and other litigation costs). These costs may be recovered from a third party if the dispute is settled by arbitration, as the arbitration tribunal has the power to allocate the costs of the parties in the award. However, if the case is heard in the Vietnamese Courts, the costs are not considered recoverable and therefore the insurer has to bear them.

In addition, under Article 46.3 of the Insurance Business Law, the insured is entitled to request the insurer to reimburse any costs incurred by the insured due to complying with the insurer's instructions. As such, this could be a ground for the insured to make a request for cost reimbursement in circumstances where the insured is instructed by the insurer to take any action to support subrogated action.

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

If the responsible party refuses to comply with the judgment, the insurer (the judgment creditor) may submit a request for enforcement to the State agency for enforcement of civil judgment to seek for the coercive enforcement of the judgment.

It is noted that if the judgment is ruled by a foreign court/arbitral tribunal, the judgment must firstly be recognized by the Vietnamese court under the applicable procedure for recognition of foreign judgments/arbitral awards before being enforced. Only recognised judgments/awards shall be executed by the enforcement authorities.

If the judgment is not voluntarily executed, depending on the assets of the judgment debtor, enforcement authorities shall have the right to:

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

In practice, the judgment creditor is expected to actively investigate the debtor's assets and provide that information to the enforcement agency for execution.

### Are subrogated actions against co-insured allowed under Vietnamese law?

Vietnamese law does not have any specific provisions relating to subrogated claims between co-insureds so this should be considered on case-by-case basis.

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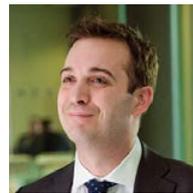
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