بسم الله الرحمن الرحيم

# *Some Aspects of the Doctrine of Subrogation in Insurance law*

*By Imtithal . Babiker Ahmed*
*Faculty of law*
*University of Khartoum*

*Supervisor*
*Dr. Mohamed Ibrahim Eltahir*

*Thesis submitted in partial fulfillment of the requirements of the LLM Degree*
*Faculty of law – University of Khartoum*
*April – 2006*

## *Acknowledgement*

I would like to express my sincere appreciation, thanks and respect to Dr. Mohamed Ibrahim Eltahir who ,despite his responsibilities, agreed to supervise this Thesis with much patience, assistance and fruitful guidance.

Also I acknowledge Ustaz Elsadig Sidahmed Elshamii , Advocate and Dr.Adel Atiyah Hassan for generously supplying me with books & materials in the subject matter of this Thesis . Also my thanks to Dr. Elhaghamad for his assistance .

Special thanks to my husband Ammar Abdelhameed Osman for his encouragement and insistence to complete this Thesis. And thanks to all who helped me.

## *Abstract*

The concept of insurance began to spread since the Eighteen century due to its importance in our daily, economic and social life. Its own principles began to be adopted till it has became a law.

One of these principles is the doctrine of subrogation. By this doctrine the insurance company is being able to subrogate the insured by suing the third party who actually caused the damage insured against.

This research contains three chapters in addition to the introduction and the conclusion.

The first chapter addresses insurance in general and the contract of insurance in particular, Its definition, difference from other type of contracts, parties to it in addition to it is own principles for example ubrimafide, and the duty of disclosure.

The second chapter handles subrogation, historical background, definition, criticisms against, Its procedure, the situations under which there is no right of subrogation, and wavier of this right.

The third chapter discuss the indemnity, its relation with subrogation, the Assessment of indemnification, co insurance and double insurance, and the uninsured losses.

At last the conclusion which contains the recommendations and suggestions.

# الخلاصة

بدأ التأمين ينتشر منذ القرن الثامن عشر في اوربا ونظراً لاهميته في حياتنا الاقتصادية والاجتماعية لذا بدأت بعض المبادئ الخاصة به تطبق حتي اخذت قوه النصوص القانونية واصبحت قانونا واجب التطبيق ومن هذه المبادئ مبدأ الاحلال في قانون التأمين وهو موضوع هذا البحث ، حيث ان شركة التأمين تستطيع وفقا لهذا المبدأ ان تحل محل المؤمن له – في حالة حدوث الضرر او الخسارة المؤمن ضدها – وذلك بمقاضاه الطرف الثالث المتسبب الحقيقي في الضرر المؤمن ضده وبهذا يستطيع المؤمن ان يسترد ما قام بسداده للمؤمن ضده جبرا للضرر وفي ذات الوقت لايفلت الطرف الثالث وهو المتسبب الخقيقي في الخسارة المؤمن ضدها من مسئوليتة في تسبيب الضرر .

يتكون هذا البحث من ثلاث فصول تناول الفصل الاول التامين في الحياه الاقتـصادية والاجتماعية والقانونية كما تناول عقد التأمين من حيث التعريف به ، اختلافـه عـن العقود الاخري ، اطرافه ، مده انتهاءه ، بالاضافة الي خـصوصية عقـد التـأمين بالنسبه للعقود الاخري كمبدأ الكشف عن كل ما يعلمه المؤمن ضده مـن معلومـات وحقائق تخص الشئ موضوع التأمين، ومبدأ ابدا حسن النية عند ابرام عقد التأمين .

كما تناول الفصل الثاني الاحلال بصفة عامة ، خلفية تاريخية عنه، تعريفه ، النقد الذي وجه له ، كيفية تطبيقه، الاجراءات القانونية وغيرها لتطبيقه ، بالاضافة الي الحالات التي لايطبق فيها هذا الحق بجانب امكانية التنازل عنه .

فيما تناول الفصل الثالث التعويض في قانون التأمين وعلاقته بمبدأ الاحلال ، كيفيـة تقدير التعويض عند تزاحم المؤمنين، التأمين المزدوج والخسائر الغير مؤمنة .

واخيرا الخاتمة التي احتوت علي ملخص البحث اضافة للتوصيات والمقترحات .

بسم الله الرحمن الرحيم

**Table of contents :** **Page**

**Chapter Three:-**

**Indemnity**

# INTRODUCTION:-

The concept of insurance was known since the risk of losing ships and cargos at sea. It began to be adopted by merchants in the sixteenth century. It is well known that marine insurance is the first type of insurance[1]. After that people began to know other types of insurance, against fire (after the great fire of London 1666) . This was followed by personal accidents insurance, and the concept of insuring spread till it covered all sorts of transactions such as industrial insurance in nineteen century, as well as life insurance. By now every imaginable accident can be insured against.

Similar to other Common law concepts, Lord Mansfield (as Lord Chief Justice in the mid eighteenth century) applied the principles derived from the merchants to solve the disputes over insurance[2]. By 1788 the jurisdiction of the courts over Insurance matters had

[1] . Abumedin Eltayeeb Lecturers in insurance. Training & legal reform institute 1997, page 9
[2] John Birds / Modern insurance law ( London : Sweet & Maxwell 1988 ) p.2

been established. The Marine insurance Act 1746 was replaced by the Marine Insurance Act 1960 and it established for the first time that the insurers must have an insurable interest.

The research will concentrate on subrogation and the third party liablity. The doctrine of Subrogation provides that if an insurer pays a loss due to the wrongful act of another, the insurer is subrogated to the rights of the insured and may prosecute a suit against the wrongdoer for recovery of the amount of damages paid.

The fundamental rule of insurance law is that contracts of insurance must contain an indemnity, so the measurement of indemnity will be emphasized, and for that reason, the doctrine of Subrogation is applied widely to insurance, yet there has been some dispute as to the origin of the doctrine of Subrogation.

Because many, if not all transactions are now subject to be insured against damages or loss e.g. fire, property and even liability, so the discussion includes the obligations of each party (insurer, insured) and the insurer's duty to the insured and the third party.

Beside trying to find an answer to such questions raised from on going discussion i.e. the case of denying the subrogation right by the third party is the insurer still has the right to subrogate ? If there is more than one person interested in the same property (co-insurance) how the subrogation rules applied?.

Another important issue relate to the research topic is that the insured cannot make a profit from his loss and that for any profit he does make he is accountable in equity to his insurer. Also the discussion will tackle the insured right to sue a third party liable to pay damages in tort or for breach of contract.

The third party's liability in the event that the insured recovered from his insurer the amount of indemnification, what agreed upon was to prevent the insured from being indemnified and profited from his loss. The discussion will be in light of the doctrine that the insured must be indemnified.

The discussion will depend on the English law beside Sudanese Laws and their applications in courts.

English law began with Marine insurance law, which was codified in the Marine Insurance Act 1906.

The Sudanese Laws governing this research are the Civil Procedure Act 1983, Civil Transactions Act 1984, and The Insurance Business Supervision & Control Act 1992, which is by now substituted by Insurance Control Act 2001, and the Insurance & Takafoul Act 2003 .

# CHAPTER ONE

## General Principles of Insurance Law :-

### Introduction:

In this chapter the research is devoted to brief historical background of developing insurance legislation and its adoption in reality, beside the definition of contract and policy of insurance in particular.

### 1/History of the Development of Insurance Legislation :-

As mentioned in the introduction, the concept of insurance was known since the risk of losing ships and cargos at sea. It began to be adopted in the sixteenth century, and it is well known that marine insurance is the first type of insurance. The first English insurance law was Elizabeth Act 1601 which was issued during Elizabeth (I) Queen period[1]. It is important here to notice that the scholar Aba Mohamed Ibn Gadamaa who died in the year 1223

[1] Dr. Esaa Abdo Eltameen baynaa Elhel wa eltahreem . Eletesam house .1997 P 75

A.D had written his famous encyclopedia which is named Elmagnaa in the year 1176 A.H and he talked about cargo insurance at sea[1].

In Sudan the first Sudanese insurance company was established with the purpose of providing motor vehicle insurance in1960 the Insurance Control Act 1960 was promulgated. Before there was no legislative regulations on the carrying on of the business of insurance. [2] The 1960 Act continued till it was amended in 1970 and in 1992 it was replaced by Insurance Business Supervision and Contract Act 1992. This Act made it imperative on all insurance companies working in Sudan to carry on insurance in accordance to Islamic principles.[3]

In United States of America a first insurance company against fire was established since 1725 and in 1906 the first Act of marine insurance appeared in England and continued up to now.

At first there were no separate insurers, a group of merchants would agree to bear each other risks among themselves.

---

[1] Aba Mohamed Ibn Gadamaa ,Elmaghnaa , 4 volume Dar elmanar 1367 Hegreeia P. 565

[2] . Dr Adel Atiya hassan Ph.D thesis . Uof K Automobile accidence compensation system2004

[3] supra PHD Adel Atiya

Individuals insurance appeared in United Kingdom and France and became prominent because for the Marine dominant of these two states e.g. Lloyds's London have became the most eminent for marine insurance.[1]

Insurance continued to be individual until the great economic crisis in 1720, and the need for companies that are capable of standing for the compensation of those insured arose. Two main companies appeared after this crisis and they continued up to now. These companies are Royal Exchange Assurance Corporation and London Assurance [2]Corporation.

After marine insurance people began to know other types of insurance against fire, accident, in nineteenth century insurance against accident has been acknowledged and it covered industry due to the industrial revolution in 1789. But as for life insurance there was a great dispute upon it and with it is modern concept it appeared in England in about 1300, in France it appeared in 1778 while in USA the first company appeared in 1900 and in the mid

[1] . Loyd's is a center for ship and commodities insurance was established by an Italian man. Idward loyd's who owned a café under his name in 1666

[2] . Dr Abdelgader Elatter .On land Insurance in Legislation. House of culture for publishing & distribution. 2001 page 24.

eightieth of the twentieth century it reached two thousand companies. The total insurance premiums in USA have reached 485 Billion USA Dollar. This makes insurance companies an economic power so vital in their society.

**Benefits of insurance**: - Insurance by now is a most important element in economic legal system providing social and mental security for those insured in a word full of risks. Insurance gives the insured a very strong sense of independence and self reliance.

Insurance is a matter of security. The insured is seeking to protect him self against risks. Also insurance is economic, legal and social system. It is an economic system by which risk is reduced, by means of transfer and amalgamation of uncertainty with regard to financial losses. It is a legal system by which risks are indemnified. Or its a commercial system by which some commercial projects be established. Or it may be considered as a social system which allow the majority to pay for the lost of minority.

Insurance as a commercial institution is considerers as a basis for credit. As such it is a major factor in free economic policies.

Insurance reduce losses and provides compensation that helps the insured to meet their obligations.

Insurance beside it encourages saving as the insurance premium is always very little , it also provides capital for investment as insurance companies are invests their saving (Assets) in many aspects that serve national economic.

Insurance companies conduct a lot of prevention activities that help to reduce loss of life or property for example: - safety of lifts.

**2/Legal Definition of Insurance law & Formation of Insurance contract:-**

A contract in general is an agreement definite and clear enough between two or more persons . (Its terms must be understood and enforceable, and there must be a legal subject matter ,and particular form if required , beside the contract must be between persons who have capacity , and must be free from mistake ,fraud or duress ) . If the terms of the contact are broken a court of law will award damages. When we talk about insurance contract we find that the general contractual rules- offer, acceptance,

consideration, intention to create legal relationship are applied to the insurance contract although it has its own principles, for example the doctrine of uberrima fides (which means utmost good faith). Beside it may be regarded as a type of adhesion contract. But the compulsory insurance which is provided for under traffic laws is not considered as a sort of adhesion contract as it is aiming to protect the third partie's damage more than the insured's loss . In Sudan [1] the Road Traffic Act imposes on every driver or user of a car an obligation to carry liability insurance coverage against his liability to a third party for personal injuries or damage to property. The English Insurance Companies Act 1974 and 1981 have never contained a definition of the meaning of the contract of insurance, but suggested that a contract of insurance is any contract whereby one party insures the risk of an uncertain event (the uncertain event need not be adverse to the other party ) and this event is not within his control, happening at future time, the other party has an interest, and the first party is bound to pay money or provide its equivalent if the uncertain event occurs. The contract of insurance

[1] Section 58 of the Road traffic Act 1983

is defined clearly in Sudanese law in Section 475 of the Civil Transactions ACT 1984 ( insurance is a contract which binds the insurer to pay to the insured or to the beneficiary who caused the insurance to be entered in his favour, a sum of money or a salary income or any other financial returns in the event of occurrence of an accident insured against or the occurrence of the risk specified in the contract, and this is in return for affixed amount or periodical installments payable by the insured to the insurer.

The insurance contract has been defined by Insurance and Takafol Act 2003[1] as follows :-

A contract by which the insurer undertakes on behalf of the insured to pay for the insured or beneficiary a sum of money or any compensation, in case of the happening of the event subject of the insurance, or in the case of the occurrence of the risks specified in the contract, and that is against a certain amount paid by the insured to the insurer, by way of donation to meet the obligations of the insurer."

[1] It is the most recent law in Sudan, and was passed 25 June 2003

The question is what distinguishes the contract of insurance from other type of contract?

**Firstly:-** As other form of contracts there must be a binding contract stating clearly that the insurer must be legally bound to compensate the other party (insured).

**In Medical Defence Union . V. Deptment of Trade 1979** [1]

The plaintiff was a company whose members were practising doctors and dentists. Its business consisted primarily of conducting legal proceedings on behalf of its members and indemnifying them against claims made against them in respect of damages and costs. The court held that the company was not carrying on insurance business and right to request assistance is not a contract of insurance.

In the situation of a manufacture who contractually guarantees his products to his consumer for example a washing machine manufacture who undertake to repair any fault arising from defective manufacture within a year of purchase, it is clearly understood that defect in manufacturing is not considered as an

[1] . 1997 ) 2 ALL ER 421

insurance obligation because this is only an undertaking to provide a service in moneys worth in certain event in which the consumer clearly has an interest, surely he has not entered into a contract of insurance.

**Secondly :-** There must be an uncertain event happening in the future. (To adopt this definition in the life insurance here the uncertainty is as to the time it will occur, It has to be mentioned that Sudanese Insurance & Takaful Act 2003 , does not include life insurance despite its clear stating of insurance against civil responsibility in Section 15 , and fire in Section 17 and insurance against carriage risk in Section 18 ).

**Thirdly**: - The insured must have an insurable interest in the liability, property which is the subject of insurance.

**Fourthly:** - The event insured against is being outside the control of the party assuming the risk.

A contract may be discharged on the ground of frustration when something occurs after the formation of the contract and due to this it become impossible to execute the contract or fulfill the

obligation ,but in insurance contract the doctrine of frustration doesn't apply, since there is a well established principle that no part of a premium is legally recoverable where the subject matter of the risk ceases to exist before the period of the insurance expires[1].

As we stated above general rules of the law of contract are applied in the contract of insurance we will try to explain these briefly:-

**Offer :-** An offer to enter in to an insurance contract may be made by a prospective insured or by an insurer. proposal forms are of course standard documents prepared by insurers , the insurer may simply accept the offer or may accept it with conditions, in all cases there must be an agreement as to the amount of the premium, the nature of the risk, the subject matter of the insurance, besides the duration of the contract.

**Acceptance**:- The general rule of the law of contract is that the acceptance of an offer is not effective until it is communicated to the offeror. Acceptance is subject to payment of the first premium

[1] Chitty on contarct , General principles the common law library , 27th edition , Sweet & Maxwell 1994 page 1146

so there is no binding contract until the premium is paid unless the parties agreed to contrary . Although the insurer would not be liable for any loss occurring before the premium was paid, non disclosure of change in the risk before the premium is paid will not entitle the insurer to avoid the contract.

**Temporary cover and cover notes:-**

It is common practice in many different type of insurance, for insurer to agree to temporary cover upon first receipt of proposal. This cover note are fully effective contract of insurance.

Authority to conclude a binding cover note will often be vested in an agent, regardless of whether or not an insurer has expressly conferred authority on an agent to issue cover notes.

The contract being concluded by the insurer or its agent temporary acceptance of the proposal's offer, provided that the material terms are agreed or discussed earlier. It will then last for the stated period or until earlier termination by the insurer upon being takeover by a formal policy.

It should be noted that as the cover note is a proper contract of insurance, the proposer is under a duty to disclose all material facts to the insurer prior to its conclusion.

In **Metts V. central stardard life insurance Co**.[1]

In this case the insurer company agreed that the immediate first day coverage automatically covers the entire family. The insured signed the application and sent it by post. After six days and before the insurance company decided in the application of insurance, one of the family members was infected with measles disease. It was held that it is a logical interpretation that the insured and his family had automatic protection from the date of signing the application and sending it by post.

**Duration: -**

The duration of an insurance contract is subject to the policy of insurance. As life insurance contract is different from other insurance polices, there must be a presumption that life insurance contract is entire, existing until the death of the insured or a

[1] . Anderson O P LIT page 499

specified fixed date in the case of an endowment or term policy, provided that the premiums due are properly paid.

The policy determines the expiry date of the contract.

The parties may choose to renew the contract upon expiry of such policy, the renewal is a new contract, and here the duty of disclosure is also required.

The policies may contain a condition entitling either party to cancel them after giving notice to other party showing the cause, but this is not absolute ( to show cause ).

In the case of cancellation there must be a period of notice before cancellation can take effect in order to enable the insured to seek a new cover, besides that the insurer must have a good reason to cancel specially where the insurance is compulsory. In **Moore .v. Halfey** [1] the agent gave a renewal receipt on a form of cover note for an original insurance and it was held that limitation of liability for fourteen days did not apply as the agent had authority to renew the policy.

---

[1] ( 1883 ) 9 VLR 400

In case the policy is silent as to renewal, any renewal is a probably a new contract, and here the duty of disclosure is raised again as if he is applying for an original policy.

The policy remains in force until the date of expiration of the period of insurance unless the policy contains an extension clause. Also the parties may renew the policy by mutual consent, the insured may express his desire to renew the policy here the insurer may either accept or refuse it.

The parties may agree to cancel the policy during the period of the insurance, either for the purpose of termination the contract between them or for the purpose of establishing another one. However the agreement for cancellation must clearly be shown. The cancellation may also be by court order, on the ground of fraud, misrepresentation or non disclosure.

**The Policy:-**

Because the policy is the main document upon which the legal obligations for each party (insurer & insured) depends we will discuss it in details.

The word policy is derived from the Latin word policeri which means Undertake.[1]

Policy is defined in Oxford Dictionary, as a document containing an undertaking in consideration of premium or premiums to pay a specific amount or part thereof in the event of specified contingency.[2]

There are no conditions and restrictions on the form of the policy but standard forms of policy are normally used and these are different from company to company.

Sometime proposal form and policy must be read together so as to determine the obligations of the parties. The policy is a major document as it contains the name of the parties, the reference number of the policy, the sum insured and the amount of premium, the description of subject matter, the event insured against, conditions and the period for which the policy is in force, and the period of insurance .. etc.

All policies of insurance may be classified in two ways :-

---

[1] . Elwaseet . elsanhoryi volume 2

[2] Eltameen bayna Elhell wa Eltahrrim D. issa abdo House of Eletessam 1997 page 75

The first one is according to the description of the subject matter and here the insurance matter may be specified e g. policies of insurance against car accidents. Or it may be expressed in general terms e g.  polices of insurance on property generally .

And the second one is accordance  to the amount recoverable in the event of loss, and here it either be unvalued policies –it is a policy which doesn't specify the sum to be paid to the insured, and it is valued after the loss happened e g. insurance against liability - . Or to be valued policies, under this type the amount revocable is fixed by the policy and the valuation here is binding except in the case of fraud or mistake.

In any dispute between the parties concerning the application of the policy and if it contains the real contract agreed between parties, the court will refer to what the parties had agreed upon in the stage of negotiations including any preliminary documents (proposal) in order to discover if there is any concluded agreement and its precise terms. The court however is entitled to look at other

documents where there is any ambiguity as to the meaning of the worlds used in the policy.

The liability of the insurer is determined by the policy conditions. If the policy provide fulfillment of a specific matter (e g. Payment of premium), the insurer is not liable until the condition has been satisfied, though the policy prima facie comes in to force from the date it is issued and the insurer becomes liable irrespective of whether the premium is paid or not.

There are certain conditions which govern the validity of every policy of insurance unless the parties exclude them expressly. These conditions are either expressed or implied, for example, the parties shall observe good faith towards each other, the subject matter of insurance is in existence at the time when the policy is effective, the subject matter is accurately described, and the insured has an insurable interest in the subject matter of insurance.

The risk insured against must be the risk described in the policy

Thus in **Clark .v. National insurance and Guarantee Corp ltd**[1] Where nine people were being carried in a car designed to carry four and it was held that the insurers were not liable. Also in **Asalmon Contractors ltd v Monksfield**[2]. where the policy stated that the insurers were not to be liable if the vehicle is used in an unsafe condition it was held that the faulty loading of a lorry had no effect on the safety of the vehicle and accordingly the vehicle was not used in an unsafe condition. The Sudanese Insurance and Takaful Act 2003 defines clearly on S ( 5 ) the risk insured against is any damage cause by fire, burglary transportation danger, car accident, civil responsibility and any other danger that may influence an economic interest.

**3/ Parties to the Contract of Insurance:-**

Before we discuss the main principles in insurance which is the duty of disclosure and Ubremia fide principle we will define briefly the parties of the contract of insurance.

---

[1] . (1964 ) IQB .199 (1963) 3 ALL E.R 375 CA ( motor insurance )
[2] 1970 ) 1 Loyd's Rep 387 Mayor's and city of London court (motor insurance

**The Insurer**:-

The insurer is any one who in fact enters in to a contract of insurance and he has permission to do this. This permission is regulated by statute. In Sudan an insurer is not entitled to carry on insurance business unless it is a company constituted under the Companies Act 1925 and it must have a share capital as prescribed by Surveillance of Insurance Act 2001. The insurer is defined under S(3) of The Surveillance of Insurance Act 2001(which substituted the Insurance Business Supervision & Control Act 1992). Any company which obtained license for carrying out insurance or reinsurance or re solidarity, the same definition is states in section (2) of the Insurance and Takaful Act 2003. In English law (companies Act 1981 which is now the Companies Act 1989) determined the ones permitted to carry on insurance business e .g. bodies authorized under the companies Act 1981 or the member of Lloyd's[1], and also registered friendly societies. But

[1] .Loyd's is aunque organization it is acorportion of loyd's which is established under the loyd's Act 1871 – 1982 and it is concerned to control the membership of loyd's insurance .

the important categories are authorized companies and Lloyd's underwriters.

Insurers cannot carry on activities other than for the purpose of their insurance business. The existence of these regulations is to protect the insured.

**The insured :-**

The insured is the other party of the contract of insurance. He / she must have a contractual capacity as it governed by the principles of the law of contract. Beside the insured must have an insurable interest in the subject matter of insurance entitling him to enter in a contact of insurance.

**4/ Principles relating to the Contract of insurance:-**

**a) The Principle of Uberrima fides:-**

The fundamental principle of insurance law is that utmost good faith must exist by each party. This rule was stated by Lord Mansfield since 1766[1]. The understanding is that the contract of insurance is Uberrima fides. The insured knows great deal and it is

[1] .Carter v Bohn 1766 Burr 1905 at 1909

his duty to inform the insurers and to disclose all material facts prior to the conclusion of the contract, without being asked of all the circumstances. Each party will state what he knows and it is their duty to help each other. There is an obligation to disclose what the insured know and to make a full disclosure of all material facts within his knowledge. In **Banque Finaciera de lacite sa.V. westgate insurance** [1], it was held that contract of insurance is contract in which ubriemma fides is required not only from the insured but also from the insurance company.

In **General insurance company v. Said khogali** [2] the material fact was defined as every thing is material which will guide a prudent insurer in determining whether he will take the risk and if so at what premium and on what conditions. This means that whether the insurer would be influenced in his judgment if he knew of it or not.

The English Marine insurance Act 1906 in S (17) provides:- "A contract of marine insurance is a contract based upon the Utmost

[1] 2. 1990 ) 2 ALL ER 947,HI
[2] 1977 SJLR P. 206

good faith, and if the utmost good faith be not observed by either party the contract may be avoided by the other party".

In **Everett v Desborough** [1] it was held that there should be the purest good faith between the parties and the most accurate representation of all material particulars.

Also good faith extends to cover the duty of helping the insurers in estimating the risk in it is exact value. This is not standard in practice, for example in a Sudanese case **General insurances CO V. Said khogali** [2] it was stated that overstatement in insurance value did not avoid the contract. The court added in this case (mere exaggeration, however is not conclusive evidence of fraud for value …etc ) .

**In Banque Financiere de la cite SA v Westgate insurance Co ltd**[3]**,** An insurer's breach of the obligation to deal with the proposer of Insurance with the utmost good faith doesn't give rise to remedy in damages but only to a right of recession of the policy and recovery of premium.

---

[1] . 1829 5 Bing 503 life insurance per park J at 518

[2] 1977 ) .SLRJ P. 107

[3] .1991 2 AC 249 1990 2ALL ER 947 at 959 ( per Lord Templeman ) .

**b)The Duty of Disclosure:-**

It is general duty for the insured to disclose all information relevant to the subject matter of insurance. Although the insurers must be informed of every material circumstance within the knowledge of the insured and the insured must be accurate during the negotiations, he can not rely upon non disclosure if the material fact is a common knowledge.

The U.S.A courts developed a much narrower duty of disclosure from the same sources ( insured)[1].

The Sudanese Insurance and Takaful Act 2003 states clearly the duty of disclosure in S( 8 ) (A) that the insured must disclose all information relevant to enable the insurer to evaluate the risks insured against. The section provides disclosure only in the time of contracting. At common law there is no general duty to disclose material facts which occured during the period of insurance. In an old case **Pim v Reid**[2], where the insured changed his trade and

[1] . Sebwing v.Fidelity phoenix insurance co 225 N.Y.382 1931
[2] 1843 ) 6 M 8 G1

caused a large amount of highly inflammable material to be brought on the insured premises, it was held that his non disclosure of this fact to the insurer was not actionable. Although it will not apply where there is such a fundamental change that the subject matter of insurance becomes different. This decision contradicts the general rule which binds the insured to inform his insurer with any matter or matters that it may increase the risk insured against. S ( 8)(G ) of the Act provides that the insured is obliged to inform the insurer during contractual period with matters that may increase the risk.

In common law the duty of disclosure will apply where there is an essential change in subject matter of insurance.

The same practice in Sudanese law, Insurance and Takafoul Act 2003 where S 9 (1) provide that if the insured or the participant concealed intentionally any matter, or offer any false information that it changes or reduces the risk insured against, the insurers could apply for termination of the contract and he would have the to obtain the premiums. In **Abdallah . Abdelrahman v . Blue Nile**

**insurance Co**[1] it was held that non disclosure would not entitle insurer to terminate the contract because the risk insured against had already occurred.

Section 9 (2) talks about the non disclosure in the absence of intention, here the insurer may terminate the contract and the insured can avoid this termination if he agreed to increase the installment.

The failure of disclosure i.e. concealment makes the policy void,

but if the insured failure is unintentionally the policy is liable to be avoided, but it depends on the circumstances.

[1] .( 1974 ) SLJR P. 198

# Chapter Two

# Subrogation in Insurance Law

## The History and Origin of the Doctrine of Subrogation

The doctrine has a lengthy history. The origin of the doctrine of subrogation was outlined by MC Cardine J in **John Edwards & CO .V Motor Uunion Insurance co ltd**[1], who observed that the doctrine was derived into English courts from the Roman law.

The doctrine began to spread and by now it is widely applied in insurance law, although it is applied in other types of law for example bill of exchange but is common practice in insurance law. Nowadays it became an important part of the general common law. In connection with insurance it was recognized since the eighteenth century.

In 1782 Lord Mansfield said "every day the insurer is put in the place of the insured. If the insured declined to enforce his rights

[1] . 1922) 2 K B 249

against a third party after payment by his insurers the insurer were allowed to sue the third party in his shoes". [1]

There has been some dispute as to the true origin of the doctrine of subrogation. Some have found trace in Roman law and some refer to it as a creature of equity. Lord Diplock referred to it as a common law doctrine arising out of a term implied in every contract of indemnity insurance.[2]

In **Yorkshaire Insurance Co ltd .v. Nibet Shipping Co ltd**.[3] Diplock j said: The doctrine of Subrogation was not restricted to the law of insurance. In the same case he said: "although its often refer to as an equity invention it is not an exclusively equitable doctrine", and he added: "to give a full effect to the doctrine by compelling an insured to allow his name to be used by the insurer for the purpose of enforcing the insured's remedies against third parties in relation to the subject matter of the loss".

---

[1] 1782 ) 3 Doug KB 61 AT 46

[2] Modern insurance law . john Birds 4th edition 1997 page 285 .

[3] . 1961 ) 2 ALL ER 487 ( marine insurance)

The insurer is entitled to recover from the insured any sum which the insured recovers from a third party (here the insured has already recovered from the third party). Or the insured has not already recovered from the third party, but had been compensated by the insurer, so in this case the insurer may lend his insured name to an action against a third party from whom he had a chance to recover such sum .

**Nature & definition of the doctrine of Subrogation:-**

If "A" has conferred a benefit on B usually in the form of payment of money , B should transfer or make available to A some asset or right, accrued or accruing to B, to recoup the loss or expense suffered or incurred by A in conferring the benefit. The law - based on a principle of natural justice - may give A the right to take benefit of such asset or right. A common example occurs when A's payment relieves B of the burden of having to proceed against C , in such event A may be entitled to exercise a right of action accrued or accruing to B to proceed against C.[1]

[1] .. Robert Goff & Gareth Johnes, The law of Restitution Sweet & Maxwell 1966 page 375

This Right is defined as a right of subrogation and is based on a principle of natural justice.

By this doctrine the insurer replacing the position of the insured, and entitled to recover from him the value of any payment the insured has received and which goes to diminish his loss, but is not entitled to any payment which is not paid of legal liability for the loss. [1] The main aim of the doctrine of Subrogation is to prevent the assured from recovering more than a full indemnity or in other word to prevent unjust enrichment.

Subrogation is concerned with the legal right of the insured against third parties. The right of subrogation is typically based upon either the terms of the policy of insurance or the right of equitable subrogation i.e.; by operation of law.

Subrogation applies to all insurance contracts, fire, motor cars, property, and liability ….etc but there is an argument in life insurance, subrogation does not apply to it nor to the accident insurance related to loss suffered by the insured. The question is why? Because this is not based on indemnity.

[1] Andrew MCGEEMA , The Modern Law of Insurance , Butterworth UK 2001 p 299

Payments under an accident policy are usually of a fixed stated sum, and the insurer's right to subrogate is concerned with the principle of indemnity only. Although some suggest that this is not true because the health insurance policy or medical expenses are indemnity policies and the right of subrogation should apply to them. The Sudanese Takaful and Insurance Act 2003 did not exclude any sort of insurance from applying the doctrine of subrogation. Article ( 7) of the above mentioned Act states clearly " in all sort of insurance the insurer subrogates the insured position in claims …… etc " it is impliedly understood that life insurance is not subject to subrogation doctrine under Sudanese law as Sudanese laws does not recognize life insurance due to the Islamic argument about its legality .

**In Aldrich v. Cooper**. [1] Lord Eldon said "subrogation arises not only by force of contract but by equity".

**Subrogation under Sudanese Law**:

1. 1803 ) 8 Ves.382,389

Sudanese laws state the right of Subrogation as this is exemplified in Section (482) of The Civil Transactions Act 1984, and in section (7) of Insurance and Takaful Act 2003, which will be discussed later. Besides Sudanese courts have recognized this doctrine and have applied it before it was codified in 1984. Thus for example in Noruricit **Yonyon insurance .V. British Kaldonal co & alixs J Insantous.**[1] And the **owner of Birga Ship .V. General insurance Co.** [2] Before this period of time Sudanese courts followed English common law and applied the doctrine of subrogation in ruling for example in the case of **Scandinavian Marine line v. Ethiopian Airlines**[3] In this case the judge Mohamed Yousif Modawi said: - "In the opinion of this court the right of insurer to institute legal proceedings on behalf of the insured is based on the subrogation doctrine. The policy of insurance is lolled upon as a Contract of indemnity, and the contract of indemnity come into operation only when payment is made by the insurer on behalf of the insured".

[1] SLJR 1973 p.178 .
[2]SLJR 1978 page 146.
[3]SLJR1965

Also in the case of **Zaki Sofian v. Arab Insurance Co.** [1] In this case J. Beldo said " The insure must take proceeding in equity to compel the assured to give him the use of his name."

The Civil Transactions Act 1984 defines the right of subrogation in Article 482 as follows:-

"The insured may subrogate to the insurer as regards whatever is paid as indemnity for damage, his rights to any cause of action which may arise to the insured against the wrongdoer from which the responsibility of the insured resulted, unless the wrongdoer of the unintentional act was one of the relatives and descendants of the insured or his wives or one of his bread winners or a person for whose acts the assured is responsible".

The Insurance and Takaful Act 2003 Section (7) gives the followings definition: - In all types of insurance the insurer subrogate the insured by virtue of indemnity paid against claims of damage that caused by the wrongdoer who caused the damage by his act and by which the insure is responsible . This if the damage is not done by some one under the insured responsibility. This

[1] SLJR 1968 page 145.

definition is more or less the same definition in Section 926 from Jordan Act 1984 and Section 771 from the Egyptian one, and Section 801 from kuwaitian one and 36 from the French Insurance Act[1] .The difference between Sudanese new Act and the above mentioned Acts is that the latter one including Civil Transactions Act 1984 used the word permissible or may, that means subrogation is optional in other word not compulsory.

One may notice that no substantial difference between the two Articles quoted above (Civil Transactions Act and Insurance & Takaful Act) however the Civil Transactions Act has specified the damage by the unintentional damage. Obviously the new Act is silent about the unintentional damage as the intentional damage has no effect on compensation. The Civil Transactions Act has detailed the situations where subrogation is invalid while the Insurance & Takaful Act gives only those under the responsibility of the insured The Civil Transactions Act add the main and secondary kinship.

[1] . Dr Abdlelgader Elattar . on land insurance in legislation . House of culture for publishing & distribution 2001 P. 245

Most of the articles of The Insurance and Takaful Act 2003 cover the doctrine of disclosure or void stipulations in insurance policy or liabilities. For example it covers both Insurance & Takaful with the exception of some articles i.e. article (7) that defines subrogation. This means Takaful as Islamic alternative for life insurance doesn't comply with the subrogation doctrine.

**Criticism Against the Doctrine of Subrogation:-**

The doctrine of subrogation had been criticized, (although it is aiming to prevent an insured from making a profit out of his loss). The main criticism is based on the ground that in case the defendant is also insured, this is wasteful and expensive in resources, the same risk is being covered both by first party and third party policies.[1]

A second argument against the doctrine if the defendant is not insured throwing liability on him relieves the insurer who has been paid to assume the risk and who is able to distribute the cost

[1] John. Birds/ Modern Insurance Law ,4th edition 1997 , Sweet & Maxwell P311

among the premium paying public. The Scandinavian practice permits insurers to exercise subrogation only against wrong doers[1]. Those other who supported the doctrine of subrogation defend that no harm would be done besides a great deal of resources would be saved.

**The Application of Subrogation Rights:-**

It is clear that the insurer application can be modified, excluded, or extended by contract or in other word express term in insurance policy. The practice in the Sudanese courts is totally in contradiction with this rule as the subrogation rights are provided by laws which can not be modified, extended or excluded by contract terms , i.e. terms of the contract must not contain any clauses that excluded the right of subrogation.

The Right of subrogation exists whether the loss is total or partial but there is no subrogation under a void policy. By subrogation insurers are entitled as between the insured and themselves to the advantage of every right of the insured, whether such right consist

[1] Supra John Birds P 312

in contract or remedy of tort or in any other right whether by way of condition or otherwise legal or equitable, which can be or has been exercised or occurred, by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished. [1]

In **Otter Mutual Fire Insurance Co v. Rand**[2].

The insurers have been held to be entitled to recover damages against a railway company in respect of a fire caused by negligence or against an incendiary and they were entitled to enforce any rights of compensation which the insured may possess against a public authority.

**The conditions under which the insurer use his subrogation right;-**

1/ The right of subrogation does not arise till the insurers have admitted the insured claim and have paid the sum payable under the policy, unless the policy contains a contrary clause.

---

[1] Ivamy ,General Principle of Insurance .Butterworths London Law Sixth ed P494
[2] 1913 ) 25 OWR 568

Dr. Elsanhori said before the insurer subrogates the insured, two conditions must be fulfilled. First the insurer should have paid insurance money. Secondly there must be a liability claim.[1] It is unnecessary that it should be a contractual responsibility claim.

Also if the owner insured the cargo against damage and loss on transportation he subrogates the insured in contractual claim as well as tortious liabilities.

The insurers are not entitled to exercise their rights against third persons before payment. However the Egyptian Court of Appeal[2] in one decision did not consider payment as a condition for the insurer to use his right of subrogation. This decision was criticized and it became obligatory for the insured to receive the compensation prior to the insurer's subrogation right.

One may notice this decision contradicts the general rule which depends on the equitable origin of the doctrine of subrogation. The Egyptian Court of Appeal ignored the ground that if the insurer did not pay he has no reason to claim.

---

[1] D. Elsanhori , Elwaseet , elhalabi Pub Peruit Lebanon volume 2 , part 7 page 627

[2] case No 288 dated 12/5/1974 25 page 859

In **Scottish Union National Insurance co .v. Davis**[1] the defendant insured's damaged car was handled to a garage for repair with the consent of the plaintiff insurers. After three attempts at repair by the garage, the insured was not satisfied with their work and took the car elsewhere .The garage sent the bill to the insurers who paid it without satisfaction note signed by the insured. The insured recovered compensation from the party responsible for the damage and used this money to repair his car. The insurer claimed this compensation sum, but the court of Appeal rejected their claim on the ground that the insurers have never indemnified the insured, and consequently the right of subrogation did not arise. If there is a dispute relating to payment the burden of proof fall upon the insurer.

The policy may contain a clause entitling the insurers to bring an action against the third party before full indemnification has been made.

2/ There must be a liability claim: - The insurers can subrogate only to an action which the insured could himself bring. The

[1] . Lloyd's Rep. 1. CA. {1970}

insurers have no right of subrogation if the insured's right of action against the third party is unenforceable.

This liability claim may be based on contractual or tortious situations. For example like a foreigner one who sets a fire in the house of the Insured; here there is a tortious liability. Another simple example within tort is probably road traffic accidents; if A's car is damaged due to B's negligent driving A's insurers indemnify him for his losses A's insurers may subrogate A's right against B who will normally be compensated by his own insurers.

Simple example within contractual liability incase of the transporter caused damage to the insured cargo.

3/The benefit must be connected to the loss

The third condition is benefit must be connected to the loss. In **Tailors V.Evans**[1],Scrutton L.J said "if one of two unique vases is insured and destroyed, it doesn't avail the underwriter that by the destruction the second vase has became more unique and valuable. The increase in the value of the second vase wouldn't be incidental to but consequential on the loss of the first".

[1] 1921 91 LJKB 379-385

**The Situations Under Which The Insurer Could Enforce His Right In His Own Name:**

The Right to which the insurer is entitled to subrogate must be enforced in the name of the assured. Mere subrogation doesn't entitle him to enforce this right in his own name.

Only there are two exceptional situations under which the insurer could enforce the right of subrogation in his own name.

The first is where the right is stated by statute which confers upon the insurer the right of action.

The second one is if the insured had made a formal assignment to them of his right of action in respect of the subject matter.

In **Compania Columbiana de Seguros v. Pacific Steam Navigation Co**.[1] the consignees of a cargo of electric cables which were damaged during a voyage from England to Columbia, recovered the sum insured from the insurers and assigned to them their right of action against the ship owners. The insurers gave notice of the assignment to the ship owners and then brought an

[1] . 1964 1 ALL ER 216

action in their own names. It was held that they were entitled to do so.

It is common law principles (property insurance policy provision relating to subrogation) that an insured may waive in writing before a loss all rights of recovery against any person. If not waived, the insurer may require an assignment of rights of recovery for a loss to the extent that payment is made by them. [1]

In addition to the above two exceptional situations under which the Insurers are entitled to use their own name if the insurers have taken over the salvage they may enforce it in their own names. Since they are the owner of the salvage and their right here is not depending on the insured's right property.

**The Claim Procedures :-**

Till the insured is indemnified he has the right to sue the wrongdoer and to control all the proceedings unless the policy provides to the contrary. It is logical to provide indemnification

[1] Rick Hammond website. www.Findlaw.com

before the insured used his right of subrogation. Before indemnified the insured, the insurer has no interest in suing the wrongdoer.

The insured can sue the third party and control the proceedings if the insurer declines, even if he has been fully indemnified, the insurer has no right to stop the insured.

The insurer, in case of controlling the procedure, must agree to indemnify the insured first in respect of the costs.[1]

If there is an express subrogation clause this will often give the insurer the right to control the proceedings regardless of indemnification.[2]

The party who elects to take control will be liable for costs as the standard term provides that if the insurers do take control, it is at their expense. Sudanese law in order No (6) of the first schedule attached to Civil Procedure Act 1983 Section 7 (1) provides that fees due on any of the proceedings should initially be paid by the person in whose favour the action is taken, unless the court

---

[1] Commercial Union Assurance Co .v. Lister{1874} L.R.9ch.483

[2] John Bird , Supra note- P 297

otherwise orders. If the insured besides being paid by his insures has a claim against a wrongdoer to recover an insured loss for example in tort and the insurers were not interested to claim. Can the insured claim that the insurers must bear the cost on the ground that they may benefit from the action? The general trend in courts is to exempt the insurer from liability. [1]

The insurer after indemnifying the insured can control the procedure and is entitled to all rights which the insured is entitled to against the wrongdoer. The insured here is not entitled to prejudice the insurer's rights of subrogation. In other words the insured is not entitled without the insured sanction to enforce any claim arising out of the loss himself. Not only this but he is also compelled by law to offer all facilities which enable the insurer to subrogate the insured as provided by Section 8 (h) of the Sudanese Insurance and Takaful Act 2003 which reads as follows:- The insured and participant must offer all facilities which enable the insurer to subrogate the insured. The general principle is that the right of subrogation exists for the benefit of the insurers and the

[1] (Newzealand case ) Arthun Barnett ltd .v. National Insurnce Co 1965 N-Z-L.R 874

insured must not prejudice this right.[1] If the insured does this act he will break the duty of good faith upon which the insurance policy is established.

The application of this condition may also prejudice the innocent party who is not aware enough of the consequence of subrogation right, or the one who makes a settlement with the third party and agree not to sue him. By doing this he may prejudice the insurer subrogation right.[2]

In case of damage, the insured have a choice either to sue the insurance company for compensation, or to sue the wrongdoer who caused the damage directly. However he doesn't have the right to bring an action to both of them. As this a public right besides it prejudices national economy. The insured would thus be unduly taking monetary compensation from the insurance company, and this money would have been benefiting other economical enterprises as the insured has already being compensated by the wrongdoer.

---

[1] Supra Ivamy , General Principle of insurance law p 505

[2] Supra John Birds . Modern insurance law P 298

The insured who bring an action against a wrongdoer, must sue for his whole loss even if he had been partially indemnified by his insurer who declined to exercise their subrogation right.

When the conditions required for the insurer to subrogate are fulfilled, the insurer is entitled to use all the procedures which the claim need whether judicial (Claim) or extra judicial.

In all cases and whenever the insurer subrogates the insured right, the third party has the right to defenses by all means for example exclusion clause of liability or limitation in case if laws provides that.

**The Reinsurance** and **Subrogation**:-

Last point we will mentioned is reinsurance which is a contract between insurer and the reinsurance company. It is a new insurance policy to indemnify the insurer against his previous liability under specific original Policy.

It is important to mention that subrogation also operates in favour of reinsurance. In **Assicurazioni Generali de Trieste v. Empress**

**Assurance Corporation ltd**[1] **.** A reinsured B in respect of certain risks on which B had insured c B paid C and A paid B in respect of losses on the policy. It was held that when B recovered C the amount so paid on the ground that he had been induced to pay as a result of a fraudulent misrepresentation, the losses paid not being in fact risks under the policy, the principle of subrogation operated to entitle A to recover from B the amount so recovered but it was also held that B was entitled to deduct the costs property incurred in recovering the money from C.

**The situations under which the insurer have no right of subrogation:-**

The right of subrogation is either arising out of contract, or tort, or under statue or over subject matter. The first two types are illustrated earlier.

When the insurer subrogate his insured right under the terms of the statute this particularly arises in case of damages to property as a result of riot, almost most insurance polices do not indemnify damages which is the result of riot.

[1] (1907) 2 kb 814

The last situation, under which the right of subrogation is arising is over the subject matter for example in case of total loss there is a sufficient amount of salvage which possess some value, the insured cannot claim both to receive from the insurers a full indemnity for his loss and to return the salvage since he would be more than fully indemnified.

In spite of all the above situations, there are situations under which the insurer has no right of subrogation.

1/ In all cases if the insured is the person who has caused the damage there is no right of subrogation (Because subrogation is a creature of equity and law). More specifically, an insurer has no right of subrogation against its own insured for claims arising from the very risk for which the insured was covered. Because by bringing an action against him, this will defeat the purpose of subrogation, which is ultimately to place the loss on the wrongdoer. Here, the wrongdoer and the insured are the same person. In **Madsen v. Threshermen's Mutual Ins. Co**[1] The

[1] Rick Hammond the Right of subrogation by an insurer against its insured and the impact of recent law. website. www. Findlaw .com .

Wisconsion Court of Appeal acknowledged the general principle of insurance i.e. that an insurer doesn't have subrogation or indemnification rights against its own insured.

2/ The right of subrogation cannot be exercised against a co-insured nor against a person for whose joint benefit the subject matter has been insured, for example in case of the tenant and the landlord  the insurance policy be for the benefit of both of them. Similarly there is no right of subrogation in the case of contractors and sub contractors engaged on a common enterprise under a building contract. In **Darrell v. Tibbits**.[1] The owner of a house which was let to a tenant insured it against fire. The local authority caused an explosion which damaged the house, and paid compensation to the tenant the insurers paid the insured and then claimed this sums.

It was held that they were entitled to succeed as the insured had already been compensated by virtue of tenants receiving the compensation which had been used to repair the house.

---

[1]. ( 1880 ) 5QBD560

3/ According to S 482 of CTA there is no right of subrogation if the loss was caused by wrongdoer un intentional act of one of the relatives or descendants of the insured or his wives or one of his bread winners or a person for whose acts the assured is responsible. In **Treciak v.Terciak.**[1] The court in Florida held that the insurer has the right of subrogation. The facts of the case were that Terciaks while going through a bitter divorce, the wife set fire to the husband's home. The insurer paid the loss and filed a subrogation action against the wife. Because the parties were not yet divorced at the time of the incident, the court held the insurer stood in the shoes of its insured, and thus was barred by the doctrine of interspousal immunity from suing the wife to recover on its subrogation claim. This decision was not correct because the application which prevents the spouses from suing each other doesn't extend to the intentional acts, so the application of subrogation by the insurer is a correct action as the wife intentionally set the fire in the insured house.

[1] hllp www./library.findlaw.com .

The question is why relatives and those who the section determined are excluded from using the subrogation right by the insurer against? The exclusion here is logical and acceptable because those are under the insured responsibility and if the insurer can claim from them, that means he claimed from his insured. But if those whom excluded are done the fault by intentional means, the insurer here is able to sue them directly without referring to the insured. Because the insured have also a civil responsibility toward them, here the insurer will recover from his insured what he paid to him, and this will defeat the right of equity upon which the right of subrogation is based.

4/ There is no right of subrogation under knock for knock agreement[1]. It is an agreement between two insurers and the insured is indemnified by one of them in respect of his loss. Less the amount of an excess clause he is still entitled to sue the other party to collision for full amount of loss. Each party shall bear its own loss. But the insured still has the right to sue the third party for losses for which they had already been indemnified. From my

[1] ER Hardy Ivamy. Fie & Motor Insurance Fourth Ed (London: Butterworths, 1984) P 293

own point of view this agreement is between the two insurers companies and this will not prejudice the insured right. The insurer in knock for knock agreement had no right under the doctrine of subrogation. **In Bell Assurance Association v licensees and general Insurance Corp and Guarantee fund ltd**[1]**,** two insurance companies had entered into a knock for knock agreement. A man named Smith was the owner of the insured car. A collision took place between Smith's car and one belonging to Mr Seaman who is not insured at all, but the car had been included in a policy which had been taken out with the defendant insurance company by Mr Cowell. At the time of the collision Cowell had no insurable interest in Seaman's car when a claim was made by Seaman against the defendant insurance company to recover the amount of the damage done to his car, the company denied liability on ground that he was not insured with them at all so he brought an action against Smith who was defended by the plaintiff insurance company and eventually the company had to pay him 257£. The plaintiff company then sued the defendant company for this sum

[1] 1923 17 LILREP 100 CA

claiming that, the particular case came within the terms of knock for knock agreement. The Court of Appeal held that the claim failed because at the time of the collision, there was no enforceable policy in respect of Seaman's vehicle and the vehicle did not come within the agreement.

Knock for knock agreement usually exists between motors insurance in comprehensive motor policy. Each insurer indemnified its own insured regardless of the liability in tort. Both damaged cars were insured against first party damage. In practice knock for knock agreement have been abandoned, although it has some advantages in particular by eliminating costly and wasteful subrogation action.

5/ Also there is no right of subrogation on payment under PPI clause (policy proof of interest). Because insurable interest is essential in any insurance policy, so the practice of court assumed that all indemnity policies were made on interest so any policy which was intend to be mere wagering contract had to be so expressed that the promise to pay was not a contract of indemnity.

It was for that reason the PPI clause was introduced. PPI policy is against the interest of commercial business it affect the validity of the policy and due to this the commercial business will be also affected, as any vagueness or uncertainty in any contract (policy) will affect the performance of that contract (policy) whether it will be commercial one or otherwise, besides it is not a contract of indemnity.

In 1745 an Act was passed in England prohibiting wagering policies on risks connected with British shipping. A PPI clause makes the insurance void[1]. A PPI marine insurance is void although in fact an insurable interest is present. In j**ohn Edwrd & co v Motor Union Insurance Co ltd**[2] The insured issued a PPI time policy on freight to be carried by a chartered vessel. Whilst proceeding to the port of loading, it collided with another vessel which was found solely to blame. The insurers paid the insured under the freight policy, but claimed under the doctrine of subrogation the sum which the owners of the wrongdoing vessel

[1] Denis B Rowne Mac Gillivry on Insurance. fifth ed London Sweet & Maxwell 1961 P 351

1. 1922, KB 249

had paid by way of damage. It was held that they were not so entitled because freight policy was a PPI policy and therefore the doctrine of subrogation did not apply to PPI policy. In the same case MC Cardie J said [1] "the right of subrogation rests upon payment under a contract of indemnity, how the matter stands when the policy of insurance is an honour policy only such policy is not a contract of indemnity at all. The policy is a mere wager the essential basic of subrogation is absent"

6/ The insurers have no right of subrogation if the insured's right of action against a third party has been waived or is unenforceable. Here the insurer has no right of action against the third party. The insurer is only subrogated to whatever rights the insured may have against a third party, since the insured have no right the insurer also have no right of subrogation. An insurer to recover a loss by way of subrogation must be able to place him in the position of the insured. If the insured himself has no claim against the third party so the insurer also has no right, the insurer cannot succeed where its insured cannot succeed.

[1] 1922, KB 249

7/ In the situation where the damage is caused by the negligence of the employee and the employer's insurers paid the compensation, can the insurers subrogate standing in the employer shoes against the employee? There is a difference opposing two views. In **Lister v Romford Ice and Cold Storages ltd**[1] the above posed question was answered in the affirmative. But such decision had an adverse effect on labour relation within a company. Practice at courts did not allow insurers to subrogate against the employee. It is submitted that to make the employee personally liable would be unjust, to compel the employer to allow his name to be used if the risk of employee's negligence is insured against.

In S(60) of the Australian Insurance Contract Act 1984, insurers doesn't have the right to be subrogated to the right of insured against the employee if the conduct of the employee that gave rise to the loss occurred in course of or arose out of the employment and was not serious or willful misconduct

8/ The doctrine of Subrogation has no application to life or personal accident policies, the main reason is that this kind of

[1] 1957 1 ALL E R 125

policies is not considered an indemnity policy [1]as explained before; thus insurer cannot claim to be subrogated to the right of the insured against any wrongdoer[2].

10/ if the insured is a company which has been wound up the insurers have no right of subrogation, since the insured name dose not exist.

**Waiver of Subrogation Right:-**

Insurers may voluntarily agree not to use their rights of subrogation. This waiver may be expressly by a term of the policy – this is frequently done in aviation policies issued to large insured-or by an agreement between the insurer and the insured. If the insurers chose this way, they have no right of subrogation. Also insurers may agree among themselves to waive their subrogation rights as in knock for knock agreement.

[1] R.D.MARGO , Avation insurance , 2nd Ed Butterworth 1989 P303
[2] MC GEE. The Modern law of Insurance Butterwotrh 2001 P299

# Chapter Three

# Indemnity

## 1/ **The Principle of Indemnity in Insurance law**:-

By contract of insurance the insurer enters in to a contract to pay the amount of loss or damages occurred to the insured, in other words indemnify another with specific conditions according to the insurance policy. The principle of indemnity is intended to recoup the loss and to prevent the insured from retaining a double indemnity, or in other word to gain profit out of his loss[1]. By this indemnification the insurer is entitled to the advantages of every right of action of the insured. If the insured and before payment by

[1] Supra John Birds P 288

the insurers received payment from other sources by which the loss is diminished, the insurers here are not liable since there is no loss and they did not indemnify the insured yet.

After the insurers have paid to the insured the amount recoverable under the policy the insured remain liable to account to them for any benefit which he subsequently received from a third person in respect of the loss, this will be discussed more widely later. In **Holmes v Payne**[1] it was held that the mere fact that the property insured was recovered after payment of the loss doesn't entitle the insurers to repayment. In another case **C F Goldberge v Emplyer's liability assurance Corp**[2] where by the terms of the policy the loss was payable within a specified period, it was held that the recovery of the stolen car from the thief after the expiration of the period did not relieve the insurers from liability to pay its value.

2/ **The insurer's rights:-**

[1] 1. 1930 2 Kb 301 , 37 LIL RE P 41
[2] 1922 IWWR 529

Although there is difficulty in defining the nature of the right of the insurers in case of subrogation, one may say that the right of the insurers may be:

(1) A right to recover back what they have paid.

(2) Also the insurers have a right to benefit of what the insured has received. When we talk about the insures right, it is important to notice that the insurers right is based on the doctrine of subrogation, by which the insurers have not only the right to remedies, but also have the right to receive the advantage of any remedy which has been applied by the insured has to himself claimed.

(3) The right of the insurers also depends on the implied contract that the insured is to hold for the benefit of the insurers or pay over to them whatever he may afterwards receive from other sources in respect of the loss. [1]

If the loss is subsequently diminished from other sources, the insured will repay the insurer what he has received from those

[1] Supra . General Principle of insurance law P512

sources. In **Darrell v Tibbitts**[1] it was held that the right has however been said to be not a right to recover back what has been paid, but merely a right to the benefit of what is received by the insured. In addition to the above three mentioned situations the right of insurers depends on the main fact that the insurers made their payment on the condition that the insured had, and therefore they are entitled to maintain an action for money had and received to recover what they had paid.

It is important to notice that the recovery of the money doesn't avoid the policy and the contract of insurance remain in force for whatever period is fixed for its duration.

**3/ Payment to Which Subrogation Right Arises:-**

The insurers may become entitled to have a payment made to the insured by a third party who diminishes the insured's loss. Certain payment may be either made by tortfeasor or under a contract or

[1]( supra) 1880 5 Q B D per brett LJ at 562 , 563 ,562

may be personal to the insured for example as a gift. So how did the indemnification be under the above situations??

**a/ Tortfaesor**

In the situation where payment is made by a tortfeasor the payment here is made by the person who caused the loss by his negligence or default. It is made by way of compensation but the insurer cannot claim benefit of the payment if it is made in respect of the loss not covered by the policy .In **Sea insurance co v. Holden**[1] where insurance company paid for constructive totals lost caused by ship collided, it was held that it was not entitled to claim from the owners the compensation which they had received from a tortfeasor for loss of freight. But the insured cannot be allowed to retain the payment made by way of compensation for the loss, in

[1]1884 ) 13 QBD 706 CA.

addition to the sum paid by the insurers under the policy, since he would receive a double indemnity.[1]

**b/ Contract**

In situation where the payment is made under a contract, the principle of indemnity is being equally applicable so long as the effect of the payment is to diminish the loss, and to prevent the insured from being doubly indemnified. It is not necessary that the payment should have been made in respect of the loss, the contract need not in any way be related to the loss, provided that it relates to subject matter of insurance.

**c/ Gifts**

If the payment is made voluntary by a third person as a gift, the insurer is not entitled to benefit of a voluntary gift received by the insured unless the gift was made with the intention of reducing or diminishing the insured loss. [2] So the right of the insurers depends solely on the intention with which the payment was made and its effect on the position of the insured. Thus if the gift is given to the

[1] Supra . General principles of Insurance Law P 514
[2] Ivamy , Maine Insurance , Third ed Butterworgs London1979 P 494

insured for his benefit only and not for the benefit of the insurers, then the gift was not given to reduce the loss insured against and the payment here was intended for the benefit of the insured only In **Burnand v. Radocana chi** [1] The insured ship was destroyed by a confederate cruiser during the American civil war. The insurers paid the agreed value. The insured subsequently received a gift from The United States government. The House of Lords held that this money was paid purely as a gift and intended to benefit the insured over and above any insurance money. The insurers were not entitled to claim it. We can conclude that the insured will be entitled to retain the gift only when it was intended to benefit him[2]. In **Stearns v. village main ref gold mining co**[3] The defendant's insured gold was commanded by the South Africa government. The insurers paid the defendant for the total lost. The government then returned a sum of money to the insured in return for the latter's agreeing to keep the mine open. It was held that the insurers were entitled to recover the equivalent of that money

[1] ( 1882) 7 APP case 333
[2] Supra General Priciples Of Insurance law P 515
[3] **(**1905) 10com cas 89

because it has been given in order to diminish the insured's loss[1]. In my opinion I think the latter above decision is unjust as the gift is a purely a gift and must not be included in the compensation language. Beside the proof of the intention, it is very difficult to proof whether the gift is obtained to recoup the loss or only as an extra compensation for the insured.

**4/ The Assessment of Indemnification:-**

Subrogation means the insurer steps in to the shoes of his insured. As such it gives rise to a right in the indemnifier to be subrogated to the rights of the indemnified. But in all cases the insurer right can not be greater than the insured's rights. And this will lead us to the question that who is entitled to any payment resulting from subrogation which is in excess of the indemnity actually paid? The general rule is that insurer's right to subrogate extends only to the amount they actually paid to the insured. If the parties are in the agreement or the policy agreed to who should take the excess, here

[1] Supra Modern Insurance Law P 293

there is no problem. The problem arises in the absence of such an agreement and this was answered in **Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd** [1] . In this case the insured's vessel was insured for £ 72.000 Due to the third party's negligence, the vessel was total lost and the insurers paid. The following year the insurer subrogated to the insured's claim in Canadian proceedings and the loss was converted in to Canadian dollars. The pound was subsequently devalued and the converted dollars produced an excess of £ 42.000. Diplock J held that the insured was entitled to the excess on the grounds that subrogation cannot produce for the insurer more than the sum he had paid out.

There are factors which measure the recovery in indemnity insurance. The main factor is the distinction between total and partial losses. Where there has been a total loss but the damaged item still have some value, the damaged goods become the property of the insurer. It is often happens that the insurer will then give the insured the option of purchasing such goods if he wishes to repair them by himself. The other factor is the sum insured and

[1]1961) 2 WLR 1043

the excesses or the deductibles sum. The last one is what the indemnity measure under insurance and average clauses.

## 5/ Co-insurance & Subrogation:-

Co- insurance is where two parties' interests are covered in one policy. The simple example is landlord and tenant situations, or the contractor and sub-contractor. **In Petrofina (UK) ltd v Magnaload ltd**[1]. Claimants were main contractors in the building of an oil refinery. They insured the property. The insured being defined in the policy as the contractors and all sub-contractors. The works were damaged by the negligence of a sub- contractor, the insurers settled the claim and then sought to exercise their subrogation right against the sub- contractor. Lloyd's J held that no subrogation rights could exist, since the sub-contractors were to be regarded as one of the insured as stated in the policy. So insurers could not seek compensation from the insured for the insured loss.

[1].1984 QB 127 Lloyd J , 1983 )3 All ER 35

Lloyd J[1] expressed some doubt as to whether he had been right to allow subrogation rights to be exercised against co-insured in other

case.[2] Whether subrogation right can be exercised against co insured that depends on substance. Where a landlord leases property he can obviously require the tenant to insure such property and the landlord may choose to insure the property himself. If damage is caused to the property by the tenant's negligence can the landlord insurers subrogate against the tenant? The answer of this question by saying that there is no subrogation against co insurance because this is a mutual interest. Though only one of the parties took out the insurance, but if one of the parties is responsible for a loss, can the insurer subrogate against the other party? The same decision in the case of **Store Vickers ltd v. Appleaddone Ferguson Shipbuliders ltd**[3] in this case subrogation was refused to the insurer's of the head contractor who

[1] supra The Modern law of Insurance MC Gee P 305

[2] Yasin case {199}2 Lloyd's Rep45 Lloyd J

[3].{1991 } 2 Lloyd'[s Rep 288

sought to use the latter's name to sue a subcontractor who had supplied defective propeller. **In National Oilwell ( UK) ltd v Davy Offshore ltd**[1]. Suppliers had contracted to supply the

defendants with equipment for their oil production facility. The equipment was faulty and caused damage to the defendants' property which was covered by their insurance policy. Their insurers sought to subrogate against the suppliers, who in turn claimed that they were co- insured under the defendant's policy. The court decided that the suppliers' insurance protection was narrower than that which they claimed. The loss caused by the suppliers was not covered by the policy wording. Therefore there could be a subrogated claim against them. **In Mark Rawlands ltd v Berni Inns ltd**[2],the tenant negligently caused a fire at the premises, in a situation where the lease provided that the tenant was to contribute to the cost of the insurance, the tenant was to be relieved from repairing obligations should there be damage by fire

[1]{1993 } 2 Lloyd'[s Rep 582 .
[2]1985 ) 3 All ER473

and the landlord would expend any insurance moneys to repair the building. Is there any subrogation right against the tenant? The answer was that the tenant was protected by such provisions and therefore no subrogation rights were enforceable against him. In

Scottish case **Barras v Hamilton**[1] it was decided that the tenant's immunity from a subrogation claim did not extend to those parts of the building not covered by the agreement between landlord and tenant. So the interpretation of the contract is important, the wording of the policy, its construction will, and if the loss caused by the co- insured is covered by the policy or not.

**6/Double Insurance &Subrogation**: -

There is a great distinction between co-insurance and double insurance. As it explained above co-insurance describe a situation where more than one person is insured under the same policy. While double insurance describe a situation where the same loss is

[1]1994 SLT949

separately insured by two or more insurance policy, either by the same insured or by a different insured. In co- insurance there is one policy while in double insurance there is more than one insurance policy. Double insurance was recognized since eighteenth century.[1]

Double insurance has the same aim which is complying with the doctrine of subrogation that is an insured must not be allowed to receive more than the loss he suffered or in other word to prevent unjust enrichment. Double insurance occurs to those cases where it is the same interest which is insured more than once against the same risk. The insured here either may have recovered the whole loss from one of the insurers, or he may recover it from all insurers. The insurer who is suing for the loss may seek to rely upon the existence of other policies as a basis for restricting or excluding his liability. If the insured assumed that one policy from his many diminished and covered his loss he might decide to demand his whole loss from this one insurance policy[2]. Could the

[1] .Text & materials insurance law Ray Hoding 2nd edition Cavendish publishing
[2] Supra The Modern law of Insurance P 317

company which paid recover that sum from the others companies? Lord Mansfield answered this question in the affirmative in **Newby v Reed**[1] , the insured took out a policy with company A to recover a voyage of his ship from Newfoundland to Barbados. He later insured the same ship the same voyage but from Newfoundland to Dominica , with company B . He made his claim against the second company only and the court allowed that company's claim for some reimbursement from the first company. If the insured chose to demand from all companies how his claim would be handled by those many companies? Lord Mansfield [2]said "Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers in distinct policies, a double satisfaction, the law says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it. And if the same man really, or for his own proper account, insures the same good doubly, though both insurances be not made in his own name, but one or both of them

[1] 1763 1 Wm B L 416
[2]Godin v London insurance Co 1758 1 Burr 489

in the name of another person , yet that is just the same thing fir the same person is to have the benefit of both policies. If the insured, to receive contribution from the other who was equally liable to pay the whole, but if the plaintiff was not to have the benefit of

both policies in all events, then it can never be considered as a double policy" here the insurer can subrogate .

If several parties had insured their own interest in the same thing, this is not considered double insurance[1]. It is necessary that the subject matter insured (property) be identical in all policies. A leading English legal textbook considers that It is not necessary the same duplication.[2] Although identical subject matter is not necessary for double insurance, yet what agreed upon is that the policies must cover a common risk. In other word, the loss for which a claim is made must be common to both policies. That means the same interest must be doubly insured.

---

[1] Ray Hoding .Insurance Law Text & Material 2nd ed Cavendish Publishing ltd London P 651-655

[2] Ray Hoding .Insurance Law Text & Material 2nd ed Cavendish Publishing ltd London P 651

Where the insured has been fully indemnified by one insurer, he has no right to bring an action against another insurer who has covered the same risk by another insurance policy. Also the first insurer cannot exercise subrogation rights against the second insurer [1]or any other insurers. Any claim between the insurers must be found on the doctrine of contribution. Right to contribution exists only when the same risk is covered by the policies.

Other requirement for double insurance is that all insurance policies must be enforced at the time of the loss. Therefore if any of the policies have expired or not fulfilled at the time of the loss, then no contribution is possible. But if the repudiation takes place after the loss here contribution will be allowed.

It is an agreed principle that no policy may exclude the rule of contribution. Here the duty of disclosure appears again. It is important to disclose any information relating to other insurance on the risk. Disclosure of such information will allow the insurance company to avoid its liability. Also it is normal for companies to ask for information regarding the issue of later policies. Sometimes

[1] Bovis Construction ltd v Commercial Union Assurance Co 2{2001) Lloyd's Rep IR 321

insurance companies consider a subsequent policy on the same risk as a breach of the policy. In **Equitable Fire and Accident Office ltd v Ching Wo Hong**[1] it was held that the requirement for notification of additional insurance was not breached where the insured had never in fact paid the premium on the second policy and thus it had not been activated.

**Lord Mc Nair MR** explained[2] that for the defendants to be liable to contribute, the plaintiff had to show that he was liable under his own policy, and he had paid under his policy, and that the defendants were liable under their policy and that the defendants had not paid under their policy.

**7/ The Uninsured Loss & Indemnity:-**

The principle of indemnity requires that whether the insured has an uninsured loss his right of action or recovery in respect thereof will not be subrogated to the insurer but will be retained by the insured.

---

[1]. (1907) AC 96
[2]. Boag v Economic Insurance Co Ltd 1954 2 Lloyd';s Rep 581

Simply because in recoveries subrogation is concerned only with the loss against which the insured is insured rather than any general loss.

If an insured has suffered an insured loss and uninsured loss, full indemnification of the former by the insurer allow the insurer to subrogate irrespective of the fact that the insured has not yet recovered the uninsured loss.

If the insurers pay the costs of repair but have no interest in pursuing their right to sue the person responsible for the loss, and the insured recovers from the third party a sum which includes the compensation for his uninsured subsequent losses for example loss of profit or in other one the cost of hiring another car while his was being repaired, can the insurers claim that sum on the ground that he was fully indemnified? Insurers would not be able to claim such money as the loss for which insurers seek compensation is uninsured. In a Sudanese case **Mohamed Abakaar Mohamed**

**Trail**[1].It was decided that insurance company was not obliged to indemnify the indirect damages and loss of profit.

In any event, if the insurer declines to sue, the insured can himself bring proceedings, and he is entitled to have the compensation from the third party in addition to have the insured sum from the insurer. The question arises here whether the insured will gain profit from his loss by doing this? It is submitted this may be considered as a profit from his loss, but if both the insured and the insurer decline to sue the third party who caused the damage, that means he will escape from his liability, because the damage must be payable by the wrongdoer. On other hand the insurer according to the contract of insurance is obliged to pay the insured.

My point of view can be supported by an Egyptian court decision[2] which allowed the insured to join between the indemnity from both the third party and the insurers as was decided in the case. The reason for the decision is due to the differences in the basis of each indemnification. The court added the relationship between the

[1]. Higher court / C L/ 2001
[2]. Civil case 17/Nov 1973 series of appeal decisions C 24 No 191page 1-11

insured and the insurer must be separate from the relationship between the insured and the third party". Although some writers did not allow the insured to be indemnified from both his insurer and the third party as those writers' regards this as unjust enrichment, and if the insured chose to be indemnified from his insurers he is only entitled to have from the third party the

remaining part of indemnification. In other word the excess of damages which is not covered by the insurance policy.

If, as a result of subrogation action, the insurer recovered more than he had paid the insured, the latter would be entitled to surplus in so far as it represents an uninsured loss.

## Conclusion

This research contains three chapters and it studies the law of insurance in general and the doctrine of subrogation in particular. There is a paucity of literature on the field of insurance in Sudan. As this branch of the law was neglected in the Sudan, though it is impossible to deny its importance in our health, financial services, social security, and other aspect of law and public, I was motivated to do a research on this area.

The First Chapter discussed the general principles of insurance and definition and formalities of contract of insurance. Although a contract of insurance is binding as between his parties and it

includes all the requirements of other types of contracts like offer, acceptance, consideration, capacity to enter into contract of insurance ….etc but it is regarded as an adhesion contract ( A contract in which one party be more stronger than the other party) . This research comes to the conclusion that S (480) in Civil Transactions Act 1984 and S (6) in Takaful and Insurance Act 2003 tried to reduce the harsh terms in the insurance policy. These sections contain the conditions under which the insurance policy will be regarded as void especially when it contains adhesions clause e.g. any stipulation which is not clear enough in typing...etc[1] This mainly to protect the insured from the wide powers the insurance companies had. The Civil Transactions Act 1984 is clearer by providing that any adhesion clause will render the clause void[2]. But the Insurance and Takaful Act 2003 only determined three situations under which the policy is considered null and void. It is important to notice that insurance policy in many countries including Sudan is considered as a contract of insurance. It is

[1] Civil Transactions Act. S 480 (g)
[2] Civil Transactions Act. S 480 (h)

important to notice that the contract of insurance can be transferred to another party if the insured property is transferred to that other person. For example the policy can be transferred from the owner to the purchaser, provided that the insured policy is valid.

Because the contract of insurance is a special one the research tries to discuss it is own principles for example ubremia fide principle. The contract of insurance is a ubremia fide contract because the insured knows great deal and it is his duty to inform the insurers about what he knows. The common understanding is that duty of disclosure is only required for the insured but the study found that both the insurer and the insured are under the duty to disclose. The insurer is obliged to disclose  any matter which affects the insured offer to insured in a particular  insurance company for example if the company under liquidation.

Also the discussion included the duty to give assistance to the insurer and not to prejudice the insurer rights. Besides the impact of the disclosure in termination the contract of insurance and how good faith can help in estimating the risks insured against in it is

exact value. The duty of disclosure is stated clearly under the Insurance and Takaful Act 2003, ,it is absent in the Civil Transactions Act 1984.

The first chapter discussed also the policy, duration, parties of the contract of insurance (the insurer and the insured). The main requirements in Sudan are the insurer must be a company constituted under Companies Act 1925 and it must have share capital as prescribed by insurance control Act 2001.

The chapter also discussed in short the existence of the legislations that control the practice of insurance in Sudan. The essence is that the first Act which regulated the insurance law appeared in 1960 and followed by the Insurance Business Supervision and Control Act 1992. We can say by this Act all insurance companies working in Sudan must carry on insurance in accordance to Islamic principles. The Act of 1992 was substituted by the Insurance Control Act 2001 and Insurance and Takaful Act 2003. There is no great differences between those acts unless which had been mentioned above.

The research in the Second Chapter tackles the doctrine of subrogation as from its beginning in eighteenth century till it was recognized and spread and its statuary regulations were work. The study also discussed all the issues relating to the enforcement of the insurer right to subrogate.

Although subrogation is recognized in other field of law, yet the research is concerned only with the right of subrogation in insurance law, namely the insured right to sue the third party in the name of the insured. From the discussion the study found that subrogation raised so many questions especially if the defendant is not in fact insured. Throwing liability on him, releases the insurer who is obliged to indemnify the insured if the risk insured against was occurred, and who is able to distribute the cost among the premium paying public.

The doctrine of subrogation can be regarded as an exception to the doctrine of the privately of contract, because as I see the general rule is that the contract is binding only on its parties and the third

party is not a party at all in the insurance contract, inspite of all this he is under an obligation to pay the insurer.

Subrogation which is concerned with the legal right of the insurer against third party is concentrated on the individual responsibility for civil wrongs in legal system.

The principle is that the insured and the insurers are regarded as one. The insurers are entitled to stand in the insured shoes and to sue the third party in his own name and he is entitled to all rights by exercise of which the loss will be diminished.

From my discussion there is no essential difference in definition of Subrogation as between Civil Transactions Act 1984 and the most recent one which is Insurance and Takaful Act 2003. The main difference – when we talk about the Acts in general - is that the latter one added takaful. It defines the insured as a participant and provided that the premium is paid by way of donation. While the Civil Transitions Act 1984 provides only about the insurance as the concept of Islamic insurance wasn’t known in Sudan before 1984.

The Chapter discussed also the criticism against the doctrine, its application, the procedure, besides the conditions under which the insurer use his subrogation e.g. the insurer must pay the insured before he can exercise his subrogation right .The discussion included the situation under which the insurer could enforce his right and whether he can sue under the insured name or he can directly sue in his own name.

The last point discussed is the situations under which there is no right of subrogation e.g. knock for knock agreement, PPI policy (policy proof of interest), void policies, life or personal accident policy….etc

The third Chapter discussed the principle of indemnity in general and it's relating to the doctrine of subrogation in particular. Since the insurer has an enforceable equitable interest in damages payable by the wrongdoer, and the insurer is obliged to indemnify the insured with specific conditions according to insurance policy despite that the doctrine of subrogation appears on biased of justice and as a creature of equity.

The discussion of indemnity is important in preventing the unjust enrichment, and the profiting from the loss for both the insurer and the insured.

The discussion extends to include the insurer right and if he is merely the right to recover back what has paid or is he entitled to benefit of what the insured has received. In spite of these two different approaches the study supports the former one which entitles the insurer to recover back what he actually paid. It is unjust to entitle the insurer to share with the insured what he had received from his loss.

Because the insurer rights are based on subrogation so the discussion illustrates payment to which subrogation right arises and whether this payment is made under a contract, gift, tortious obligation.

At last the research discussed the assessment of indemnification especially in co-insurance and double insurance situations and the complications of assessment of damage especially in relating to subrogation right.

The study found many difficulties in collecting data especially in field of insurance in Sudanese laws. Although it is impossible to deny the role of insurance rule in our life yet it is important to promote and improve the awareness to the necessity of the role of insurance and to increase the attention to the laws regulates insurance.

I refer to English law more than Sudanese one due to the lack of Sudanese legal precedents and literature especially in subrogation. There are only two recorded precedents both of them talk about the subrogation rights. I recommend recording the arbitrations decision in insurance law, as most insurance disputes do not reaches courts and are settled by arbitration committees.

It is important to amend the insurance laws to follow the changes in business field, by adding new legislative clauses to insurance laws especially in subrogation. Because law practice decided in light of the English common law and there is no clause regulating many points either in Civil Transactions Act 1984 or in Takaful and Insurance Act 2003, for example the insurer right to sue in his

own name, the requirements of indemnity if the insurer subrogate after before indemnifying the co insurance and double insurance …etc while in English laws it details e.g. Marine insurance

e law 1906 lays down some principle for resolving cases of double insurance  s 32 (1-2) where two or more policies are effected by or on behalf of the insured on same adventure and interest or any part there of and sums insured exceed the indemnity allowed by this Act the insured is said to be over insured. The insured here unless the policy otherwise provides, may claim payment from the insurer in such order as he may think fit, provided that he is not entitled to receive any sum in excess of indemnity allow by this act .

I hope this research provides useful guides to students of law in general and to practitioners of insurance in particular.

**المراجع العربية :-**


1 / : الاستاذ الدكتور مصطفي محمد الجمال . التأمين الخاص وفقا لاحكام القانون المدني المصري. دار الفتح للطباعة والنشر . الطبعة الاولي 2001

2/ د علي سيد قاسم . وثيقة التأمين العائمة . دار الفكر العربي الطبعة الاولي 1991

3/ د. احمد السعيد شرف الدين ،عقود التأمين وعقود ضمان الاستثمار ( واقعها الحالي وحكمها الشرعي ) 1986 مطبعة حسان رقم الايداع 3799 / 1982

4/ دكتور عباس حسني ،عقد التامين في الفقة الاسلامي والقانون المقارن. مكتبة وهبة 1978 .

5/ د. فتحي عبدالرحيم عبدالله ، التأمين / قواعده /اسسة الفنية والمبادئ العامة لعقد التأمين، الناشر مكتبة الجلاء الجديدة المنصورة 1997 .

6/ د. سمير كامل، التأمين الاجباري من المسؤلية المدنية للمهندسين والمقاولين عن حوادث البناء . دراسة مقارنة بين القانون المصري والفرنسي. الطبعة الاولي 1990- 1991 .

7/ د الصديق الامين الضرير. الغرر واثرة في العقود في الفقة الاسلامي . دار الجيل بيروت 1990 .
9/ كمال جاد كريم ادم. رسالة ماجستير التأمين الاسلامي بين النظرية والتطبيق – تجربة شركة التأمين الاسلامية –جامعة الخرطوم 1993 .

10/ د. عيسي عبده. التأمين بين الحل والتحريم، دار الاعتصام القاهرة 1997.

11/ الدكتور عبدالقادر العطير، التأمين البري في التشريع .دراسة مقارن . دار الثقافة للنشر والتوزيع. الطبعة الاولي 2001 .

12/ . د عبدالرزاق احمد السنهوري ،الوسيط في شرح القانون المدني _ عقود الغرر وعقد التأمين . المجلد الثاني الطبعة الثالثة . منشورات الحلبي الحقوقية بيروت لبنان 1998 .

13/ . د . سيد امين المبادئ الاساسية والتأمين في القانون المقارن. دار الطباعة و دارالتأليف والترجمة والنشر جامعة الخرطوم . الطبهة الاولي 1974.

14/ الاستاذ/ سلاف الدين ابوبكر .السوابق القضائية السودانية في مجال التأمين اتحاد شركات التأمين واعادة التأمين السودانية . الطبعة الاولي 2004.

15/ مولانا ابومدين الطيب محاضرات في التأمين. معهد التدريب ولاصلاح القانوني 1997 .

16/ عبدالعظيم حسن عبدالرحمن ، التعويض عن الاخلال بالعقد . دار الممطبوعات الجامعية الاسكندرية 2001.

17/ تاج السر محمد حامد،عقد التأمين فقها وقضاء . مطبوعات مركز شريح الطبعة الاولي 2001.

**English References:-**

1/ Andrew MC GEE MA The Modern law of Insurance . Butterworths UK 2001.

2/ Road . D . Margo .Aviation Insurance. Second edition Butterworths 1989.

3/ E R Hardy Ivamy. Marine Insurance. third edition .Butterwortgs London 1979.

4/ Ray Hodgin. Insurance law Text and Materials . Second edition Cavendish Publishing limited. London.

5/ Ivamy, General Principles of Insurance Law, sixth edition Butterworths London 1993.

6/ Robert Goff & Gareth Jones .The law of Restitution,. Sweet & Maxwell London 1966.

7/ Robert Merkin .Colinvaux's law of insurance. Sixth edition Sweet & Maxwell London 1990.

8/ John Birds. Modern Insurance law.. Fourth edition. Sweet & Maxwell London 1997.

9/The Common Law Library No Chirty on Contract General Principles. Twenty seventh edition. Sweet & Maxwell 1994.

10/ George Gleason Bogert. Introduction to Business Law.

11/ E R Hardy Ivamy. Fire and Motor Insurance . fourth edition. Butterworths London 1984.

12/ Denis B Rowne .Mac Gillivary on Insurance Law related to all risks other than Marine,. Volume 1.Fifth edition Sweet & Maxwell London 1961.

13/ Adel Atieyah Hassan. PHD Faculty of law Uof Khartoum Automobile Accident Compensation System in Sudan ..2004

**Websites :-**

1/ www.law.uconn.edu

2/ wwww.nolo.com /index.cfm

3/ www.Cornell.edu /insurance,html

4/ www.dougsimpson.com.

5/ www.findlaw.com

6/ www.geotechnica.demon.co.uk