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The insurer's primary obligation to pay valid claims in a timely manner

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***J.B.L. 37 Abstract**

This article considers the English and Chinese laws relating to the insurer's primary obligation and the consequences for non-performance of the obligation. English law characterises an insurer's primary obligation as a duty to "hold the insured harmless" against the insured event and there is no damage for late payment of insurance claims. Chinese law requires the insurer to pay valid claims in a timely manner and also sets out time-limits for an insurer to assess and pay claims. The strengths in setting out such time-limits and the difficulties without such time-limits are discussed. This article also considers how Chinese courts interpret and apply these time-limits. Finally, suggestions are made on further improvement of Chinese law and of the Law Commissions' recommendation that insurers should have an obligation to pay valid claims "within a reasonable time".

Introduction

The insurance contract is a contract whereby the insured pays premium to the insurer in return for the insurer's promise that he will pay the insured when the event insured against occurs.¹ Thus the insured would reasonably expect that his claim for insurance payment should be handled and paid by the insurer promptly and fairly. However, in practice, it happens that an insured can suffer consequential loss as a result of the insurer's unreasonable delay or wrongful repudiation of a claim. So the question whether the insured should be entitled to damages or compensations where the insurer has refused to pay a valid insurance claim, or has paid only after a considerable delay which gives rise to further loss, is fundamentally important in terms of protection of the insureds, as the insureds can often become financially vulnerable after the insured event occurs if they are not paid promptly or their claim is wrongly rejected.

Different jurisdictions adopt different approaches to this question. In the current English

law, an insurer's primary obligation is to "hold the insured harmless" against the insured event.² In other words, the insurer is said to promise that the loss will not occur. The surprising effect is that the insurer is in breach of contract **J.B.L. 38* as soon as the insured suffers a loss against which it is insured. Thus an insurance payment is characterised as a payment of damages for breach of contract, rather than a contractual debt. English law does not recognise an obligation to pay damages for late or non-payment of damages.³ Consequently, an insured who has not been paid a valid claim is entitled to sue the insurer for the money owed, plus interest, but not entitled to damages for any further loss suffered owing to the delay in receiving the money.⁴ The law has been widely criticised.⁵

The Law Commission and the Scottish Law Commission have in recent years been engaged in a project to reform the law of insurance contracts, and published a series of papers in respect of damages for late payment of insurance claims, including *Issues Paper 6: "Damages for Late Payment and the Insurer's Duty of Good Faith" in March 2010*⁶; the *"Summary of Responses to Issues Paper 6" in November 2010*⁷; the *Consultation Paper: "Post Contract Duties and Other Issues" in December 2011*⁸; and the update of the Law Commissions' proposals for the reform of the law in 2013⁹; the Insurance Contracts Law Draft Bill in June 2014¹⁰; and the report to the Government in July 2014.¹¹ The Law Commissions expressed the view that the English approach to the nature of the insurer's obligation and the effect of late payment is lack of principle,¹² unfair and unexpected,¹³ an increasingly anomalous legal position,¹⁴ appears to reward inefficiency and dishonesty and can lead to injustice.¹⁵ The law is definitely in need of reform.¹⁶ The Law Commissions released draft clauses of the Insurance Contracts Bill for consultation in January and March 2014. The Insurance Contracts Law Draft Bill was published for further **J.B.L. 39* consultation on June 17, 2014. The recommendations relating to late payment were included in cl.14 of the draft Bill in June 2014,¹⁷ but excluded from the draft Bill in July 2014 which was presented to the Government on July 15, 2014. The majority of the Law Commissions' recommendations were accepted by the Government. The Insurance Bill was introduced to the Parliament by the Government on July 17, 2014.¹⁸ The reason for excluding the clause relating to late payment is that the clause was not considered sufficiently uncontroversial.¹⁹ The Law Commissions will continue to work with stakeholders to increase the consensus around this measure and to redraft the clause on late payment, with the view to introducing a statutory right to damages for late payment at the next legislative opportunity.²⁰

The Law Commissions' main recommendation for reform of the law in respect of late payment is that a term should be implied in every insurance contract that the insurer will pay valid claims within a reasonable time.²¹ An insured who suffers loss as a result of breach of that term will be able to recover damages from the insurer.²² A particular matter of concern for this recommendation is that the concept of "reasonable time" for payment of a claim is too uncertain without further definition,²³ and will introduce uncertainty and scope for litigation.²⁴

In contrast to the English position that the insurer's primary obligation is to pay damage for breach his obligation to prevent loss from occurring,²⁵ Chinese law characterises the insurer's primary obligation as a duty to pay valid claims in a timely manner, and also sets out time-limits for the insurer to meet in order to fulfil the requirement of paying claims "in a timely manner". The relevant rules are **J.B.L. 40* provided in arts 22, 23, 24 and 25 of

the Insurance Law 2009, which were first formulated in the Insurance Law 1995²⁶ and amended in 2002²⁷ and 2009.²⁸

The Insurance Law 2009 requires the insurer to notify the insured, in one comprehensive list, of all the documents and evidence he needs to assess a claim.²⁹ The time-limit for the insurer to make a decision on a complex claim is 30 days after receiving the insured's claim, and the time-limit for making payment to a valid claim is 10 days after reaching an agreement with the insured as to the amount of payment.³⁰ If the claim is not covered, the insurer must send the insured a notice specifying reasons for rejection within three days after the decision is made.³¹ If the settlement amount cannot be determined within 60 days of receiving the claim documents, the insurer is obliged to make a preliminary payment on account of the sums that can be agreed.³² Where the insurer is in breach of these statutory duties, he is liable to compensate the insured for losses incurred therefrom, in addition to paying the insurance proceeds.³³

The 1995 and 2002 versions of the Insurance Law required the insurer to examine claims in a timely manner but did not set out time-limits for the insurer to meet. This caused difficulties in practice.³⁴ Delay in making payment can only occur when the time-limit for performance has passed. If no time-limits are clearly set out, it will be difficult to judge whether or not the insurer has acted "in a timely manner" in dealing with claims. Chinese experience in setting out time-limits for the examination of claims and payment of insurance proceeds provides a test case in handling claims "in a timely manner" and might be of interest to English law reform in this area.

This article considers briefly the English law and the Law Commissions' recommendations for reform of the law in respect of the nature of the insurer's obligation and the remedies available to the insured. It then examines Chinese law relating to the insured's obligations to pay valid claims in a timely manner and remedies for consequential loss by reason of the insurer's breach of the duties, discusses the strengths in setting out time-limits for an insurer to assess and pay claims in the Insurance Law 2009 and the difficulties without setting such time-limits in the 2002 version of the Insurance Law, and at the same time considers how Chinese courts interpret and apply these time-limits. Finally, suggestions are made on further improvement of Chinese law and of the Law Commissions' recommendation that insurers should have a contractual obligation to pay valid claims "within a reasonable time". **J.B.L. 41*

The nature of the insurer's obligation in insurance contracts under English law

It has been generally accepted in most jurisdictions that an insurer's primary obligation is to pay valid claims in a timely manner. [Section 1 of the Marine Insurance Act 1906](#) (MIA) stipulates:

"A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

According to [MIA](#), the insurer's obligation is to indemnify the insured against marine losses, but not to prevent marine peril from occurring. However, English common law takes a

different view; in [The Fanti](#),³⁵ Lord Goff said that

"a promise of indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred; however, once the loss is suffered or the expenses incurred, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss or expense."

From the "hold harmless" point of view, the insurer's primary obligation is to pay damage for breach of his obligation to prevent loss from occurring, but not to pay valid claims. As a result, a claim for damages caused by the insurer's unreasonable rejection of a valid claim for insurance payment is irrecoverable, because there is no such thing as a cause of action in damages for late payment of damages.³⁶ The "hold harmless" view is surprising. As the judge put it in [Transthene Packing Co Ltd v Royal Insurance \(UK\) Ltd](#),³⁷ property insurers may be surprised to discover that on this argument they are, collectively, in breach of contract hundreds or thousands of times every day, whenever a fire, a flood, a road accident or other such event occurs.³⁸ The legal fiction that an insurer's primary obligation is to "hold the insured harmless" makes an indemnity insurance contract an exception to the usual rules of contract law under which where one party breaches a contract the injured party can claim damages for loss suffered, provided that the claimant proves that actual, financial loss incurred; establishes the loss was foreseeable at the time of the contract; and shows that reasonable steps had been taken to mitigate that loss.³⁹ It is noteworthy that the "hold harmless" analysis has not been applied to life insurance⁴⁰ or to policies for reinstatement.⁴¹

In [The Italia Express \(No.2\)](#),⁴² a claim for damages for consequential losses on a marine insurance policy raised issues about the nature of the insurer's primary **J.B.L.* ⁴² obligation under the policy. As to the question whether the insurer was immediately in breach of contract when an insured loss occurred, or whether the breach occurred at some subsequent point, after the insured had made a valid claim under the insurance policy that was not paid when it should have been, the insured argued that the latter characterisation was the correct one. By contrast, the insurer argued that the insurer's obligation was to prevent the insured loss from occurring in the first place. The remedy for this breach was to pay the liquidated damages agreed under the policy. The insurer had done this, and no further damages were payable. Hirst J rejected the insured's argument, holding that the insurer was immediately in breach of contract as soon as the insured loss occurred, and not in failing to pay a claim after it had been submitted, and that the "hold harmless" doctrine applied to both liability and property insurance.

That the same principle also applies to non-marine insurance has been confirmed in [Sprung v Royal Insurance \(UK\) Ltd](#)⁴³: there Mr Sprung suffered damage to his factory, the insurer failed to pay his claim for four years, by which time he had been forced out of business. As a result of the insurer's delayed payment, he had suffered further losses of £75,000. The Court of Appeal found, with "undisguised reluctance", that there could be no award of damages for late payment of a valid insurance claim. The anomalous reasoning in [Sprung](#) arises because of the historic rule that an insurer's primary obligation is to "hold the insured harmless". An insurance contract is treated as analogous to a contract with a security firm, in which the security firm undertakes to prevent a break-in. Thus, an insurer's breach of contract occurs when the harm occurs, and the insurance payment is

characterised as damages for that breach.⁴⁴ English law does not recognise a claim for damages on damages. Therefore, if payment is delayed, an insured who suffers loss has no remedy other than a claim for interest.

The conclusions in *The Italia Express* and *Sprung* rest on an incorrect premise and are therefore flawed. The insurer does not promise to prevent the insured event from occurring, nor promise that it will not occur, ⁴⁵ but promises that if it occurs, the insurer will indemnify the insured for the loss it causes. Consequently, the insurer's payment of the sum insured following the occurrence of the event is not by way of damages for breach of contract, but by way of fulfilment of the insurer's primary obligation to indemnify. Non-fulfilment of that primary obligation that results in loss to the insured should lead to the payment of damages as a secondary obligation.⁴⁶ An insured's claim for damages for consequential losses arising from non-payment is not a claim for damages upon damages, but a claim for damages based upon a broken promise to indemnify.

In addition to the principles of "hold harmless" and "no damages on damages", another English common law rule is that the insurer has no duty to handle claims promptly.⁴⁷ An insurance contract normally does not fix a specific time for payment **J.B.L. 43* of a claim, and in consequence non-payment at any point in time cannot by itself be a breach of contract. Moreover, a term could not be implied that an insurer would "with reasonable diligence and due expedition" conduct negotiation after the occurrence of an insured event, assess the amount due or pay sums due, since such a term was not necessary for business efficacy.⁴⁸

Under the current law, the insured has no remedy for late payment of valid claims other than a claim for interest.⁴⁹ There are three other possible routes to redress, but none of them is a sufficient alternative to legislation reform:

1. An insurer may breach his duty of good faith if he denies a claim he knows to be valid.⁵⁰ The only remedy is the right to avoid the policy. This is a wholly one-sided remedy in favour of the insurer and of little use to the insured who wishes a claim to be paid, not to avoid the contract.⁵¹
2. If an insurer fails to deal with claims "promptly and fairly", he is in breach of Financial Conduct Authority (FCA) rules.⁵² The insured may be entitled to damages for breach of statutory duty under [s.138D of the Financial Services and Markets Act 2000](#) (FSMA).⁵³ However, this right is only available to individuals and those groups who are not carrying on business of any kind.⁵⁴ The Law Commissions think that [s.138D of FSMA](#) has limited potential to provide redress to claimants in the present context and believe that the need for statutory reform to reverse *Sprung* is not diminished by the availability of [s.138D of FSMA](#).⁵⁵
3. Consumers and some small businesses have the right to complain to the Financial Ombudsman Service (FOS) that often awards damages for loss caused by delayed payment and poor claim handling.⁵⁶ Importantly the FOS decided disputes on the basis "what FOS believes is fair and reasonable in the

circumstances of each individual case".⁵⁷ Although the FOS mitigates the injustice of the law for **J.B.L. 44* consumers and some small businesses,⁵⁸ it can neither help small and medium-sized businesses which have more than 10 employees and an annual turnover of more than €2 million, ⁵⁹ nor provide damages of over £150,000.⁶⁰

The Scots law approach to damages for late payment of insurance claims has followed ordinary contract principles. An insurer's primary obligation is to pay a valid claim following a reasonable time for investigation. Thus, an insurer who unjustifiably delays payment or wrongfully repudiates a claim is considered to be in breach of contract which opens the possibility that the insurer may be liable for losses which the insured has suffered and which fall within one or other branch of the rule in *Hadley v Baxendale*.⁶¹ In the Scottish experience, the test for foreseeable loss has been interpreted restrictively. ⁶² The Scots law approach is more logical than the English legal fiction of the "hold harmless" principle.

The Law Commissions criticised the English law as unprincipled and unfair. The law appears to reward inefficiency and dishonesty, and can lead to injustice.⁶³ The Law Commissions were persuaded that there was a compelling case for reform,⁶⁴ and have formulated recommendations for the reform of the law in order to allow the insured to recover damages for the late payment of insurance claims.⁶⁵ The recommendations include:

1. It should be an implied term of an insurance contract that insurers will pay valid claims within a reasonable time.⁶⁶ An insured who suffers loss as a result of breach of that term will be able to recover damages from the insurer.⁶⁷
2. A "reasonable time" will always include time to investigate and assess the claim. "Reasonable time" will be assessed by reference to all relevant circumstances, including the type of insurance, the size and complexity of the claim, compliance with any relevant **J.B.L. 45* statutory or regulatory rules or guidance, and factors outside the insurer's control.⁶⁸
3. Insurers should have a defence to a claim for late payment (to a claim for damages, not for the substantive insurance claim) where they incorrectly refuse to pay a claim but can show that they acted reasonably in doing so.⁶⁹
4. The late payment provisions should be mandatory in consumer insurance contracts. This means that an insurer may not exclude the application of the implied term about payment, or exclude or limit its liability for breach of that term. In non-consumer insurance contracts, an insurer should be able to disapply the implied term about payment, or exclude or limit its liability for breach of that term. However, such exclusion or limitation terms should be of no effect where the insurer's breach was deliberate or reckless.⁷⁰

5. The limitation period for late payment claims should run from the point at which the obligation to pay within a reasonable time is breached.[71](#) But no change to the existing limitation and prescriptive periods is recommended.[72](#)

6. The "hold harmless" principle need not be repealed.[73](#)

The difficulty with recommendation (6) that the "hold harmless" principle need not be repealed is that this would cause inconsistency with recommendation (1). Under the "hold harmless" principle, an insurer is immediately in breach of contract when an insured loss occurs; the remedy for this breach is to pay "damages". Recommendation (1) requires an insurer to pay valid claims within a reasonable time. If the payment of valid claims is still regarded as the payment of "damages", a new rule would be introduced to English law, that is, "damages" are required to be paid "within a reasonable time". This would also infringe the current rule of no damages for late payment of damages, and might affect other areas of law in relation to payment of damages.

It has been accepted that the "hold harmless" principle is a fiction, which could be removed without affecting other areas of insurance law. The authority for the proposition that an insurer has a duty to prevent a loss is *The Fanti*.[74](#) The decision in this case would be more easily explained by saying that the insurer was not required to prevent the loss to occur but only to make a payment in the **J.B.L. 46* circumstances specified in the contract. Alternatively, it is suggested that the "hold harmless" principle should be repealed.

The major difficulty with recommendations (1), (2) and (5) is that there is no clear definition of a "reasonable time". The periods of time are not specified within which insurers are obliged to perform the duties to investigate, assess and pay claims in order to satisfy the requirement to act "within a reasonable time". If no time-limits are clearly set out, it will be difficult to judge whether or not an insurer has acted "within a reasonable time". In other words, it will be difficult to determine the time points at which the duties to be performed "within a reasonable time" are breached. No clear definition of a "reasonable time" would undoubtedly give rise to uncertainty and scope for litigation.[75](#)

Having seen the major difficulty with the Law Commissions' recommendations, without a clear definition of a "reasonable time", it is now appropriate to consider the question: what time periods would be appropriate for an insurer to perform his duties in assessing and paying claims.

In cl.46.7 of the International Hull Clause 2003, a 28-day period for making a decision on a claim is specified, which provide:

"The leading Underwriter(s) shall make a decision in respect of any claim within 28 days of receipt by them of the appointed average adjuster's final adjustment or, if no adjuster is appointed, a fully documented claim presentation sufficient to enable the Underwriters to determine their liability in relation to coverage and quantum." [76](#)

This is much logical than the ambiguous term "within a reasonable time". It is submitted that if it takes 28 days to make a decision for a hull insurance claim, it would be shorter to

make a decision for a simple case. It is suggested that a 28-day period for making a decision on a claim is appropriate and could be adopted in the Law Commissions' recommendations.

Time-limits within which the insurer is required to perform his duties in assessing and paying claims are clearly set out in the Principles of European Insurance Contract Law (PEICL), which require an insurer to take all reasonable steps to settle a claim promptly⁷⁷; and the claim is deemed to have been accepted unless the insurer responds in writing either to reject the claim or to defer acceptance with reasons within one month after receipt of the relevant documents and other information.⁷⁸ Where the claim or part of the claim is accepted, the insurer must pay up without undue delay and not later than one week after acceptance and quantification.⁷⁹ PEICL recognises damages for late performance of the duties. If insurance money is not paid within one week after acceptance and quantification, the claimant is entitled to interest on that sum from the time when payment was **J.B.L. 47* due to the time of payment, and also entitled to recover damages for any additional losses caused by the late payment.⁸⁰

Under German law, the time-limit for an insurer to explain its decision on liability and any settlement proposals is one month after receiving the information necessary to make such a decision. The time-limit for payment of the claim is two weeks after the claim is acknowledged and an agreement is reached.⁸¹

The Chinese Insurance Law 2009 sets time-limits for an insurer to perform his duties of assessing and paying claims. In the following part, Chinese law in relation to an insurer's obligation to pay claims in a timely manner will be examined, and the strengths in setting out time-limits and the difficulties without such time-limits discussed.

The insurer's obligation to pay valid claims in a timely manner in Chinese law

Chinese law characterises the insurer's primary obligation as a duty to pay valid claims in a timely manner. Article 2 of the Insurance Law 2009 provides:

"For the purposes of this law, the term 'insurance' shall refer to a commercial insurance act whereby a proposer pays a premium to an insurer in accordance with a contract while the insurer assumes liability for payment of insurance monies for property losses as a result of the occurrence of an event specified in the contract, or when the insured dies, becomes injured or disabled, falls ill or reaches the age or time limit as specified in the contract." ⁸²

It is clear that an insurer's primary obligation is to pay the insured for his loss suffered, namely, to pay the insurance money where the insured event occurs and causes losses to the insured.

The Insurance Law 2009 requires an insurer not only to pay valid claims but also to perform this obligation in a timely manner, and sets out time-limits for assessing a claim,⁸³ for rejecting the claim,⁸⁴ for paying the claim,⁸⁵ and for making preliminary payment.⁸⁶ It is appropriate here to consider these time-limits in detail.

A 30-day period for making a decision on a claim

Paragraph 1 of art.23 of the Insurance Law 2009 provides:

"The insurer shall, after receipt of a claim for indemnity or insurance benefits from the insured or the beneficiary, determine the matter in a timely manner; if the claim is complicated, the insurer shall make a determination within 30 days, unless otherwise agreed on in the contract. The insurer shall inform the insured or the beneficiary of the result of the determination; where the claim is covered, the insurer shall fulfil its obligations to pay indemnity or insurance **J.B.L. 48* benefits within 10 days after reaching an agreement on the amount of indemnity payment or insurance benefits with the insured or the beneficiary. Where there are provisions in the insurance contract as to the period within which indemnity or the payment of the insurance benefits should be effected, the insurer shall fulfil its obligation accordingly."

The insurer is obliged to deal with claims in a timely manner, but it may sometimes be difficult to determine how long the insurer may take to handle a claim in order to satisfy the requirement of handling claims "in a timely manner", for dealing with a more complicated claim usually takes longer than a simple one. The 2002 versions of the Insurance Law required the insurer to handle claims in a timely manner, but did not set out a time-limit for making a decision on a claim.⁸⁷ This caused difficulties in practice.⁸⁸ Where there was no time-limit, it would be difficult to judge whether or not the claim was handled "in a timely manner". Different courts interpreted the term "in a timely manner" differently, giving rise to uncertainty and inconsistency. So in the 2009 version of the Insurance Law, a 30-day time-limit for making a decision on a complex claim has been added in art.23. If the claim is complex, the insurer is required to make a decision within 30 days of receiving the claim. By implication, the insurer must make a decision in less than 30 days for simple claims. If a clause in an insurance contract extends the 30-day time-limit, it is very unlikely that the courts would enforce such a clause, because a contract clause which exempts the insurer's obligations that the insurer should have borne according to law shall be invalid by virtue of art.19 of the Insurance Law 2009.⁸⁹

A question which is unclear is what cases can be regarded as complex ones. It is suggested that to determine whether a case is a complex one, the insurer should take into account several factors, such as the type of insurance, the amount claimed, the need for more information and further investigation, the need for reporting the claim to the head office of the insurance company⁹⁰ and so on. In practice, insurance contracts usually contain a clause stipulating the time period for handling claims. Most of such clauses are simple restatements of art.23 of the Insurance Law.⁹¹ But some contracts contain clauses which specify the time-limits for handling claims. For instance, in the accident insurance policy of Samsung Air China Life Insurance Co Ltd,⁹² cl.13 states: "we shall, after receipt of a claim and the relevant evidence and documents, determine the matter within 5 days; where the claim is complex, we shall make a determination within 30 days" **J.B.L. 49*

In *Cheng Yang Transport Co v Pingan Insurance Co*,⁹³ a clause in the contract states:

"Upon receiving notice of an accident, the insurer shall determine the loss in one working day where the loss is less than ¥5000, or no more than 3 working days for cases where it is difficult to determine the loss. If the insurer does not come to the spot of accident to investigate the loss and fails to make a determination as to the loss within 48 hours after

receiving the notice of accident, the evidence provided by the insured, such as photographs of the damaged vehicle, a list of damaged property, and receipt of repair cost should be used as the basis for insurance payment."

The People's Insurance Company of China (the PICC) sets time-limits for making a decision for motor claims according to the amount of the claims. From the time when all relevant evidence and documents are collected, the decision on a claim (in which no injury to the human body is involved) must be made within one, three, five or seven working days for the amount claimed for less than ¥10,000, ¥10,000 to less than ¥30000, ¥30000 to less than ¥50,000, or ¥50,000 or more, respectively; the decision to a claim (in which injury to the human body is involved) must be made within seven working days.⁹⁴

As to the date when the 30-day period should start to run, the Insurance Law is silent. There are a number of different views on this point.⁹⁵ The first view is that the 30-day period should start from the date when the insured or the beneficiary notifies the insurer of the occurrence of the insured event. The Insurance Law requires the insured to notify the insurer of the occurrence of the insured event in a timely manner.⁹⁶ The notification of the occurrence of the insured event should also be treated as a request for insurance payment. The second view is that the 30-day period should start from the date when the insured or the beneficiary makes a formal claim for insurance payment. The notification of the occurrence of the insured event is a statutory duty for the insured to perform, while a request for insurance payment is a right for the insured to exercise, so these two cannot be equivalent.⁹⁷ In practice, the insurer usually requires the insured to submit a claim application form. This form is dated, so it is not difficult to judge when the 30-day period should start.⁹⁸ The third view is that the 30-day period should start to run from the date when the insurer has for the first time received the claim and the **J.B.L. 50* relevant evidence and documents, as the insurer is unable to assess a claim without the relevant documents.⁹⁹

The Supreme People's Court (SPC) has recently settled the matter in respect of the starting point of the 30-day period in its Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China.¹⁰⁰ Paragraph 1 of art.15 of the SPC Interpretation provides

"the 30-day period for the assessment of a claim as stipulated in art. 23 of the Insurance Law starts to run from the date on which the insurer has for the first time received the claim and the relevant evidence and documents¹⁰¹ from the proposer, the insured, or the beneficiary."

This Interpretation is logical. It would be unreasonable for the 30-day period to run from the date of the occurrence of the loss (the first view) or from the date of making the claim (the second view), for the claim has not been made or the insurer does not have any information and evidence to assess the claim.

When the insurer sits down to check the claim documents during the 30-day period, it is possible that further evidence or information may be needed for his assessment of the claim. The law requires the insurer to notify the insured, in one comprehensive list, of all the documents and evidence that he needs to assess a claim, but does not allow the insurer to request information on a piecemeal basis.¹⁰² If requested by the insurer, the insured needs to obtain such information. The time taken for the insured to obtain the information

may vary and sometimes may exceed the 30-day period. If the time taken by the insured is counted in the 30-day period, the insurer would be put in the position that he cannot control the 30-day time-limit himself. It is submitted that the insurer should not be penalised for breach of the 30-day period deadline due to the insured's delay in supplying such further information. A question can then arise whether or not the time taken by the insured should be deducted from the 30-day period. The SPC has recently answered this question in providing

"the People's Courts should uphold the insurer's request to deduct the time period (from the 30-day period for the assessment of a claim) for which the insurer requests the insured to supply further evidence and documents. The period to be deducted begins from the date when the proposer, the insured or the beneficiary has received insurer's notice for such request which was made in accordance with art.22 of the Insurance Law to the date when the insurer has received such relevant evidence and documents from the proposer, the insured or the beneficiary". **J.B.L. 51* [103](#)

It is now clear that the insurer has a 30-day period at his disposal for the assessment of a complex claim and any time taken by the insured to obtain further evidence and information can be deducted from this 30-day period.

Sending a rejection notice to the insured within three days after determination of a claim

If the loss is not covered under the policy, the insurer is obliged to send a rejection notice to the insured within three days after determination of the claim, specifying reasons for the rejection. This obligation is stipulated in art.24 of the Insurance Law.[104](#) Following the Insurance Law, the Shenzhen Insurance Regulatory Bureau published a regulatory document on the management of rejections of claims,[105](#) which stipulates that the notice of rejection of a claim must include the following content: (1) the fact and reasons for the rejection, including the fact that was obtained through investigation and sufficiently influenced the insurer's decision as to the rejection of the claim, and the policy clauses and relevant laws which were invoked by the insurer to reject the claim; (2) the channels for the insured to make a complain to the insurer, including telephone number and name of the contact person; and (3) the notice must be stamped by the seal of the insurance company.

If an insurer does not make a decision on the claim within 30 days and does not send a rejection notice to the insured in another three days, the insurer will lose his defence to the claim on day 34 and should be deemed to have accepted the liability for the loss. This is demonstrated in the case of *Mr Guo v The Insurance Co.*[106](#) Mr Guo took out a serious disease policy on his wife (the insured) on June 27, 2009, under which the insurer was liable to pay the insured ¥30,000 if the insured was diagnosed to have a serious disease (such as cancer, heart disease, etc.). The insured suffered a heart attack on December 13, 2009 and died in the hospital on December 15, 2009. Guo notified the insurer of that event when his wife was treated in the hospital and made a formal claim in January 2010. The insurer did not respond to the claim by either accepting the liability or rejecting it by sending a notice to the insured within 33 days of receiving the claim. The court held that the insurer lost his defence to the claim on day 34, so he was liable to pay the insurance

money.

The Chinese court's decision in this case is similar to the approach in art.6:103 of the PEICL, which states that the insurer is deemed to have accepted the claim if he does not reject it or defers acceptance of a claim by written notice giving reasons for its decision within one month after receipt of the relevant documents **J.B.L. 52* and other information.¹⁰⁷ This approach is fair to the insured and has an advantage of certainty.

Payment of insurance money within 10 days after reaching an agreement on the amount of loss

If the claim is covered under the policy, the insurer should pay the insurance money within 10 days after reaching an agreement with the insured on the amount of loss, in accordance with art.23 of the Insurance Law

"where the claim is covered, the insurer shall fulfil its obligations to pay indemnity or insurance benefits within 10 days after reaching an agreement on the amount of indemnity payment or insurance benefits with the insured or the beneficiary.¹⁰⁸ Where there are provisions in the insurance contract as to the period within which indemnity or the payment of the insurance benefits should be effected, the insurer shall fulfil its obligation accordingly."

If the insurer fails to pay the insurance money within 10 days after reaching a payment agreement, he is liable to pay damages from day 11. This can be explained by the case of *Guangdong Wenshi Food Co v People's Property Insurance Co of China Guangzhou Branch*.¹⁰⁹ The insured effected a marine cargo insurance policy to cover 800 tons of fish powder. At the destination port, the goods were found damaged during the period of carriage. The two parties reached an agreement on the amount of payment on December 6, 2004, but the insurer delayed in making the payment. In March 2005, the insured sued for the agreed sum (¥824,413) and interest (¥11,616) for a bank loan for the period from December 6, 2004 to 28 February 18, 2005. The court made judgment on June 24, 2005, holding that the interest should be calculated from December 17, 2004 (11 days after the payment agreement was made) to February 28, 2005. It is submitted that the court's decision on the end date for the calculation of interest is incorrect. The correct date should be the date when the insurance payment was made.

The insurer's statutory duty to pay within 10 days after an agreement of payment is made is subject to a contract, which usually contains a clause stipulating the time period for payment of insurance money. For instance, in *Cheng Yang Transport Co v Pingan Insurance Co*,¹¹⁰ a clause in the contract sets out the time-limit for payment. The insurer must pay within one working day for an amount claimed of less than ¥10,000, three working days for ¥10,000 to ¥50,000, and 10 working days for more than ¥50,000. The insured must fulfil his contractual duty to pay the insurance money according to the clause. It may be possible that an insurer will extend the 10-day period by a clause in the standard form of contract, but it **J.B.L. 53* is very unlikely that the courts would enforce such a clause, for the reasons explained earlier.¹¹¹

Preliminary payment within 60 days of receipt of claim documents

As mentioned earlier, the insurer is required to make a decision within 30 days of receiving the insured's claim and relevant documents. Sometimes, the insurer may request further information and/or evidence to determine whether the loss is covered or the amount of loss. The amount of time taken for the insured to acquire such evidence can be deducted from the 30-day period.¹¹² In some complex cases, however, the insured may take many days (or even months) to obtain the requested evidence for the insurer's determination of the amount of loss. Under these circumstances, according to art.25 of the Insurance Law,¹¹³ the insurer must first make a preliminary payment on the basis of evidence and information available to him within 60 days of receipt of the claim and the relevant evidence, and he will pay the difference accordingly after receiving further information based on which the final amount of insurance payment is determined.¹¹⁴

This rule of preliminary payment within 60 days may inhibit the insurer's delay in making a payment on the ground that he cannot determine the exact amount of loss on the basis of the evidence available. If the insurer and insured cannot reach an agreement on the amount of payment beyond 60 days, the insured is likely to sue or resort to arbitration for the insurer's delay in making a payment. For example, in *Lei Jun Yan v Behai Property Insurance Co Ltd, Xuchang Branch*,¹¹⁵ the insured car was stolen on June 8, 2009. The insured claimed on June 9, 2009. The two parties could not reach an agreement as to the amount of payment. The insurer did not make any payment to the insured, so the insured sued on December 29, 2009. The insurer was held liable to pay the insurance money and interest. The interest ran from the date when the claim should have been paid (on August 9, 2009) to the date when the insurer payment was made (within five days after the court's judgment was made on May 10, 2010). The court's award of interest to the insured was based on art.25 of the Insurance Law, which requires the insurer to make a preliminary payment within 60 days after receiving the claim and relevant documents. In this case the insurer did not make a preliminary payment and was thus in breach of his duty on August 9, 2009 (day 61 after the claim was made on June 9, 2009); he should therefore be liable for interest arising from the late payment of the claim.

Delay in performing a contractual obligation due can only occur when the time-limit for performance has passed. As discussed above, the time-limits for the insurer to perform his duties are determined by arts 23, 24 and 25 of the Insurance *J.B.L. 54 Law. If an insurer fails to handle claims or pay valid claims within the time-limits, he breaches these statutory duties and is thus obligated to pay compensatory damages resulting from his late payment or unreasonable rejection of valid claims.¹¹⁶ In the following part, two questions about the effect of late payment are considered: first, how to determine damages; and secondly, what kind of damages should be available to the insured who has suffered loss as a result of the late payment of a claim.

Compensatory damages for the insurer's late payment of valid claims

It is clear that the Insurance Law imposes a statutory duty on the insurer to pay damages for consequential loss caused by the delay in examination of claims or in making payment of valid claims.¹¹⁷ However, the Insurance Law 2009 does not provide any rule in dealing with remedy of damages, so the Contract Law 1999 can be referred to for the purpose of

working out solutions in respect of damages for late payment of insurance proceeds.[118](#)

Determination of damages

The general rule under the Contract Law is that if one party breaks a contract, the other party may claim damages for the actual loss suffered, provided that it was foreseeable at the time the contract was entered into. This is provided in arts 112 and 113 of the Contract Law, which concern liability for damages for breach of contractual obligations and determination of damages. Article 112 provides:

"Where a party fails to perform his contractual obligations or where his performance of the contractual obligations is not in conformity with the agreement, and if, after performing the obligations or taking remedial measures, the other party has other losses, damages shall be paid."

Article 113 sets forth the general rule on contractual damages, providing

"the amount of damages shall be equal to the loss sustained as a result of the breach, including the benefits that could have been obtained after the performance of the contract, but shall not exceed the loss that the breaching party foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract."

This general rule under the Contract Law is subject to three main limitations:

The first one is stated in art.113 of the Contract Law, whereby

"the amount of damages ... shall not exceed the loss that the breaching party foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract. **J.B.L. 55* "

This principle of foreseeability in Chinese Contract Law is similar to the rules originally laid down in the English case of [Hedley v Baxendale](#).[119](#) The issue of causation concerns the relationship between the fact of breach of contract and the loss. To ascertain the causation, the Contract Law follows the rule of foreseeability, which requires that the damages should only be awarded if they are the probable consequences of the breach and such consequences are foreseeable by the parties at the time of the contract. The rule of foreseeability functions as a gauge to help to keep the damages within certain boundary. Under the rule, the causation will exist when the damages that are caused by the breach are foreseeable, and the party in breach is only responsible for the damages that could be reasonably foreseen. There is no ready test in the Contract Law to determine the foreseeability. It is normal for the courts to determine what damages are foreseeable. The injured party is required to prove the fact of breach, the loss and the connection between the breach and the loss. The approach generally used by the courts is whether the damages are the reasonable and natural outcomes of the breach that would be contemplated by an ordinary person in the same or similar position at the time of the contract. If, however, the loss arises from special circumstances and would not ordinarily occur, the party in breach is liable only if it knew or ought to have known of the special circumstances at the time of the contract. Those special circumstances may include arrangements entered into by the injured party which may give rise to unusual profit or penalty.[120](#)

The second limitation is that the injured party must prove actual loss with certainty. Although it is not stated in the Contract Law, the limitation of proof is a corollary of the requirement that a claimant bear the burden of proving the facts in support of his claim.¹²¹ A claim of contractual damages cannot succeed unless the injured party proves his loss with reasonable certainty. In the insurance context, if the insured cannot show sufficient evidence for consequential loss, the court will not support the insured's claim for that loss. This can be demonstrated by the case of *People's Insurance Co of China, Yaoping Branch v Chaozhou City Huafeng Petroleum Product Storing Co.*¹²² Huafeng Petroleum Storing Co effected a comprehensive property insurance policy to cover the dock and petroleum product storing facilities for a total insured amount of ¥130,000,000. A typhoon caused severe damage to the dock and the facilities. The insured and the insurer could not reach an agreement on the amount of loss. The insurer did not pay the insurance money for 28 months after the occurrence of the insured event. The insured then sued for payment of the loss plus damages for the consequential loss of profit (¥11,050,000) which was caused by reduced storing capacity of 6,500 tons of petroleum per month which was equivalent to net profit of ¥50 per ton per month **J.B.L. 56* for 34 months (28 months plus 6 months for reconstruction of the dock and the facilities). It was estimated that it would take six months for the reconstruction, with a total cost of ¥3,428,000. The trial court held that: (1) the insurer was liable to pay the total cost for the reconstruction of the dock; (2) according to art.24(2) of the Insurance Law 2002,¹²³ the insurer was also liable to pay the consequential loss as a result of the reduced storing capability of petroleum product, but owing to the fact that the insured did not give sufficient evidence for the loss of profit and the time bar for providing such evidence, this part of claim was not upheld.

The third limitation is that the injured party must take reasonable steps to mitigate the loss. Mitigation is the rule precluding the recovery of the damages that could have been avoided with reasonable efforts and without undue risk, burden or humiliation.¹²⁴ The duty of mitigation is recognised in both the Insurance Law and the Contract Law¹²⁵ and applied to the injured party. Article 57 of the Insurance Law 2009 provides:

"Following the occurrence of an insured event, the insured is obliged to take all necessary measures to prevent or mitigate loss or damage. The insurer shall bear the necessary and reasonable expenses incurred by the insured for preventing or mitigating loss of or damages to the insured subject matter after occurrence of the insured event"

The idea is that in the case of the occurrence of an insured event, the insured should not sit idly by and allow the loss to increase, but should take reasonable measures to mitigate the loss. The Insurance Law does not provide any remedy for the insured's non-performance of the duty of mitigation; but under the Contract Law, if the injured party fails to take appropriate steps so that the loss is aggravated, he may not be allowed to claim any compensation as to the aggravated part of the loss.¹²⁶

It is reasonable to request the insured to take reasonable steps to mitigate loss following the occurrence of the insured event, but it is unreasonable to expect the insured to take measures to mitigate the loss arising from the insurer's late payment of insurance proceeds if the insured lacks the financial means to do so. In *Hainan Hongye Wool Textile Co v Hong Kong Minan Insurance Co, Haikou Branch*,¹²⁷ the insured machine (for printing coloured patterns on cloth) broke down in March 2003. The insured made a claim but the insurer did not respond to the claim for several months. This seriously affected the normal business of

the insured. On November 22, 2003, the insured had to purchase a new part for the machine by a bank loan (¥1,146,631) to get the machine to work; therefore normal business was resumed and the loss caused by the delay of the insurer's handling the claim was **J.B.L. 57* mitigated. The insured sued for the cost of buying the new part of the machine, and the interest for the bank loan (calculated for the period starting from November 22, 2003 to the day when the insurance money was paid), and the claim was upheld by the court.[128](#)

In summary, an insured is entitled to damages for consequential losses, provided that the loss was foreseeable at the time the contract was made and proved by the insured who claims for the damages. If the insured has financial means to mitigate the consequential loss, the insurer should bear the necessary and reasonable expenses incurred by the insured. If the insured cannot afford to take steps to mitigate the loss, the insurer should not be discharged from his liability for consequential loss on the ground of the insured's failure in performing the duty of mitigation of loss.

Having considered the question of how to determine damages for consequential loss, the next question to be considered is what types of damages should be available to the insured.

Types of damages available to an insured

As discussed above, the insurer's primary obligation is to pay valid claims in a timely manner. If the insurer fails to do so, he breaks the contract and is thus liable to pay damages for consequential loss due to his late payment of insurance proceeds.[129](#) From the decided cases, generally the courts award three types of damages to the insured: loss of profit due to business interruption, cost for renting a replacement of the damaged property, and loss of interest, which are considered in turn below. Meanwhile, the point in time at which the insurer breaches the duty of payment is considered as well, as this time point must be referred to for the calculation of the amount of consequential losses.

Loss of profit due to business interruption

Consequential loss of profit due to late payment of insurance claims has been recognised by the Chinese courts. In *People's Insurance Co of China, Yaoping Branch v Chaozhou City Huafeng Petroleum Product Storing Co*,[130](#) the delayed payment of insurance proceeds resulted in the delay in rebuilding the dock and in repairing the storing facilities for petroleum products, and consequently the loss of profit was caused by reduced storing capacity. The court recognised that the consequential loss as a result of the reduced storing capability should be recoverable, but turned down the insured's claim for the loss for lack of evidence.[131](#)

In a number of motor insurance cases, the courts upheld the insured's claims for loss of income caused by the insurer's late payment of substantive claims. In *Mr Yang v The Insurance Company*,[132](#) the insured lorry was damaged by a road **J.B.L. 58* accident on July 8, 2009. The insured claimed on July 11, 2009. The insurer estimated the repair cost to be ¥60,000 on August 28, 2009. The insured did not agree with the insurer's estimate. He then requested an independent loss adjuster to make another estimate of the repair

cost (¥74,940) on September 13, 2009. On the basis of the latter estimation, the insured had the vehicle repaired and then claimed against the insurer for the cost (¥74,940), and consequential loss of income (¥201,000). The insured claimed that the income loss was caused by the insurer's delay in determination of the repair cost and thus the insured's inability to use the lorry for 67 days (¥3,000 per day) from the day of the road accident (July 8, 2009) to the day of the determination of the repair cost by the independent loss adjuster (September 13, 2009). The insurer refused to pay the income loss, arguing that the income loss for the period the insured vehicle was not in operation was not covered under the policy, and that if the insured wished to be covered for that loss he should have effected another policy for loss of income when the vehicle was not in operation. The court held that the insurer was liable for the repair cost (¥74,940), and that the insurer's delay in determining the cost of repair breached his statutory duty to determine the claim within 30 days after receiving the insured's claim for the loss,¹³³ and as a consequence resulted in the insured's loss of income for the period that the vehicle was not in operation for business. The insurer was, therefore, liable for the income loss. The insurer's liability for that loss was irrelevant to the issue that the insured did not have a policy in place to cover the loss of income when the vehicle was not in operation. As to the calculation of the amount of income loss, the court held that the insurer was liable for the loss for the period from day 30 after the insurer received the claim to the date when the insurer estimated the repair cost (August 28, 2009), which was 18 days in this case. The daily income should refer to the average of the same kind of vehicle for the similar kind of business in the same city, which was ¥433.33. Thus the total loss of income amounted to ¥7800 (18 days × ¥433.33 per day). In this case the time point at which the insurer breached the duty to determine the claim (for the repair cost) was considered to be day 30 after the insurer received the claim. It is submitted that this is incorrect. The correct time point at which the insurer breached the duty to determine the claim should be day 31 after the insurer received the claim.¹³⁴

For simple cases, courts award damages even before the 30-day deadline is reached.¹³⁵ For instance, in *Mr Wang v the Insurance Company*,¹³⁶ the insured lorry was damaged in a road accident on August 3, 2009. Mr Wang reported the accident to the insurer, who sent a loss adjuster to estimate the cost of repair. Because the two parties disputed over the amount of loss, the insurer did not send a letter to the insured to authorise a repair for the damaged lorry. The insured waited for 10 days and then authorised a garage to repair the lorry on August 12, 2009. The lorry was repaired in two days, with a total expense of ¥16,831. The insured had a contract with Beijing Transportation Co for the rental of the lorry, for the sum of ¥3,500 per day. Because of the delayed authorisation of the insurer for repairing **J.B.L. 59* the lorry, the insured incurred a loss of rental income of ¥ 35,000 for 10 days. The insured sued. The insurer argued that the rental loss was not covered under the policy, so he was not liable for that part of the loss. The court held the insurer liable to pay the total cost of repair (¥16,831) and some of the rental income (¥6000). Although the rental loss was not covered under the policy, the insured's claim for that loss was caused by the insurer's delay in authorising the repair and should thus be upheld according to art.23 of the Insurance Law. This case was not a complex one; the court thought that the insured breached his duty in determining the claim in a timely manner even before the 30-day deadline (which is only for complex cases), so awarded some rental loss by discretion.

For cases which were tried before 2009, the Insurance Law 2002 was followed in

determining the time point for the insurer's breach of the duty to determine a claim in a timely manner, but the 2002 version did not set out a 30-day time-limit for making a decision on a claim.¹³⁷ So the courts sometimes calculated the amount of consequential loss from day 61 when the insurer breached the duty of making a preliminary payment within 60 days of receipt of the claim, according to art.26 of the Insurance Law 2002.¹³⁸ The following case explains this point. In *Beijing Lu Gou Bridge Zhi Hong Concrete Co v People's Insurance Co of China (Property), Nan Le Branch*,¹³⁹ a concrete-mixing vehicle had a road accident and was damaged on July 31, 2007. The repair job was completed for a cost of ¥245,490 on July 4, 2008. The insurer delayed in making a payment owing to a dispute over the amount of insurance payment, so the insured vehicle was not released from the garage. The insured sued for the repair cost (¥245,490) and the loss of income (¥229,600) for the period from the date when the repair was completed (July 4, 2008) to the date of the judgment (June 2, 2009), which was calculated using a monthly income of ¥21,000. The insurer argued that the loss of income was not covered by the insurance contract, so he should not be liable for that loss. The court held that (1) the insurer was liable to pay part of the repair cost (¥134,515) according to the terms of the contract; (2) the insurer did not make a decision on the claim in a timely manner, nor did it send a rejection notice to the insured or make a preliminary payment within 60 days of receipt of the claim.¹⁴⁰ The insurer was thus liable for the insured's loss of income for the period starting on day 61 after the completion of the repair of the vehicle (September 2, 2008) to the date of the court's judgment (June 2, 2009). The amount of income loss was ¥180,000, which was calculated using a monthly income of ¥20,000. In this case, although the two parties disputed over the amount of insurance payment, the insurer should have ***J.B.L. 60** made a preliminary payment within 60 days after the completion of the repairing of the vehicle.

Cost for renting a replacement of the damaged property

Where the insured property is damaged and the insurer delays in assessing the loss, deciding the amount of the loss, or making a payment to the insured, and the insured has to rent a replacement, the cost of renting a replacement of the damaged property should be covered by the insurer. In *Mr Gu v An Bang Property Insurance Co Shanghai Branch*,¹⁴¹ Mr Gu's car was damaged in a road accident on March 26, 2010. The insurer estimated the cost of repairing the car on June 1, 2010. The repair work was completed on July 7, 2010. During the repair period, Mr Gu rented a car and spent ¥10,000 on the rental. His claim for the rental was turned down by the insurer on the ground that the rental was not covered by the insurance contract. The trial court made a judgment for the insurer. Mr Gu appealed. The Shanghai First Intermediate People's Court held that the insurer was liable for paying the rental. According to art.23 of the Insurance Law, the insurer should estimate the loss within 30 days after receiving the claim and the relevant documents from Gu. The insurer delayed in making the estimate of the loss, so was in breach of its statutory duty. Mr Gu's cost of renting a car was due to the insurer's delay in estimating the loss. Thus the insurer should be liable for paying the insured the cost of renting the car.

Loss of interest

Delay in the performance of a monetary obligation is subject to rules under the Contract Law. If a party owes an obligation to pay money, its delay of payment entitles the injured party to resort to remedies generally applicable to non-performance of the contract. Article 207 of the Contract Law provides:

"If a borrower defaults in repaying a loan within the agreed time, he shall pay interest for the default in accordance with the agreement or the relevant regulation of the state." [142](#)

In the insurance context, when a claim is wrongly refused or not handled within the time-limits, the courts award interest to compensate the insured for being out of funds.[143](#) The starting point for the running of interest is the date on which the insured is deemed in breach of his duty of paying the insurance money.[144](#) In *Shanghai Zhenan Co v PICC Property Co Wenzhou Branch*,[145](#) the ship carrying ***J.B.L. 61** insured cargo (steel) sank in the coastal sea near Ningbo on March 12, 2006. The insured immediately informed the insurer of the occurrence of the event and submitted all relevant claim documents on August 30, 2006. The insurer orally promised to handle the claim in a timely manner but delayed in making payment. The insured sued on July 10, 2007. The court held that the insurer breached the statutory duty to handle the claim in a timely manner, so was liable for interest loss in addition to the payment for the loss of the steel. But the court did not specify the starting point for the running of interest. According to art.26 of the Insurance Law 2002, if the amount of insurance payment cannot be determined within 60 days of receipt of relevant evidence and information, the insurer should make a preliminary payment which can be determined by the evidence and information available. It is suggested that the interest should run from October 30, 2006, which was 61 days after the insured's submission of all relevant documents to the date of the court's judgment. If the Insurance Law 2009 were to be applied, the interest should run from September 30, 2006, which was 31 days after the insured's submission of the relevant documents to the date of the court's judgment.

In a motor insurance case,[146](#) the insured's car was stolen on October 8, 2003. The insured made a claim on October 14, 2003 and submitted all relevant documents to the insurer on August 12, 2004. The insurer neither rejected the claim nor paid the insured sum. The trial court held that according to art.26 of the Insurance Law 2002, the starting point for calculation of interest should be 60 days after the insurer's receipt of the relevant documents. The Guangdong Province Guangzhou Intermediate People's Court held that as the insured submitted the relevant documents to the insurer on August 12, 2004, the starting date for calculation of interest should be August 13, 2004.

Though the courts award interest, the starting point for the running of interest is arbitrary in a number of cases, resulting in unfairness and inconsistency. In *China Pacific Property Insurance Co, Dongying Branch v Zhong Xiohai*,[147](#) the court held that the insured was entitled to interest which ran from the date of insurer's refusal of the claim to the date of the court's decision. In *Minfeng Special Paper Co Ltd v Gerling Allgememeine Versicherungs AG*,[148](#) the interest was held to run from the date the insured brought the lawsuit to the date of the court's judgment. In *Guangdong Fuhong Oil Products Ltd v China Ping An Property Insurance Co Ltd, Shenzhen Branch*,[149](#) it was held that the reasonable time for the insurance payment should be 15 days after the insurer's receipt of all claim documents (which was on January 13, 2005), and the interest should run from January 14, 2005 to the date of the judgment. In another case,[150](#) the insured's ***J.B.L.**

62 superstore was flooded and the two parties disputed over the total loss. The trial court's decision that the interest loss should run from the date of two months after the flood to the date of the payment of the insurance money was reversed by the Ganzhou City Intermediate People's Court on the ground that there was no clear basis for the claim of interest.

It is submitted that the interest loss should run from the date on which the insurance claim should be paid, to the date on which it is actually paid. The date on which the claim should be paid is the date on which the insurer is in breach of the duty of payment of insurance proceeds within the time-limits. As mentioned earlier, the 2002 versions of the Insurance Law required the insurer to handle claims in a timely manner, but did not set out a time-limit for the insurer to make a decision on a claim. [151](#) Thus it was difficult to judge the time point at which the insurer breached his duty of making a decision to a claim, thus giving rise to uncertainty and inconsistency in the courts' judgments. The 30-day time-limit was introduced in the 2009 version of the Insurance Law, which greatly enhances certainty, thus providing a greater protection to the insured.

Damages arising from delay in litigation should not be precluded

Whether or not damages arising from delay in litigation should be recognised is a controversial issue. The Insurance Law 2009 does not cover this point, resulting in uncertainty in judicial practice. This can be seen in the complex case of *Property Insurance Co of China Hainan Branch v Fenghai Oil and Grain Co Ltd.*[152](#) There the trial court held that damages should be awarded where they were caused by delay in the litigation process, but the Hainan Province High People's Court gave a different judgment. It is worthwhile seeing how the courts arrived at different decisions.

In this case, the insured cargo (palm oil) was carried from Indonesia to Hainan Island, China by an Indonesian ship. The cargo and the ship were confiscated by the Indonesian authorities owing to smuggling by the ship on April 16, 1996. The insured cargo was as a result totally lost. After having been refused the insurance payment, the insured sued on August 20, 1996. The Haikou Maritime Court (the trial court) held the insurer liable for the insured amount (US\$3.6 million). The insurer and the insured received the letter of judgment on December 25, 1996. The insurer appealed. The Hainan Province High People's Court reversed the decision of the trial court on October 27, 1997. The insured applied to the SPC for a retrial of the case. The SPC eventually upheld the decision of the trial court on July 13, 2004. The letters of retrial judgment were received by the two parties on August 16, 2004. The insurer paid the insured amount accordingly in September 2004.

Having been paid the insured amount, the insured then sued for the interest loss at Haikou Maritime Court in January 2005. Evidence showed that for the period from the date when the two parties received the letter of judgment from the trial court (December 25, 1996) to the date when they received the letter of retrial judgment from the SPC (August 16, 2004), the insured suffered an interest loss of **J.B.L. 63* US\$1.3 million (calculated using the bank loan interest rate for the same period for the amount of insurance payment (US\$3.6 million)). Two questions then arise: (1) whether the insurer was liable to compensate the insured for the loss of interest due to the delay in the litigation process; and (2) if the insurer was liable, when the time should start to run for the calculation of interest.

The Haikou Maritime Court held that (1) the insurer was liable for the interest loss (US\$1.3 million) due to the delay in the litigation process; and (2) the starting point for the running of interest should be the date when the two parties received the letter of judgment (for the substantive insurance claim) from the Haikou Maritime Court (December 25, 1996), and interest should terminate at the date when the insurer received the letter of retrial judgment from the SPC (August 16, 2004).[153](#)

The insurer appealed against the trial court's decision as to the payment of interest. The Hainan Province High People's Court reversed the trial court's decision on the ground that there was no legal basis to request the insurer to pay interest for the delay in the litigation process. With respect, the Hainan Province High People's Court's decision was incorrect. Article 23 of the Insurance Law 2002 clearly sets out the requirement for the insurer to perform its obligation to pay valid claim in a timely manner, otherwise the insurer must pay the insured for consequential loss caused by the late payment of the claim. It is submitted that the insurer should be made liable for damages incurred by the late payment of insurance claims arising from delay in the litigation process.

In English law, there is no clear-cut answer to the question whether damages arising from delay in litigation should be recognised. In the responses to the Law Commissions' Issues Paper 6, the majority of consultees expressed the view that where damages would otherwise be available, they should not be precluded because they were caused by delay in the litigation process.[154](#) However, in the 2014 Report, the Law Commissions recommended that insurers should have a defence to a claim for late payment where they incorrectly refuse to pay a claim but can show that they acted reasonably in doing so.[155](#) If the insurer does not pay any sums due in **J.B.L. 64* respect of the claim within a reasonable time, he is in breach of the contractual obligation.[156](#) The "sums due in respect of the claim" encompass sums which are "due" either by virtue of an agreement between the parties or because they have been determined by a court to be payable by the insurer.[157](#) This implies that if the "sums due in respect of the claim" are determined by a court, damages arising from any delay in litigation should not be payable by the insurer, because prior to the court's decision as to the "sums due", the insurer should not be deemed in breach of his obligation "to pay any sums due in respect of the claim within a reasonable time".[158](#) This analysis should only be suitable for cases where the insurer genuinely and for good reason considered that he was not liable to pay the claim. If the insurer did not have a reasonable basis for disputing a claim and the "sums due in respect of the claims" were in the end determined by a court, the insurer should be deemed in breach of his obligation and thus should be liable for damages arising from delay in litigation.

Limitation period for late payment claims

The case of *Property Insurance Co of China Hainan Branch v Fenghai Oil and Grain Co Ltd* also raises an important issue in respect of the limitation period and time point for the limitation period to run. According to the Insurance Law, the limitation period is two years for indemnity policies and five years for life policies, starting to run from the date when the insured or the beneficiary knows or ought to know the occurrence of the insured event.[159](#) However, there is no answer to the question of when the limitation period starts to run for late payment claims in the Insurance Law.[160](#) According to art.137 of the Civil Code,[161](#)

the two-year limitation period starts to run from the time the plaintiff has known or ought to have known that his right has been prejudiced. In the insurance context, the limitation period for late payment claims should also be two years, beginning to run from the date when the insurer breaches his statutory duties by failing to meet the time-limits: (1) for making decisions on claims within 30 days after receiving the insured's claims; (2) for making payments to valid claims within 10 days of reaching an agreement with the insured as to the amount of payment; (3) for failing to send the insured a rejection notice within three days after the decision to reject the claim; and (4) for making preliminary payment within 60 days of receiving the claim. Where the late payments of insurance claims and the consequential losses (such as interest loss) are caused by the delay in litigation process, the limitation period should start to run from the date when the insured has received the final judgment of the court, because only when the insured receives the court's final judgment is **J.B.L. 65* it possible for the insured to know for certain that his right has been prejudiced and he is therefore entitled to damages for consequential loss.

In summary, Chinese courts award damages for late payment. The damages include loss of profit due to business interruption, costs of renting a replacement of the damaged property and loss of interest. Punitive damages that are designed to punish the defaulting party and award the injured party money damages greater than its actual loss are incompatible with the compensatory nature of contractual liability and the provision of art.113(1) of the Contract Law, which states that "the amount of damages shall be equal to the loss sustained as a result of the breach". Hence, in principle, punitive damages are not recoverable under Contract Law.¹⁶² This is unlike the approaches in the North American jurisdictions where punitive damages are awarded to the injured insured for the insurer's bad faith and late payment of insurance proceeds.¹⁶³

Conclusions and suggestions

Under Chinese law, an insurer's primary obligation is to pay valid claims in a timely manner. An insurer is deemed to be in breach of his statutory duties if he fails to meet the time-limits for performing these duties.¹⁶⁴ As a result, the insurer is liable for damages for consequential losses.

Some situations are unclear or not covered in the Insurance Law, so suggestions are made in order to improve the law:

- Where the insured makes a claim but the insured does not respond to the claim (neither rejecting nor accepting it), and the insured then sues for insurance payment plus interest (or other damages), it is suggested that the interest and other damages should run from day 34 after the insured's submission of the claim because the insurer breached his duties to make a decision within 30 days of receiving the claim and to send a rejection notice to the insured within three days after the decision to reject the claim.

- Where the insurer cannot decide on the amount of payment on the basis of the information available and asks the insured to provide further information,

it is suggested that the interest and other damages should run from day 61 if the insurer does not make any preliminary payment within 60 days of receiving the claim.

- It is suggested that where damages would otherwise be available, they should not be precluded because they were caused by delay in the litigation process. *J.B.L. 66 [165](#)

- The limitation period for litigation is two years for indemnity policies and five years for life policies, starting to run from the date when the insured knows or ought to know the occurrence of the insured event.[166](#) It is suggested that the limitation period should also be two years for late payment claims,[167](#) starting to run from the date when the insurer breaches his statutory duties to assess and pay claims within the time-limits. Where the late payments of insurance claims and the consequential losses are caused by the delay in litigation process, the limitation period should start to run from the date when the insured has received the final judgment of the court.[168](#)

The current English law in respect of late payment of insurance claim is unprincipled and unfair. The Law Commissions' recommendation that insurers should be obliged to pay valid claims within a reasonable time is reasonable. This would effectively remedy the harshness and unfairness of the English law with regard to late payment. However, the fact that there is no clear definition of a "reasonable time" would undoubtedly give rise to uncertainty and scope for litigation.[169](#) The Chinese experience has demonstrated that no clear definition of the ambiguous term "in a timely manner" in the 2002 version of the Insurance Law caused uncertainty and difficulties in industrial and judicial practice. To avoid similar problems to those that have already occurred in China, it is suggested that the time periods within which the insurers are required to perform the duties of investigating, assessing and paying insurance claims should be specified in the Law Commissions' recommendations:

- An insurer should make a decision on a claim within 28 days after receipt of the relevant documents and other information.[170](#) Where the insured is required to supply further information and evidence, the time taken for the insured to obtain such information should be deducted from the 28-day period.[171](#)

- Where the claim or part of the claim is accepted, the insurer must pay the insurance money within 10 days after acceptance and quantification.[172](#)

- Where the claim is not covered, the insurer should, within three days after the decision is made, send a rejection notice to the insured, specifying reasons for the rejection.[173](#)

- If the amount of payment cannot be determined within 60 days of receipt of the claim, the insurer should effect payment of the amount determinable with the evidence and information available; the insurer **J.B.L. 67* should pay the difference accordingly after the final amount is determined.¹⁷⁴

It is hoped that these suggestions could be taken into account by the Law Commissions in the reform of the law in this area.

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1. See [s.1 of the Marine Insurance Act 1906 \(UK\)](#) and art.2 of the Chinese Insurance Law 2009.
 2. [The Fanti and The Padre Island \[1991\] 2 A.C. 1 HL](#) at 35–36.
 3. There is House of Lords authority that "there is no such thing as a cause of action in damages for late payment of damages". See [President of India v La Pintada Compania Navigacion SA \[1985\] A.C. 395 HL](#) at 424, per Lord Brandon; [President of India v La Pintada Compania Navigacion SA \[1985\] A.C. 395 HL](#); and [The Fanti \[1991\] 2 A.C.](#) at 35. *The Law Commission and the Scottish Law Commission, Issues Paper 6: Damages for Late Payment and the Insurer's Duty of Good Faith (March 2010), para.S.11 (Issues Paper 6 (2010)).*
 4. See [Sprung v Royal Insurance \(UK\) Ltd \[1999\] 1 Lloyd's Rep. I.R. 111 CA \(Civ Div\)](#).
 5. See J. Al-Asady, "Damages, Late Payment and Indemnity Insurance" [2006] J.B.L. 396; J. Birds, "No Damages Remedy when Insurers Unjustifiably Repudiate Liability" [1997] J.B.L. 368; N. Campbell, "The Nature of an Insurer's Obligation" [2000] L.M.C.L.Q. 42; M. Clarke, "Nature of Insurer's Liability" [1992] L.M.C.L.Q. 287; S. Drummond, "Damages for Consequential Loss when the Insurer Fails to Pay" [2005] Ins. L.J 1; P.M. Eggers, "Late Payment of Insurance Claims" [2013] L.M.C.L.Q. 341; *D. Foxton, "Can a Marine Insurer be Liable for Loss Consequential upon the Late Payment of Indemnity?" in R. Thomas (ed.), The Modern Law of Marine Insurance (Informa, 2009), p.213*; M.C. Hemsworth, "Consequential Loss Claims for Delayed Insurance Settlements: Creating a Financial Crisis from an Insurance Drama" [1998] L.M.C.L.Q. 154; J. Lowry and P. Rawlings, "Insurers, Claims and the Boundaries of Good Faith" (2005) 68 M.L.R. 82; Lord Mance, "The [1906 Act](#), Common Law and Contract Clauses—all in Harmony" [2011] L.M.C.L.Q. 346; *Colinvaux's Law of Insurance, 9th edn, edited by R. Merkin (Sweet & Maxwell, 2010), paras 10-022 to 10-023*; G. Swaby and P. Richards, "Insurance Reforms: Rebalancing the Kilter?" [2011] J.B.L. 535; and C. Ying, "Damages for Late Payment of Insurance Claims" (2006) 122 L.Q.R. 205.
 6. Issues Paper 6 (2010).
 7. *The Summary of Responses to the Issues Paper 6: Damages for Late Payment and the Insurer's Duty of Good Faith was published in November 2010.*
 8. *The Law Commission and the Scottish Law Commission, Insurance Contract Law: Post Contract Duties and Other Issues: A Joint Consultation paper (December 20, 2011 (Consultation Paper (2011))).*
 9. D. Hertzell and L. Burgoyne, "The Law Commissions and Insurance Contract Law Reform: an Update" (2013) 19 J.I.M.L. 105, 107–119.
 10. In January and March 2014, the Law Commissions released draft clauses of the Insurance Contracts Bill for

Consultation. The Insurance Contracts Law Draft Bill was made public for further consultation on June 17, 2014. After that, the draft Bill was presented to Government on July 15, 2014.

- [11.](#) *The Law Commission and the Scottish Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment, Law Com No.353/Scot Law Com No.238, July 17, 2014 (Report (2014)).*
- [12.](#) Report (2014), paras 26.4 to 26.7.
- [13.](#) Report (2014), paras 26.8 to 26.14.
- [14.](#) Report (2014), paras 26.15 to 26.26.
- [15.](#) Issues Paper 6 (2010), para.S.30.
- [16.](#) Consultation Paper (2011), para. 4.14; Report (2014), paras 26.27 to 26.29.
- [17.](#) Clause 14 of the Insurance Contract Law Draft Bill (June 17, 2014) relates to late payment.

"Clause 14, Implied term about payment:

(1)It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.

(2)A reasonable time includes reasonable time to investigate and assess the claim.

(3)What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account—

- (a)the type of insurance,
- (b)the size and complexity of the claim,
- (c)compliance with any relevant statutory or regulatory rules or guidance,
- (d)factors outside the insurer's control.

(4)If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount of any sum payable, or as to whether anything at all is payable)—

- (a)the insurer does not breach the term implied by subsection (1) merely by failing to pay the claim (or the affected part of it) while the dispute is continuing, but
- (b)the conduct of the insurer in handing the claim may be a relevant factor in deciding whether that term was breached and, if so, when.

(5)Remedies (for example, damages) available for breach of the term implied by

subsection (1) are in addition to and distinct from—

(a) any right to enforce payment of the sums due, and

(b) any right to interest on those sums (whether under the contract, under another enactment, at the court's discretion or otherwise)."

- [18.](#) See Law Commission's website, <http://lawcommission.justice.gov.uk/publications/insurance-contract-law.htm> [Accessed October 9, 2014].
- [19.](#) Report (2014), Executive Summary, para.1.7.
- [20.](#) Report (2014), para.5.23.
- [21.](#) Draft Bill 2014 cl.14(1); Report (2014), paras 28.2 and 28.3.
- [22.](#) Draft Bill 2014 cl.14(5); Report (2014), paras 28.5 and 28.6.
- [23.](#) Report (2014), para.28.22.
- [24.](#) Z. Jing, "Comments on the Law Commissions' Initial Draft of Insurance Contracts Bill 2014 in Respect of Late Payment" (submitted to the Law Commissions on February 18, 2014); Kees van der Klugt, "Law Reform and the Damages for Late Payment of Claims Proposals: is this a Good Idea?" (2012) 125 B.I.L.A. Journal 23.
- [25.](#) *The Fanti [1991] 2 A.C. 1* at 35–36.
- [26.](#) The Insurance Law of the People's Republic of China was enacted by the National People's Congress in 1995, which was the first comprehensive legislation on insurance in China; it consists of insurance contract law and insurance regulation. It includes eight chapters, namely (1) General Provisions; (2) Insurance Contracts; (3) Insurance Company; (4) Rules governing insurance business; (5) Supervision and Control of insurance industry; (6) Insurance Agents and insurance brokers; (7) Legal liability; and (8) Supplementary provisions.
- [27.](#) To meet the commitment to the WTO, the Insurance Law 1995 was amended in 2002 mainly on insurance regulation, and insurance contract law was essentially not changed in the 2002 version.
- [28.](#) The Insurance Law was significantly amended in 2009 in both insurance contract law and insurance regulation. Many aspects are modified in the 2009 version, including the modification of arts 23, 24 and 25. This will be seen in the text of this article.
- [29.](#) Insurance Law 2009 art.22.
- [30.](#) Insurance Law 2009 art.23.
- [31.](#) Insurance Law 2009 art.24.
- [32.](#) Insurance Law 2009 art.25.
- [33.](#) Insurance Law 2009 art.23.
- [34.](#) This will be discussed later.
- [35.](#) *The Fanti [1991] 2 A.C. 1* at 35–36.

36. See [*President of India v Lips* \[1988\] A.C. 395](#) at 424, per Lord Brandon; [*President of India v La Pintada* \[1985\] A.C. 395](#); and [*The Fanti* \[1991\] 2 A.C.](#) at 35.
37. [*Transthene Packing Co Ltd v Royal Insurance \(UK\) Ltd* \[1996\] Lloyd's Rep. I.R. 32 QBD](#) at 40.
38. [*Transthene Packing Co v Royal Insurance* \[1996\] Lloyd's Rep. I.R. 32](#) at 40.
39. These principles were set out in the case of [*Hadley v Baxendale* \(1854\) 156 E.R. 145](#). See Consultation Paper (2011), para.2.6.
40. [*Blackley v National Mutual Life Association Ltd \(No.2\)* \[1973\] 1 N.Z.L.R. 668](#), in which a claim was treated as a contract debt and the usual rules of contract law applied. See Report (2014), paras 25.2 and 25.3.
41. For example, in [*Arbory Group v West Craven Insurance Services* \[2007\] Lloyd's Rep. I.R. 491](#). See Report (2014), para. 25.24.
42. [*The Italia Express \(No.2\)* \[1992\] 2 Lloyd's Rep. 281](#).
43. [*Sprung v Royal Insurance \(UK\) Ltd* \[1999\] 1 Lloyd's Rep. I.R. 111](#); [*\[1997\] C.L.C. 70 CA \(Civ Div\)*](#).
44. [*Apostolos Konstantine Ventouris v Trevor Rex Mountain \(The Italia Express \(No.3\)\)* \[1992\] 2 Lloyd's Rep. 281 QBD](#).
45. N. Campbell, "The Nature of an Insurer's Obligation" [2000] L.M.C.L.Q. 42.
46. C. Ying, "Damages for Late Payment of Insurance Claims" (2006) 122 L.Q.R. 205.
47. It has been said that there is no such thing as late payment of insurance money because insurers are not obliged to pay it by any particular time, unless the policy lays down a time for payment. For more, see M. Clarke, "Compensation for Failure to Pay Money Due: A 'Blot on English Common Law Jurisprudence' partly Removed" [2008] J.B.L. 291, 296.
48. [*Insurance Corp of the Channel Island Ltd v McHugh* \[1997\] L.R.L.R. 94 QBD](#) at 136–137. Mance J rejected the proposition that a term requiring payment within a reasonable time could be implied for two reasons: first, for such a term to be implied it would have to be mutual, and he doubted that the insured would have agreed to be under a duty not unreasonably to delay, misstate or overstate his case in making or progressing a claim; and secondly, since the insurer's primary obligation is to pay damages on the occurrence of the insured event, it would be inconsistent and unusual to have an implied contractual duty to assess and pay damages for which the insurer is already liable.
49. For more, see Clarke, "Compensation for Failure to Pay Money Due" [2008] J.B.L. 291.
50. Professor Merkin has suggested actions requiring good faith which are relevant in the context of damages for late payment of claims: (1) insurers should not plead policy defences other than with the utmost good faith; (2) insurers are under a duty to reach a timely decision on a claim; and (3) insurers must act with the utmost good faith in deciding whether the insured has established a claim under the policy. See *R. Merkin, "Reforming Insurance Law: is there a Case for Reverse Transportation?"*, http://www.lawcom.gov.uk/docs/merkin_report.pdf [Accessed October 9, 2014].
51. Consultation Paper (2011), para.3.1.
52. The Financial Conduct Authority provides detailed rules on claims handling by insurers, set out in the Insurance Conduct of Business Sourcebook. Rule 8.1.1 requires insurers to: (1) handle claims promptly and fairly; (2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress; (3) not unreasonably reject a claim (including by terminating or avoiding a policy); (4) settle claims promptly once settlement terms are agreed. See <http://fshandbook.info/FS/html/FCA/ICOBS/8/1> [Accessed October 9, 2014].
53. [*Section 138D\(2\) of the FSMA*](#) states that a contravention by an authorised person of a rule made by the FCA is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

54. Report (2014), para.26.68.
55. Report (2014), para.26.71.
56. Report (2014), para.26.73.
57. For more on how FOS handles disputes between businesses and consumers, see http://www.financial-ombudsman.org.uk/publication/technical_notes/QG7.pdf [Accessed July 25, 2014]. Under the [FSMA \(s.228\(2\)\)](#), it is required to decide disputes "by reference to what is in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case". This means that although the FOS will have regard to the law, where the legal result would be at odds with what it considers to be fair and reasonable, then the law will not be applied. In considering what is fair and reasonable the ombudsman may take into account: relevant law and regulations, regulators' rules, guidance and standards, codes of practice and industry practice: Consultation Paper (2011), para.3.27.
58. The FOS has a jurisdiction to hear complaints from both consumers and some small businesses with an annual turnover of less than €2 million and fewer than 10 employees: *FCA Handbook, DISP 2.7.3*.
59. Report (2014), para.26.75.
60. See FOS's website, http://www.financial-ombudsman.org.uk/publication/technical_notes/QG7.pdf [Accessed July 25, 2014].
61. [Hadley v Baxendale \(1854\) 9 Ex. 341](#) at 342. Losses may be recovered if they may "reasonably be supposed to be in the contemplation of both parties, at the time they made the contract". There are two limbs: the first limb relates to those losses which may fairly and reasonably be considered as arising naturally, "according to the usual course of things", from the breach; and the second limb is concerned with those losses arising from any special circumstances which were communicated at the time the contract was made.
62. Consultation Paper (2011), para.2.70.
63. Issues Paper 6 (2010), para.S.30.
64. Consultation Paper (2011), para.4.14. Paul Jaffe criticised the Law Commissions' proposals, and expressed his view that the proposals do not reflect any real need for a change in the law, in his paper "Reform of the Insurance Law of England and Wales: Separate Laws for the Different Needs of Businesses and Consumers" (2013) 126 B.I.L.A. Journal 18.
65. See Report (2014), Ch.27.
66. This is similar to the Australian approach. Australian courts have recognised, as a term implied in a contract of insurance, an obligation requiring the insurer to pay within a reasonable time (*Tropicus Orchids Flowers and Foliage Pty Ltd v Territory Insurance Office* [1997] NTSC 467). Furthermore, the High Court of Australia ([Hungerfords v Walker \(1989\) 171 C.C.L.R. 125](#), by Mason CJ and Wilson J) has disapproved Lord Brandon's dictum in [Lips](#) that "there is no such thing as a cause of action in damages for late payment of damages".
67. Draft Bill 2014 cll 14(1) and 14(5).
68. Report (2014), paras 27.3 to 27.5; Draft Bill 2014 cll 14(2) and 14(3). The Law Commissions have moved away from the proposed three-stage timetable for deciding a claim. This was discussed at paras 5.10 to 5.14 of the Consultation Paper (2011) and identified collecting information, assessing the claim and making a decision, and communicating that decision as separate milestones. Consultees had considerable misgiving about the complexity of this approach to calculating what is a reasonable time.
69. Report (2014), para 27.6; Draft Bill 2014 cl.14(4). This protects the ability of insurers to take a robust approach to decision-making where they suspect fraud or non-compliance with a policy term. The proposals are intended to catch bad claims handling practices, not prevent legitimate investigations by insurers.

- [70.](#) Report (2014), paras 27.9 to 27.11.
- [71.](#) Report (2014), para.27.7 reads: "In England and Wales, the limitation period for insurance claims will continue to run for 6 years from the date of the original loss, while we recommend that the period for late payment claims should run from the point at which the obligation to pay within a reasonable time is breached."
- [72.](#) Report (2014), para.28.70.
- [73.](#) Report (2014), para.27.12. The Commissions' aim is to make it possible for insureds to recover damages for late or non-payment of claims. Fundamental change to the structure underpinning insurance contract law would unnecessarily complicate these objectives, which can be achieved in England and Wales without the removal of the hold harmless principle.
- [74.](#) [*The Fanti \[1991\] 2 A.C. 1.*](#)
- [75.](#) Van der Klugt, "Law Reform and the Damages for Late Payment of Claims Proposals" (2012) 125 B.I.L.A. Journal 23.
- [76.](#) The clause continues: "If the Leading Underwriter(s) request additional documentation or information to make a decision, they shall make a decision within a reasonable time after receipt of the additional documents or information requested, or of a satisfactory explanation as to why such documents and information are not available."
- [77.](#) PEICL art.6:103(1).
- [78.](#) PEICL art.6:103(2).
- [79.](#) PEICL art.6:104.
- [80.](#) PEICL art.6:105.
- [81.](#) German Insurance Contracts Act 2007 s.187.
- [82.](#) Insurance Law 2009 art.10 provides: "The term 'insurer' shall refer to an insurance company that concludes an insurance contract with a proposer and assumes liability for payment of insurance monies."
- [83.](#) Insurance Law 2009 art.23.
- [84.](#) Insurance Law 2009 art.24.
- [85.](#) Insurance Law 2009 art.23.
- [86.](#) Insurance Law 2009 art.25.
- [87.](#) Insurance Law 2002 art.24 provides: "The insurer shall, after receipt of a claim for indemnity or insurance benefits from the insured or the beneficiary, determine the matter in a timely manner. The insurer shall inform the insured or the beneficiary of the result of the determination"
- [88.](#) This will be discussed later.
- [89.](#) Insurance Law 2009 art.19 provides: "The following terms and conditions in an insurance contract concluded by adopting the standard clauses provided by the insurer shall be invalid: (i) those that exempt the insurer of the obligations that the insurer should have borne according to law or that aggravate the obligations of the proposer and the insured; and (ii) those that deny the proposer, the insured or the beneficiary the rights that they should have been entitled to according to law."
- [90.](#) In China, a claim handling department is usually required to report a claim which exceeds certain amount of money to its Head Office of the Insurance Company.
- [91.](#) For example, see cl.17 of the All Risk Property Insurance Contract, Tai Ping Insurance Company of China

(2009).

92. 2009 version of the policy.
93. *Cheng Yang Transport Co v Pingan Insurance Co, Qingdao Shinan People's Court, Court Judgment (2010) No.20243*. See also *Zhang Shaojie v Pingan Insurance Co, People's Court of Pingdu City, Court Judgment (2010) No.2831*.
94. See the PICC's website, <http://www.epicc.com.cn/khfw/bzzx/lpfw/ajpfsx/> [Accessed October 9, 2014].
95. See J. Wang, *Insurance Cases: Judicial Rules and Application of Law* (People's Court Press, 2013), pp.182–183.
96. Insurance Law 2009 art.21 provides: "Where the proposer, the insured or the beneficiary knows the occurrence of an insured event, it shall notify the insurer thereof in a timely manner. Where notice is not sent in a timely manner intentionally or due to gross negligence, and as a result the nature, cause and extent of loss of the insured event are difficult to be ascertained, the insurer shall not be liable for making indemnity payments or paying insurance benefits in respect of the portion that cannot be ascertained, but with the exception that the insurer has known in time or should have known in time the occurrence of the insured event through other channels." Insurance contracts sometimes set a time-limit for the insured or the beneficiary to perform the duty of notification of the occurrence of the insured event. For example, cl.3.2 of the life insurance policy of the China Ping An Life Insurance Co Ltd (2013 version) states: "The insured or the beneficiary shall notify the insurer of the occurrence of the insured event within 10 days after he knows its occurrence."
97. See Wang, *Insurance Cases* (2013), pp.182–183.
98. For a sample claim application form, see the website of the China Life Insurance Co Ltd, <http://www.chinalife.com.cn> [Accessed October 9, 2014].
99. See Wang, *Insurance Cases* (2013), pp.182–183.
100. The Interpretation was passed by the Judgment Committee of the Supreme People's Court on May 6, 2013 and became effective on June 8, 2013.
101. The required evidence and documents for a claim vary for different types of policy and for different insurers. As a example, the claim documents for the PICC's household property insurance includes: the insurance policy, a claim application form, evidence for the loss (from the Department of Security, or fire brigade, etc.), a list of property loss, receipts for costs for mitigating the loss, evaluation of the lost property from an independent loss adjuster, and subrogation form if a third party caused the insured event to occur: see the PICC's website, <http://www.epicc.com.cn/khfw/bzzx/lpfw/ajpfsx/> [Accessed October 9, 2014].
102. Insurance Law 2009 art.22(2) provides: "Where the insurer, based on the provisions of the insurance contract, considers the relevant evidence or information supplied by the insured incomplete, the insurer shall, in a timely manner, advise the proposer, the insured or the beneficiary, once and for all, to provide additional evidence or information."
103. SPC Interpretation 2013 art.15(2).
104. Insurance Law 2009 art.24 provides: "After making a determination according to the provisions in article 23 therein, where the claim is not covered, the insurer shall, within 3 days from the date the determination is made, send to the insured or the beneficiary a notice rejecting indemnity or payment of insurance benefits and specifying reasons therefor."
105. "Notification Concerning Management of Rejection of Insurance Claims" by Shenzhen Insurance Regulatory Bureau China Insurance Regulatory Commission, *Shen Bao Jian Fa* [2012] No.89 (September 4, 2012).
106. *Mr Guo v The Insurance Co, Gansu Province Jiu Quan City Fuzhou Distinct People's Court, Civil Judgment (2010) No.166*. This case is reported in *China Insurance Society (ed.), The Annual Report of the Typical*

Insurance Cases (Volume III) (Law Press China, 2011), pp.255–257.

107. PEICL art.6:103 provides: "(1) The insurer shall take all reasonable steps to settle a claim promptly. (2) Unless the insurer rejects a claim or defers acceptance of a claim by written notice giving reasons for its decision within one month after receipt of the relevant documents and other information, the claim shall be deemed to have been accepted."
108. PEICL sets a time-limit of one week for payment of insurance money. Article 6:104(3) provides: "Payment of insurance money ... shall be made no later than one week after the acceptance and quantification of the claim or part of it, as the case may be."
109. *Guangdong Wenshi Food Co v People's Property Insurance Co of China Guangzhou Branch, Guangzhou Maritime Court, Civil Judgment (2005) No.103*, <http://old.simic.net.cn/news/detail.jsp?id=13884> [Accessed October 9, 2014].
110. *Cheng Yang Transport Co v Pingan Insurance Co, Qingdao Shinan People's Court, Court Judgment (2010) No.20243*. See also *Zhang Shaojie v Pingan Insurance Co, People's Court of Pingdu City, Court Judgment (2010) No.2831*.
111. Insurance Law 2009 art.19.
112. SPC Interpretation 2013 art.25(2).
113. Insurance Law 2009 art.25 provides: "If the amount of indemnity payment or insurance benefits cannot be determined within 60 days of receipt of the claim for indemnity payment or insurance benefits and the evidence and information relevant thereto, the insurer shall effect payment of the amount determinable with the evidence and information available; the insurer shall pay the difference accordingly after the final amount of indemnity payment or insurance benefits is determined."
114. PEICL also requires an insurer to make preliminary payment. Article 6:104(2) provides: "Even if the total value of a claim cannot yet be quantified but the claimant is entitled to at least a part of it, this part shall be paid or provided without undue delay."
115. *Lei Jun Yan v Behai Property Insurance Co Ltd, Xuchang Branch, Henan Province Xuchang City Intermediate People's Court, Judgment on May 10, 2010*, http://www.110.com/panli_4109190.html [Accessed October 9, 2014].
116. Insurance Law 2009 art.23(2) provides: "Where the insurer fails to fulfil its obligations as prescribed in the preceding paragraph in a timely manner, the insurer shall compensate the insured or the beneficiary for any damages incurred therefrom, in addition to payment of the amount insured."
117. Insurance Law 2009 art.23(2).
118. In the Chinese legal system, specific law prevails over general law. The Insurance Law is a specific law as compared with the Contract Law. For matters that the Insurance Law covers, the Insurance Law prevails. For matters the Insurance Law does not deal with, the Contract Law operates.
119. *Hedley v Baxendale (1854) 9 Ex. 341*.
120. For more, see *Mo Zhang, Chinese Contract Law: Theory and Practice (Martinus Nijhoff Publishers, 2006), p.307*.
121. Article 64 of the Civil Procedure Law of the People's Republic of China provides: "It is the duty of a party to an action to provide evidence in support of his allegations.

If, for objective reasons, a party and his agent ad litem are unable to collect the evidence by themselves or if the people's court considers the evidence necessary for the trial of the case, the people's court shall investigate and collect it.

The people's court shall, in accordance with the procedure prescribed by the law, examine and verify evidence comprehensively and objectively."

- [122.](#) *People's Insurance Co of China, Yaoping Branch v Chaozhou City Huafeng Petroleum Product Storing Co, Guangdong Province High People's Court, Civil Judgment (2004) No.22*, http://www.110.com/panli_54667.html [Accessed October 9, 2014].
- [123.](#) Insurance Law 2002 art.24(2) provides: "Where the insurer fails to fulfil its obligations as prescribed in the preceding paragraph in a timely manner, the insurer shall compensate the insured or the beneficiary for any damage incurred therefrom, in addition to payment of the amount insured." This is exactly the same as art.23(2) of the Insurance Law 2009.
- [124.](#) C.J. Goetz and R.E. Scott, "The Mitigation Principle: Toward a General Theory of Contractual Obligation" (1983) 69 Va. L. Rev. 967.
- [125.](#) Contract Law 1999 art.119 provides that "after a party breaches the contract, the other party shall take appropriate measurements to prevent any increase in the loss; if the appropriate measures fail to be taken, thereby causing an increase in the loss, no compensation may be claimed in respect of the increased loss".
- [126.](#) Contract Law 1999 art.119.
- [127.](#) *Hainan Hongye Wool Textile Co v Hong Kong Minan Insurance Co, Haikou Branch, Haikou City Intermediate People's Court, Civil Judgment (2005) No.2*, <http://www.zfwlxt.com/html/2007-10/200710132110511.htm> [Accessed October 2013].
- [128.](#) The time point when the insurer is deemed to be in breach of his duties to assess and pay claims and the starting point for the interest to run will be discussed later.
- [129.](#) Insurance Law 2009 art.23.
- [130.](#) *People's Insurance Co of China, Yaoping Branch v Chaozhou City Huafeng Petroleum Product Storing Co, Guangdong Province High People's Court, Civil Judgment (2004) No.22*, http://www.110.com/panli_54667.html [Accessed October 9, 2014].
- [131.](#) The court should at least award interest to the insured for the late payment of the amount of insurance proceeds.
- [132.](#) *Mr Yang v The Insurance Company*: see Xie Xian, *A Hundred Insurance Cases (Law Press China, 2011)*, pp.399–400.
- [133.](#) Insurance Law 2009 art.23.
- [134.](#) This time point was determined following art.23 of the Insurance Law 2009 which requires the insurer to determine a complex claim within 30 days of receipt of the insured's claim.
- [135.](#) Insurance Law 2009 art.23.
- [136.](#) *Mr Wang v The Insurance Company, Beijing City Miyun County People's Court, Civil Judgment (2009) No.06207*. This case is reported in *China Insurance Society (ed.), The Annual Report of the Typical Insurance Cases (Volume II), (Law Press China, 2010)*, pp.444–446.
- [137.](#) Insurance Law 2002 art.24 provides: "The insurer shall, after receipt of a claim for indemnity or insurance benefits from the insured or the beneficiary, determine the matter in a timely manner. The insurer shall inform the insured or the beneficiary of the result of the determination" The law did not set out a 30-day time-limit but only required the insurer to act "in a timely manner".
- [138.](#) Insurance Law 2002 art.26 provides: "If the amount of indemnity payment or insurance benefits cannot be determined within 60 days of receipt of the claim for indemnity payment or insurance benefits and the evidence and information relevant thereto, the insurer shall effect payment of the minimum amount determinable with the evidence and information available; the insurer shall pay the difference accordingly after the final amount of indemnity payment or insurance benefits is determined." The only difference between art.26 of the 2002 version and art.25 of the 2009 version of the Insurance Law is that art.26 of the

2002 version requires the insurer to make a preliminary payment of the minimum amount determinable with the evidence and information available.

139. *Beijing Lu Gou Bridge Zhi Hong Concrete Co v People's Insurance Co of China (Property)*, Nan Le Branch, Beijing City Feng Tai District People's Court, Civil Judgment (2009) No.891; see <http://lawyer.legaldaily.com.cn/judgement/default/uuid/95008673490825525> [Accessed October 7, 2013].
140. Insurance Law 2002 art.26.
141. *Mr Gu v An Bang Property Insurance Co Shanghai Branch*, Shanghai First Intermediate People's Court, Civil Judgment (2010) No.233.
142. In practice, the SPC has instructed the courts to adopt the interest rate set by the People's Bank of China for default on loans for assessing interest loss for late payment of the loan. See "The SPC Reply on the amendment of the SPC Reply to the Question What Standard of Calculation Should Be Adopted for Liquidated Damages for Delayed Payment", SPC Gazette, 2000, p.203; "The SPC Reply to the Question What Standard of Calculation Should Be Adopted for Liquidated Damages for Delayed Payment", SPC Gazette, 1999, p.58.
143. The courts usually use the interest rate set by the People's Bank of China to calculate the interest.
144. By contract, under current English law, the starting point for the running of interest is the date on which the insured peril occurred, as that is the deemed date at which the assured's action accrues, and interest terminates at the date of judgment. For more on the date of running of interest, see *Colinvaux's Law of Insurance* (2010), para.10-027.
145. *Shanghai Zhenan Co v PICC Property Co Wenzhou Branch*, Ningbo Maritime Court, Civil Judgment (2007) No.25 (see *Property Insurance Law* (Intellectual Property Press, 2009), p.259).
146. *China Pingan Property Insurance Co Fanyu Branch v Mr Pan Jingxing*, Guangdong Province Guangzhou City Intermediate People's Court, Civil Judgment (2006) No.1910, http://111.com/panli_80898.html [Accessed July 22, 2013].
147. *China Pacific Property Insurance Co, Dongying Branch v Zhong Xiohai*, Shandong Province Dongying City Intermediate People's Court, Civil Judgment (2005) No.62 (http://www.110.com/panli/panli_31389.html [Accessed October 10, 2014]).
148. *Minfeng Special Paper Co Ltd v Gerling Allgememeine Versicherungs AG*, Shanghai Maritime Court, Civil Judgment (2004) No.91 (<http://sifaku.com/falvanjian/4/za59dd9ebec6.html> [Accessed October 10, 2014]).
149. *Guangdong Fuhong Oil Products Ltd v China Ping An Property Insurance Co Ltd, Shenzhen Branch*, Guangzhou Maritime Court, Civil Judgment (2005) No.211 (<http://haishang-law.com/Article/haishanghaishi/haishangjingdian/201101/4304.html> [Accessed October 10, 2014]).
150. *People's Insurance Co of China, Nankang Branch v Nankang City Laoxiong Kelong Store*, Ganzhou City Intermediate People's Court, Civil Judgment (2005) No.207 (http://www.110.com/panli_66888.html [Accessed October 10, 2014]).
151. Insurance Law 2002 art.24.
152. *Property Insurance Co of China Hainan Branch v Fenghai Oil and Grain Co Ltd*, Trial Court: Hainan Province Haikou Maritime Court, Civil Judgment (2005) No.35; Appeal Court: Hainan Province High People's Court, Civil Final Judgment (2005) No.35.
153. The Haikou Maritime Court made the judgment for the following reasons:

1. The insurer's argument that the right of the insured to claim for interest lapsed because the insured failed to make such a claim within two years of the occurrence of the

insurance event was unfounded. According to art.137 of the Civil Code, the limitation period starts to run from the time the plaintiff has known or ought to have known that his right has been prejudiced. During the period from the date when the two parties received the letter of judgment from the Haikou Maritime Court (December 25, 1996) to the date when the insurer received the letter of retrial judgment from the SPC (August 16, 2004), whether the insured's claim for the insured amount would be upheld by the courts was uncertain. Only when the insured had received the letter of retrial judgment from the SPC (August 16, 2004) was it possible for the insured to know for certain that he was entitled to the insurance payment for the loss of cargo and also for the insured to work out the amount of interest loss on the basis of the amount of insurance payment (US\$3.6 million). Thus the insured's lawsuit for interest was within the two-year limitation period.

2. The insurer also argued that the insured's interest loss was not due to the fault of insurer's delay in making insurance payment but the courts' delay in making judgments. This argument was not persuasive. After receiving the letter of judgment from the trial court (December 25, 1996), the insurer should perform its obligation to pay the insured amount (US\$3.6 million) for the cargo loss. Instead, the insurer appealed, and the SPC eventually upheld the trial court's decision. It was the insurer's appeal that led to the retrial of the case and consequential loss of interest. According to art.23 of the Insurance Law 2002, the insurer should pay the insured the interest loss incurred by his delay in paying the insurance money for the period from the day of receiving the letter of judgment from the trial court (December 25, 1996) to the day of receiving the letter of retrial judgment from the SPC (August 16, 2004).

- [154.](#) However, of the 32 responses, 3 disagreed, arguing that there were no reasons why costs attributable to delays in litigation should be borne by the insurer. See *Summary of Responses to Issues Paper 6 (2010)*, para. 4.9.
- [155.](#) Report (2014), para.27.6.
- [156.](#) Draft Bill 2014 cl.14(1).
- [157.](#) Report (2014), para.28.16.
- [158.](#) Draft Bill (2014) cl.14(1).
- [159.](#) Insurance Law 2009 art.26.
- [160.](#) In English law, under the "hold harmless" principle, the insurer is considered to be in breach as soon as the harm occurs and thus the limitation begins to run at that date. See [Callaghan v Dominion Insurance Co Ltd \[1997\] 2 Lloyd's Rep. 541 QBD](#). The Law Commissions recommended that in England and Wales, the limitation period for late payment claims should run from the point at which the obligation to pay within a reasonable time is breached. Under Scots law, limitation begins to run only after the passing of a reasonable time for investigation of the claim. See [Strachan v Scottish Boatowners' Mutual Insurance Association 2010 S.C. 367 CS \(OH\)](#).
- [161.](#) The General Principles of the Civil Law of the People's Republic of China were promulgated in 1986; they are referred to as the Civil Code.
- [162.](#) The only exception to this rule is provided in art.113(2) of the Contract Law, which states: "If a business operator commits a fraudulent act in the supply of merchandise or service to a consumer, he is liable in damages pursuant to the provisions of the Consumer Rights and Interests Protection Law of the People's Republic of China." Article 49 of the Consumer Rights and Interests Protection Law provides: "If a business operator commits a fraudulent act in the supply of merchandise or service, compensation for the loss sustained by the consumer shall be increased one time the price or remuneration for which the consumer

purchases the merchandise or receives the service."

- [163.](#) See Lowry and Rawlings, "Insurers, Claims and the Boundaries of Good Faith" (2005) 68 M.L.R. 82; and R.E. Pomerantz, "Punitive Damages: An Insurer's View" [1980] Ins. L.J. 21.
- [164.](#) The time-limits are briefly summarised as follows: 30 days for making a decision on a claim; 3 days for sending a rejection notice to the insured; 10 days for making a payment; and 60 days for making a preliminary payment.
- [165.](#) This suggestion is made by referring to the view of the majority of consultees: see *Summary of Responses to Law Commissions' Issues Paper 6 (2010)*, para.4.9. Also see *Property Insurance Co of China Hainan Branch v Fenghai Oil and Grain Co Ltd*, Trial Court: Hainan Province Haikou Maritime Court, Civil Judgment (2005) No.35; Appeal Court: Hainan Province High People's Court, Civil Final Judgment (2005), No.35.
- [166.](#) Insurance Law 2009 art.20.
- [167.](#) Civil Code art.137.
- [168.](#) This was the decision by the Haikou Maritime Court in *Property Insurance Company of China Hainan Branch v Fenghai Oil and Grain Co Ltd*, Civil Judgment (2005) No.35.
- [169.](#) Van der Klugt, "Law reform and the damages for late payment of claims proposals" (2012) 125 B.I.L.A. Journal 23.
- [170.](#) See International Hull Clauses 2003 cl.46.7.
- [171.](#) This is the approach in SPC Interpretation 2013 art.15.
- [172.](#) See PEICL art.6:104, and Insurance Law 2009 art.23.
- [173.](#) See Insurance Law 2009 art.24.
- [174.](#) See Insurance Law 2009 art.25.