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《民法典》对海上保险合同的适用

汪鹏南 合伙人

海事海商与仲裁法律事务部负责人

北京市盈科（大连）律师事务所

[摘要] 《民法典》承继和发展《民法总则》和《合同法》，对海上保险合同的订立、效力、履行、变更、转让、终止和解释等都有不同程度的适用。

[关键词] 海上保险法；法律适用；民法典

【引言】

在调整海上保险合同方面，自 2021 年 1 月 1 日起施行的《民法典》，承继并发展《民法总则》和《合同法》，已经成为《海商法》和《保险法》重要的、全面的和统一的补充。

保险合同是商事合同，《民法典》及此前的《民法总则》和《合同法》都没有将保险合同、海上保险合同作为“典型合同”做出特别规定，故本文仅需要关注《民法典》第一编“总则”和第三编“合同”中第一分编“通则”的有关规定。

与海上保险合同相关者，《民法典》对《民法总则》及《合同法》的主要相关修改包括：

（1）完善电子合同的成立、交付等规则（《民法典》第 469、491、512 条）；
（2）规定了预约合同，并明确违反预约合同应承担违约责任（《民法典》第 495 条）；
（3）明确保险人未有效提示或说明的免除或减轻保险人责任的格式条款可不成为保险合同内容（《民法典》第 496、497、498 条）；
（4）增加了连带债务的涉他效力规则（《民法典》第 518 - 521 条）；
（5）增加了真正利益第三人合同规则（《民法典》第 522 条）；
（6）补充第三人代为履行规则（《民法典》第 524 条）；
（7）修订了合同的情势变更规则（《民法典》第 533 条）；
（8）完善代位权制度中的保全与保存规则（《民法典》第 535 条）；
（9）区分合同解除与债权债务终止（《民法典》第 557 条）。

对《民法典》如何影响海上保险合同的订立、效力、履行、变更、转让、终止和解释，本文作简要讨论，不限于上述《民法典》的新规定。

一． 海上保险合同的订立

1. 海上保险合同无法定书面形式要件

《民法典》承继《合同法》，放宽了对经济合同书面形式的要求，因《海商法》和《保险法》皆未要求海上保险合同满足书面形式要件，故除非双方约定须具备书面形式，海上保险合同可口头缔结。

此外，即使双方约定采用合同书形式订立海上保险合同，如果在签字或盖章之前一方已经履行了主要义务，对方接受的，也视为该合同成立[1]。

2. 海上保险合同的内容只求“具体确定”，不求完整

在合同的实质要件方面，《民法典》承继《合同法》，澄清了只要双方约定了“具体确定”的合同内容，就认为合同已经成立，不要求双方就合同的全部内容达成一致[2]。《民法典》第 470 条只是提示性地或说示范性地规定了合同“一般包括”的内容，要约的成立也是以“内容具体确定”为标准[3]。

值得注意的是，虽然合同标的、数量、质量、价款或者报酬、履行期限、履行地点和方式、违约责任和解决争议方法等皆属于

[1] 《民法典》第 469/490 条。
[2] 《民法典》第 470 条。
[3] 《民法典》第 472 条。

合同的“实质性”内容[4]，也是合同中“一般包括”的条款[5]，但其中只有合同“标的”一项是合同成立不可或缺的条款[6]，合同中欠缺其他各项中的一项或数项皆不影响合同的成立[7]。

《海商法》第 217 条关于海上保险合同“主要内容”的规定，我认为也是提示性或示范性的规定，但其中第（一）项“保险人名称”、第（二）项“被保险人名称”和第（三）项“保险标的”，无疑是海上保险合同必备的条款，缺乏这些条款时，海上保险合同不能成立。其第（四）项“保险价值”，双方未约定时，就是不定值保险而已，在国内海上保险合同中也常见。其第（五）项“保险金额”、第（六）项“保险责任和除外责任”、第（七）项“保险期间”和第（八）项“保险费”，在双方未约定其中一项或数项时，可依次通过双方补充协议、对合同的整体解释和交易习惯来予以补充[8]。如果仍不能明确有关内容，可依《民法典》第 466 条规定的“符合合同目的”标准、诚信原则及市场价格等方法来进一步寻找合同客观的规范内容[9]。

但是，《保险法》第 18 条规定了非海上保险合同诸多的必备条款，可能解释为要式合同的依据，与《民法典》存在冲突。

3. 海上保险合同成立过程：“要约—承诺”分析法

《民法典》承继《合同法》，详细规定了此前学理所阐释的关于合同成立过程的“要约—承诺”概念分析方法[10]，也适用于电子合同。

海上保险业务中常用的投保单，一般是保险人印制的空白格式，保险人将其交给被保险人时，只构成要约邀请[11]；而当被保险人填写了投保单并交给保险人时，只要投保单上明确了被保险人、保险人和保险标的，就构成了被保险人投保的要约[12]。缺乏对保险费、保险金额、保险责任和/或保险期限等内容的明确规定，不一定影响要约的成立。

《海商法》第 217 条所规定的八项“主要内容”，都是海上保险合同的“实质性”内容，受要约人对要约中的这些内容的任何变更，皆导致要约失效，而构成一个新的要约[13]。保险保证也是海上

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4 《民法典》第 478/488 条。
5 《民法典》第 470 条。
6 此外双方当事人也是必要条款。
7 崔建远， “关于合同欠缺条款的处理”，《人民法院报》1999 年 9 月 30 日第三版。
8 《民法典》第 142/510 条。
9 《民法典》第 455/511 条。
10 《民法典》第 471 - 494 条。
11 《民法典》第 473 条。
12 《民法典》第 473 条。
13 《民法典》第 478 条。

保险合同的实质性内容。

承诺对要约无“实质性”变更的，该承诺有效，且以承诺内容作为合同内容[14]。承诺生效时合同成立[15]。承诺生效的地点为合同成立的地点[16]。

根据《民法典》第 480 条，承诺应以通知的方式作出，但根据“交易习惯”或者要约表明可以通过行为作出承诺的除外。故保险人出立正式保险单证，要求收取保险费或接受支付保险费，皆是有效的承诺方式。

值得注意的是，保险合同成立后，保险合同的内容包括投保单和保险单（附保险条款），以及双方的其他特别约定。当投保单与保险单的内容不一致时， 哪一个文件的效力更高？目前尚有争议。海事司法实践中法院倾向于保护被保险人的利益，因此保险人应将保险单中对其有利的特约条款（如航区保证、不保甲板货风险、免赔额等），明确填写在在投保单中，并要求投保人在投保单上亲自签字和/或盖章（投保人为公司的情况下）。

4.电子海上保险合同的成立与交付规则

在《电子签名法》的基础上，《民法典》第 469 条澄清了电子合同一般不是书面合同的一种形式；如其能够有形地表现所载的内容并可以随时调取查用，视为书面形式。

根据《民法典》第 491 条，在成立时间上，电子合同有其特殊性：如果双方选择确认书形式订立电子海上保险合同，则签订确认书时合同成立；如果一方当事人通过互联网等信息网络发布的保险产品信息内容确定，而且表明一经承诺即受约束的意思，则该保险产品信息符合要约，被保险人提交投保单时保险合同即成立。

根据《民法典》第 512 条，在合同效力方面，系统生成的保险单电子凭证（电子合同标的物）时间为提供保险服务的时间，保险单电子凭证进入被保险人指定的特定系统，而且能够检索识别的时间为交付时间。

5.海上保险合同中的先合同义务

在我国民法中，《合同法》第 42 条和第 43 条创设了“先合同义务”的新规定，《民法典》第 500 条、第 501 条予以保留。

其实 1993 年生效的《海商法》，早于《合同法》，借鉴英国 1906 年海上保险法，规定了“先合同义务”，而且对海上保险合同当事

[14] 《民法典》第 479/489 条。
[15] 《民法典》第 483 条。
[16] 《民法典》第 492 条。

人的诚实信用有更高的要求，例如《海商法》第 222 条和第 223 条规定了被保险人所负的严格的告知义务；《海商法》第 224 条的规定，也是诚信原则运用于海上保险合同的必然结果之一。

但《合同法》、《民法总则》和《民法典》明确规定并特别强调了诚实信用原则，不仅适用于合同订立过程中，还适用于合同履行过程中以及合同终止后，故这一原则对海上保险合同仍很重要。例如保险人与被保险人签订了海上货物运输预约保险合同，在合同履行期间，常发生被保险人违约向其他保险公司投保或故意不申报的情况，此时保险人可援用诚实信用原则，对被保险人在事故发生后才申报投保的货物，依法主张不受预约保险合同的约束，拒绝赔偿。

保险人开出的保险费率、手续费等承保条件，是很重要的商业秘密，被保险人不应泄露给其他保险公司，否则可能要承担损害赔偿责任。这是《民法典》第 501 条的要求。

二． 海上保险合同的效力

1. 附生效条件或生效期限的海上保险合同

海上保险合同的生效有时附一定条件或期限，例如船舶保险人在承保时发现船舶证书已失效，要求船东尽快办妥，但先收了保险费，应认为船舶保险合同已成立，只是要等到船舶证书办妥时该合同才生效。

此外，需要注意海上保险合同生效与海上保险人责任开始也不是同一概念。例如双方事先订立了海上货物运输保险合同，约定保险人的保险责任期间从保险货物离开被保险人的仓库开始起运时开始，该合同在合同成立时已经生效，但保险人的责任在货物启运后才开始。

2. 表见代理与表面授权

《民法典》第 503 - 505 条规定是为了保护“善意”相对人的信赖利益及交易的安全。当善意相对人有理由相信行为人有代理权，或相信行为人有经营权时，被代理人不得以行为人无代理权为由否认合同的效力，经营人也不得仅以其超越经营范围确认合同无效。

海上保险代理制度在我国比较发达，轮船客运站、渔港监督站、银行网点，甚至居民储蓄网点等，常被保险公司授权代理海上保险业务。如果行为人处挂有保险人的授权书，或行为人有盖

好章的空白保险单，或此前该行为人从事过某保险公司的保险代理业务，被保险人就“有理由相信”行为人有保险代理权，保险人须受行为人所签保险合同的约束。至于保险人与行为人的关系，可根据《民法典》第一编总则第七章代理的有关规定来另案处理，因为它属于另一个法律关系。另一方面，有人以保险代理名义骗收保险费后逃之夭夭，被保险人在投保时有合理查核代理权的义务，不能盲目相信，否则尔后发现上当受骗去纠缠保险公司也无用。

三. 海上保险合同的履行

1. 通知与协助的义务

在海上保险合同履行过程中，双方当事人应遵循《民法典》第 7 条规定的“诚实信用原则”，根据“合同的性质”、“目的”和“交易”习惯履行通知、协助和保密等义务[17]《海商法》和《保险法》对损失通知、协助追偿等有更具体的规定，但不可能面面俱到，仍可能需要借助《民法典》的这一规定作为最终的补充。

2. 第三人代为履行

《合同法》首次规定了第三人代位履行债权或债务问题[18],《民法典》第 524 条做了补充规定，弥补了《合同法》在债的清偿人方面的不足，也可能适用于海上保险合同。例如，船舶有抵押的情况下，船东不支付保险费而影响到保险合同的效力的，船舶抵押权人有权代船东支付保险费。

3. 先履行抗辩权

根据《民法典》第 526 条，本人认为，被保险人支付到期保险费的义务在先，保险人支付保险赔偿金的义务在后。在被保险人未付清到期保险费之前，保险人有权拒绝支付保险赔偿金，而且被保险人不得主张抵销。从保险赔款中扣除保险费，是保险人不得已的作法，但保险人没有义务这样做。

4. 债权人的代位权：合同的保全

《民法典》第 535 条和第 536 条完善了《合同法》第 73 条首次引入的债权人的代位权制度，对保险人追偿被保险人拖欠的保险费有一定意义。

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[17] 《民法典》第 509 条。

[18] 《合同法》第 60/65 条。

此外，债权人的代位权应与《保险法》第 65 条规定的责任保险合同的第三人直接起诉保险人的权利相区别。

四． 海上保险合同的变更与转让

1． 海上保险合同的变更

合同变更指合同内容的变更。《民法典》澄清了一点：当事人对合同变更的内容约定不明确的，推定未变更[19]。例如海上货物运输保险单的被保险人变更保险金额、目的港等合同内容时，一定要得到保险人正式批单并认真审查批单措辞，以避免产生争议。

2． 海上保险合同当事人的合并与分立

《民法典》规定合并或分立的法人或者其他组织，对合同的权利和义务享有连带债权，承担连带债务[20]。这一规定对保险人索赔保险费有所帮助。

在船舶保险中，被保险人应注意的是，被保险人发生合并和分立时，一定要事先通知保险人并取得保险人的同意，否则将发生船舶保险合同的解除或自动终止[21]。

3． 保险人的代位求偿权

《民法典》规定债权人将合同的权利全部或部分转让给第三人时，只需通知债务人即发生法律效力[22]。但是，海上保险合同中保险人的代位求偿权，规定在《海商法》第 252 条，“被保险人向第三人要求赔偿的权利，自保险人支付赔偿之日起，相应转移给保险人。”对此规定，通说认为代位求偿权的法律性质为债权的法定转移[23]，不需要通知。

债权的转让不是基于保险人与被保险人之间的协议，而是基于保险人支付保险赔偿金。实务中，被保险人在收到保险赔偿金后，一般按保险人要求签发“收据及权益转让书”，作为保险人已支付保险赔偿金的证明和保险人以自己名义向债务人索赔或诉讼时诉权的证明。此种“收据及权益转让书”是保险人已实际支付保险赔偿金的初步证据，或至少是债权转让的证据，但最高人民法院的司法解释仍要求保险人提供银行支付凭证以证明保险金的支付。此种“收据及权益转让书”不是保险人取得法定代位求偿权的必要证据。本文认为该文件本身构成一份独立的被保险人同

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[19] 《民法典》第 544 条。
[20] 《民法典》第 67 条。
[21] 《海商法》第 230 条，人保《船舶保险条款》第六条第二款。
[22] 《民法典》第 546 条。
[23] 汪鹏南，《海上保险合同法详论》，第四版，大连海事大学出版社，2017 年，第 114 页。

意向保险人转让其债权的协议，其所转移的债权范围可以超过保险人的保险赔偿责任范围或实际赔偿范围或金额，对此法院或仲裁机构不应加以限制。

《海商法》第 252 条和《保险法》第 60 条对代位求偿权的规定并不完整，也不准确。为了统一司法实践，2021 年 1 月 1 日起施行的最高人民法院“关于适用《中华人民共和国保险法》若干问题的解释（四）”对此有多条重要规定。但“债权法定转让”的理论仍有待完善。

五． 海上保险合同的解除

《海商法》只规定了海上保险合同的“解除”[24]，该概念包括了海上保险合同权利义务的“终止”。《民法典》第 557 条区分了合同解除与单个债权债务终止；合同解除的效果是合同法律关系的消灭，即合同项下的权利义务关系终止，合同解除后，未履行的合同债务终止履行，已经履行的部分进入清算关系，因合同解除发生新的返还之债。

根据《民法典》，当事人可以约定一方解除合同的条件[25]，解除合同的通知到达对方时生效[26]。

根据《民法典》第 563 条，当事人一方延迟履行主要债务，经催告后在合理期限内仍未履行的，对方可以解除合同。在海上保险合同争议中，近年来常出现的问题是，被保险人拖欠保险费时，保险人是否有权解除合同？《海商法》和《保险法》都只是强调除合同另有约定外，保险责任开始后，保险人不得解除合同[27]。《民法典》第 563 条并不能改变《海商法》的有关规定，因为特别法的规定应优先适用。

实务中，船舶保险合同可约定被保险人拖欠保险费时保险人有权解除合同。船舶抵押权人对此应予注意。

但是海上货物运输保险因可自由转让，即使当事人约定保险人得以被保险人拖欠保险费为由解除合同，此种约定也不能对抗善意的保险单受让人，只是保险单受让人应对拖欠的保险费承担连带赔偿责任[28]。

六． 海上保险合同的约束力及其解释

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[24] 《海商法》第十二章第二节

[25] 《民法典》第 562 条。

[26] 《民法典》第 565 条。

[27] 《海商法》第 227/228 条；《保险法》第 34 条。

[28] 《海商法》第 229 条

1.合同解释原则

《民法典》第 142 条规定了对所有合同条款的解释规则，第 498 条对如何解释格式条款规定了三个原则，第 510 条和第 511 条对如何补充合同的欠缺条款又作了具体规定，可见立法者充分了解合同解释问题在司法实践中的重要性。

根据《民法典》第 142 条，合同条款的真实意思，要根据下列要素来确定，即，

（1） 合同所使用的词句：文义解释；
（2） 合同的有关条款：整体解释；
（3） 行为的性质和合同的目的：目的解释；
（4） 交易习惯：习惯解释；和
（5） 诚实信用原则：“帝王条款”。

2. 保险人对格式海上保险合同的说明义务与不利解释规则

与《合同法》相比，《民法典》扩大了对格式合同下保险人的明确说明义务和不利解释规则的适用范围及其法律后果。

《民法典》对于规范格式条款，形成了订入规则（第 496 条）、效力规则（第 497 条）和解释规则（第 498 条）。根据《民法典》第 496 条第 2 款的规定，采用格式条款订立合同的，提供格式条款的一方应当遵循公平原则确定当事人之间的权利义务，并采取合理的方式提示对方注意免除或者减轻其责任等与对方有重大利害关系的条款，按照对方的要求，对该条款予以说明。提供格式条款的一方未履行提示或说明义务，致使对方没有注意或者理解与其有重大利害关系的条款的，对方可以主张该条款不成为合同的内容。

对保险合同中的“免责条款”，《保险法》第 17 条要求保险人，在订立保险合同时向投保人明确说明，未明确说明的，该条款对被保险人不产生效力。而《民法典》将保险人应该明确说明的条款范围扩大到“免除或者减轻其责任等与对方有重大利害关系的条款”，要求保险人在合同成立之前提请被保险人注意，并在被保险人有要求时予以说明，并明确规定保险人未提请注意或未说明的法律后果是这种条款可以不是合同内容。围绕《保险法》第 17 条的争议尘埃未定，《民法典》第 496 条第 2 款将再起烽烟。

该规定将对海上保险合同产生重大的影响，因为海上保险合同几乎都是由保险人指定的格式保险单条款，而且保险条款在 2009 年全面修订后仍有许多条款陈旧，与《海商法》和《保险法》有诸多冲突之处。

保险人的明确说明义务和不利解释规则的扩大适用，对消费

者保险合同（如人身险、车险）是合适的，但对海上保险合同这种商业保险合同并不合适，在将保险人的说明义务和不利解释规则适用于海上保险合同时，应从严解释，因为海上保险合同通常不属于消费者合同，保险合同本质上是一种限定性赔偿合同，而且很少修订，被保险人应该理解格式海上保险合同条款的内容，否则可能会被法官或仲裁员滥用，而致全部保险条款无效，把保险合同变成了保证合同。保险人免除其责任或排除被保险人的主要权利，应限于保险人在保险单条款中规定一些免责条款，免除其通常情况下应承担的保险赔偿责任，与其承保的险别和收取的保险费极不相称。海上保险合同中的保证条款、保险赔偿先决条件条款等，只要与国际惯例相一致，就是有效的，尽管对被保险人很苛刻。

因此，《民法典》对格式条款的规定应引起保险公司的高度重视，并形成新的业务模式，包括：在承保前提供保险条款及相关重要信息、增补保险单条款的解释条款，将其作为保险条款的组成部分，并在投保单和保险单上以带颜色粗体字提请被保险人注意；并借鉴银行的双录做法，要求被保险人在投保单或其他适当文件上亲自签字确认他已仔细阅读全部条款，理解其内容，特别是免责条款和限制责任条款的内容，以避免日后被保险人作纯技巧性的抗辩，使保险变质为保险人保证补偿被保险人的一切损失。

《民法典》的相关规定也对《保险法》和《海商法》（海上保险合同一章）的修订提出迫切要求，例如仿效德国保险法，明确规定将特种大额风险保险（海上保险合同通常属于这种保险）和通过专业保险经纪人和保险代理人承保的业务等，作为例外情况。

第二，《民法典》中的格式合同效力规则（第 497 条），限制保险人任意设定保险条款，避免保险合同显失公平。《民法典》的规定比《保险法》第 19 条的规定更宽泛。这对消费者保险合同（如人身保险合同）将产生重大影响。就商业性的海上保险合同而言，何为“不合理地免除或减轻保险责任”？何为“不合理地限制对方权利”或“排除对方主要权利”？也有待司法检验。

第三，《民法典》第 498 条规定了解释格式合同的三条原则。其一，应遵循“通常理解”的原则。这是一个总的解释原则，对非格式合同也同样适用。其二，对格式条款有两种以上通常解释的，应当作出不利于提供格式条款的一方的解释。此前，在原《保险法》第 30 条有类似规定，但表述不当，在审理海上保险合同争议时，这一解释原则可能被错误地理解为，按被保险人的观点去

解释保险单条款。诉讼或仲裁时，肯定是保险人与被保险人各执一辞，但并不等于所争议的条款，根据“通常解释”原则，可能出现两种或两种以上的理解，也不等于双方各自声称的观点就是各为“通常理解”中的一种；现行《保险法》第 30 条已修改为指“通常解释”，与《民法典》第 498 条的规定一致。其三，该条款规定明确了追加条款的效力高于格式条款效力的解释原则。在普通法中，还有手写条款的效力高于打印条款的效力之必要规定。

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The Application of the Civil Code upon the Marine Insurance Policy

Prof. Pengnan Wang, Partner
Head of Shipping & Arbitration Team
Beijing Yingke Law Firm, Dalian Office

[Abstract] The Civil Code succeeds and develops the General Provisions of Civil Law and the Contract Act, will apply to the conclusion, effect, performance, change, transfer, termination and explanation of the marine insurance policy to some extent.

[Key Words] Law of Marine Insurance; Application of Law; the Civil Code

A Introduction

The Civil Code, coming into effect from 1 January 2021, succeeds and develops the General Provisions of Civil Law and the Contract Act, has become the important comprehensive and unified supplement to the Insurance Act and the Maritime Code.

The insurance contract is a commercial contract, neither the Civil Code nor the General Provisions of Civil Law and the Contract Act takes the insurance contract as a "typical" contract, so this paper only analyses the First Volume "General Provisions" of the Civil Code and the First Sub-section "General Stipulation" of the Third Volume "Contract" of the Civil Code.

Regarding a contract of marine insurance, the main revisions of the Civil Code on the General Provisions of Civil Law and the Contract Act includes:

(a) improvement on the conclusion and delivery of a electronic contract (the Civil Code ss. 469, 491 & 512);
(b) the new stipulation that the open contract is a contract (the Civil Code s. 495);
(c) the heavier limitation on the insurer that the format policy clauses excluding or mitigating the insurer's liability, if not duly notifying it and explaining its meaning to the assured, will not be part of the insurance contract (the Civil Code ss. 496, 497 & 498);
(d) new stipulation regarding the joint obligation's effect on a third party(the Civil Code ss. 518 - 521);
(e) new stipulation regarding rules on a third party of genuine interest (the Civil Code s. 522);
(f) new stipulation regarding rules on the substitution performance by a third party(the Civil Code s. 524);
(g) revision on the change of circumstances rules (the Civil Code s. 533);
(h) improvement on the preservation rules and conservation rules in subrogation(the Civil Code s. 535); and

(i) distinguishing the discharge of contract from the termination of obligation(the Civil Code s. 557).

The paper highlights how the Civil Code, including but not limited the above new provisions, will affect the conclusion, effect, performance, change, transfer, termination and explanation of a contract of marine insurance.

B Conclusion of the Contract of Marine Insurance

B.1 The contract of marine insurance may be oral

The Civil Code succeeds the Contract Act, does not require that a contract shall be in writing. Neither the Maritime Code nor the Insurance Act requires that a contract of marine insurance shall be in writing, so a contract of marine insurance may be oral.

Furthermore, a contract of marine insurance shall have been concluded where the substantial obligations have been performed by a party to the contract before the contract is signed or chopped, even if both party agreed that the contract should be in writing.[1]

B.2 The contents of a contract of marine insurance shall be "actually definite", though incomplete

With regard to the material elements of the contract of marine insurance, the Civil Code succeeds the Contract Act, clarifies to the effect that the contents of a contract shall be "actually definite", and may be incomplete.[2] Section 470 of the Civil Code only stipulates the examples of contents which a contract may be "ordinarily included". The establishment of an offer is also judged by whether the offer is actually definite.[3]

Although the subject matter, quantity, quality, price or payment, performance period, performance location and method, liability arising from the breach of contract are all the material elements[4]and ordinary contents in a contract[5], only the subject matter of a contract of marine insurance shall be indispensable,[6]and deficiency of the other part or parts shall not affect the conclusion of a contract of marine insurance.[7]

It is submitted that the provision of "main contents" of a contract of marine insurance in the Maritime Code is of description only, but its 1st item "the name of insurer", the 2nd item "the name of assured" and the 3rd item "the subject matter" are integral parts of a contract of marine insurance. In the case that the 4th item "insured value" is not agreed, the policy will be unvalued one, which is also popular in China. The 5th item "insured amount", the 6th item "insurance liability and exclusion", the 7th item "the period of insurance" and the 8th item "premium", if not agreed, may be implemented by an endorsement, explanation of contract and insurance

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[1]the Civil Code ss. 469 & 490
[2]the Civil Code s.470
[3]the Civil Code s.472
[4]the Civil Code ss.478 & 488
[5]the Civil Code s.470
[6]*Both parties to the contract are also the necessary terms in the contract.*
[7]*See Cui Jianyuan, On the Approach to Incomplete Contract Terms, Renmin Fayuan Neswpaper, September 30,1999*

customs.[8]Where the contents of contract cannot be decided, we may rely upon the purpose of contract, the principle of good faith and market price in accordance with Section 466 of the Civil Code.[9]

However, Section 18 of the Insurance Act stipulates the necessary contents of an insurance contract, which may be interpreted as the integral parts of an insurance contract, conflicts with the Civil Code.

B.3 Analysis of the conclusion of a contract of marine insurance: offer and acceptance

The Civil Code succeeds the Contract Act, explicitly the concepts of offer and acceptance,[10]which also applies to an electronic contract.

The application ordinarily used in marine insurance, is a format in blanket, only constitutes an invitation to offer when the insurer shows the application to the assured;[11]the application filled in the name of insurer, the name of the assured and the subject matter of insurance may constitutes an offer when the assured delivers it to the insurer,[12] lacking of other items will not affect the establishment of an offer.

8 "main" items stipulated in Section 217 of the Maritime Code are all "material" contents, any change to these main items will result in a new offer.[13]An insurance warranty also belongs to the material contents in a contract of marine insurance.

An acceptance will be valid and become the contents of a contract where the acceptance does not change the material parts of an offer.[14]The contract concludes when an acceptance comes into effect.[15]The location where an acceptance comes into effect is the location where the contract concludes.[16]

In accordance with Section 480, an acceptance should be given by a notice except in the case that an acceptance may be given by an act as per the customs or where the offer allows to do so. Therefore, issuing a formal policy, requiring premium payment or receiving premium will all constitute valid method of acceptance.

It is worthwhile mentioning that the contents of a contract of marine insurance include both the policy and the application, and the special agreements. It is still uncertain whether the application should surpass the policy where the contents of two documents are inconsistent. Maritime Courts in China prefers to protecting the interests of the assured, so we suggest that the insurer should requiring the assured to fill in the special agreements in favor of the insurer, for example, the navigation area warranty, the deck cargo excluded, the deductible in the application, and to duly sign the application in person.

B.4 Conclusion and delivery rules on an electronic contract of marine insurance

[8]the Civil Code ss.142 & 510
[9]the Civil Code ss.466 & 511
[10]the Civil Code ss.471 - 494
[11]the Civil Code s.473
[12]the Civil Code s.473
[13]the Civil Code s.478
[14]the Civil Code ss.479 & 489
[15]the Civil Code s.483
[16]the Civil Code s.492

Based on the Electronic Signature Act, Section 469 of the Civil Code clarifies to the effect that an electronic contract is not a contract in writing, but may be taken as one in writing provided that its contents can be shown and checked at all times.

In accordance with Section 491 of the Civil Code the time of conclusion of an electronic contract of marine insurance is special: it will be the time both parties execute the letter of confirmation if so agreed before; or it will be the time when the assured submits its application provided that the insurance information issued by the insurer online is definite and will bind the insurer upon accepting.

In accordance with Section 512 of the Civil Code the generation time of the electronic insurance certificate (the subject of electronic contract) shall be the time to provide the insurance service, whereas the time when the electronic insurance certificate enters into the assured's computer system and can be identified shall be the delivery time.

B.5 Pre-contractual obligations in a contract of marine insurance

In Chinese civil law Sections 42 & of 43 of the Contract Act 1999 create the legal norm of pre-contractual obligations, which are succeeded by Sections 500 & 501 of the Civil Code.

In fact, the Maritime Code taking effect from 1 July 1993, has introduced the legal norm of pre-contractual obligations on the assured's duty of disclosure in light of the principle of utmost good faith in the Marine Insurance Act 1906 of UK, the detailed provisions are set in Sections 222, 223 & 224 of the Maritime Code.

However, the Contract Act, the General Provisions of Civil Law and the Civil Code all have specific provisions of good faith as one of the fundamental principle of civil law, which applies to both pre-contract, the performance of contract and the post-contract, so Sections 500 & 501 of the Civil Code are still very important in the context of marine insurance. For example, during the performance of an open cover of goods to be carried by sea, if the assured intentionally breaches the open cover, does not inform the insurer of every transport of goods before the accident, the insurer may rely upon the general legal principle of good faith stipulated by Sections 500 & 501 of the Civil Code to discharge liability for the loss of or damage to goods unreported intentionally though there exists an open policy.

The placing terms such as the premium rates, the commission etc. are all important commercial secret, the assured should keep it confidential. This is the requirement under Section 501 of the Civil Code.

C. The Effect of a Contract of Marine Insurance

C.1 Contract of marine insurance with conditions or period for taking effect

Taking effect of the contract of marine insurance may be subject to a certain conditions or a period, for example, a ship's certificate is invalid when the assured submits the application for this ship, the insurer charges the premium but sets the conditions that the policy does not take effect until the shipowners have got the valid certificate, in such a case the insurance contract has concluded when the premium is

charged, but does not take effect. Section 502 of the Civil Code stipulates the contract with conditions or period for taking effect as agreed by both parties to the contract.
Besides, it is worthwhile to mention that the time when the insurer attaches insurance liability is also different from the time when the contract comes into effect, for example, in a marine cargo policy which has a warehouse to warehouse clause, which states to the effect that the insurance periods commences from the time when the goods insured depart from the warehouse of the assured, the insurance contract takes into effect upon concluded, and the insurance attaches from the time for goods leaving the warehouse for transit.

C.2 Apparent agency and ostensible authority

Provisions of Sections 503, 504 & 505 are to protect the reliance interests and transaction security of the *bona fides* other party to the contract. Where the *bona fides* other party has good reason to believe that the doer has agency or the right of doing business, the principle is not allowed to disclaim the validity of the contract on the grounds of lacking agency or transcending authority.

There are many application scenarios of placing marine insurance through agents, for example, the ferry stations, the fishing vessel superintendence authorities and bank branches are authorized by insurers to accept marine insurance applications. In the cases that there is the letter of authority, that the agent has blanket policy with the stamp of an insurer, or that the agent once did similar business for the insurer, the *bona fides* other party has good reason to believe that the doer has agency or the right of doing business, so the insurer should be bound by its agent's acts. With regard to the relationship between the agent and the principal, it is a separate issue, and shall be governed by the law of agency in the Civil Code (Chapter 7 in the First Volume "General Provisions"). On the other hand, if there exists fraud in selling false policy, the assured is obliged to check the authority of insurance agent, otherwise the false policy shall not bind the insurer.

D. The Performance of Contract of Marine Insurance

D.1 Duty of notice and assistance

During the performance of a contract of marine insurance both parties to the contract have obligations to give notice and assistance, and to keep relevant information confidential[17] in accordance with the principle of good faith, the nature and purpose of contract and the transaction customs as required by Section 7 of the Civil Code. Such a general provision is still very useful though both the Maritime Code and the Insurance Act have a certain specific rules on the notice of loss, assisting recovery against the third party and so on.

D.2 Performance by third party

The Contract Act introduced the legal norm of the performance by third party,

[17]the Civil Code s.509

[18]which is succeeded and improved by Section 524 of the Civil Code. The new provision may benefit marine insurers, for example, the ship mortgagee has right to pay premium in order to maintain the validity of a hull policy where the shipowners fail to pay it in time.

D.3 Right of defense of prior performance

It is submitted that the assured's obligation to pay premiums is prior to the insurer's obligation to indemnify the compensation according to Section 526 of the Civil Code. Furthermore, the assured does not have right of set-off before the premiums are paid in full.

D.4 Claimant's right of subrogation and right of rescission: preservation of contract

Sections 535 &536 of the Civil Code improve the legal norm of a claimant's right of subrogation introduced by Section 73 of the Contract Act, and will assist the insurer to claim unpaid premiums.

By the way one should distinguish a claimant's right of subrogation from the right of a third party to sue the insurer directly under a liability insurance policy in accordance with Section 65 of the Insurance Act.

E. Change and Transfer of a Contract of Marine Insurance

E.1 Change of contract

Change of contract means the rights and obligations in the contract change. The Civil Code makes it clear that a contract does not change where there is not definite change on the rights or obligations. [19]For example, in the context of a marine cargo policy any change to the insurance amount or the destination of goods should be done by an endorsement issued by the insurer, otherwise it would give rise to dispute.

E.2 Merge and separation of a party to contract

The Civil Code provides the joint right or obligation where a party to the contract merges or discrete.[20]This provision may be invoked to claim unpaid premiums where the assured merges or separates.

It is worthwhile to mention that in the context of hull policy the assured should give notice to the insurer and get the insurer's approval before merging or separating, otherwise the hull policy would be automatically discharged.[21]

E.3 The insurer's right of subrogation

The Civil Code stipulates to the effect that a partial or complete transfer of right to a third party takes effect provided that the notice of transfer is served on the debtor.

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[18]the Contract Act ss.60 & 65
[19]the Civil Code s.544
[20]the Civil Code s.67
[21]the Maritime Code s.230, PICC Hull Clauses Cl.6.2

[22]However, the insurer's right of subrogation, as provided in Section 252 of the Maritime Code, "the right of the assured to demand compensation from the third person shall be transferred to the insurer from the time when the insurance indemnity is paid". Based on the above provisions the common view is that the legal nature of insurance subrogation is the statutory transfer of rights, no notice is required.[23]
The transfer of rights is not based on the agreement between the insurer and the assured, instead it is based on the fact that the insurer has effect payment of the insurance indemnity. In practice, the assured will sign a Receipt and Subrogation to the insurer after having received the insurance indemnity as per the requirement of the insurer, which may become the evidence that the insurer has paid the insurance indemnity, so has right to claim against the third person directly. But the insurer is required to provide the evidence that the insurance indemnity has been actually paid in addition to the Receipt and Subrogation in accordance with the relevant judicial interpretation promulgated by the Supreme People's Court. In other word such a Receipt and Subrogation is not the evidence that the insurer is entitled to the statutory right of subrogation. It is submitted that such a Receipt and Subrogation itself is an independent agreement of transfer of rights, its scope is not limited to the statutory subrogation stipulated by the Maritime Code, and the maritime courts and the arbitration tribunal should not set limitation on such a contractual transfer.

It is a pity that the relevant provisions on the subrogation in both Section 252 of the Maritime Code and Section 60 of the Insurance Act are far from complete or accurate. To assure the certainty of application the Interpretation IV of Certain Issues Concerning the Application of the Insurance Act promulgated by the Supreme People's Court, taking effect from 1 January 2021, has a certain important rules on the subrogation. There is still room for the improvement of the statutory transfer theory.

F. Discharge of a Contract of Marine Insurance

The Maritime Code only stipulates the discharge of a contract of marine insurance,[24] which includes the termination of obligations under a contract of marine insurance. Section 557 of the Civil Code distinguishes the discharge of contract from the termination of each obligation under the contract; the effect of discharge is the elimination of the contract relation, i.e. the end of all obligations under the contract, thereafter the contract performance stops, whilst the performed part becomes the liquidation relation, which creates new liability in restitution.

In accordance with the Civil Code both parties may agree on the conditions to discharge the contract,[25] and the discharge comes into effect from the time when the notice of discharge is served on the other party.[26]

In accordance with Section 563 the other innocent party may discharge the contract where a party to the contract is still in default in performing its main obligations after

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[22]the Civil Code s.546
[23]See *Wang Pengnan, The Contract of Marine Insurance, 4th edition., Dalian, 2017, p.114*
[24]the Maritime Code Ch.12-2
[25]the Civil Code s.562
[26]the Civil Code s.565

a reasonable notice of interpellation expired. There are many disputes on the issue that whether the insurer may discharge the contract of marine insurance where the assured fails to pay premiums due. Both the Maritime Code and the Insurance Act only provide to the effect that the insurer may not discharge the contract after the insurance attaches unless otherwise agreed in the contract.[27]The Civil Code may not affect the relevant provisions in the Maritime Code because the Maritime Code, as the special law, takes precedence on application.

In practice the hull policy may provides the insurer's right to discharge in such a case, to which the ship mortgagee should pay its attention.

However, a marine cargo policy may be transferred, such a specific agreement on discharge may not bind on the innocent holder of the policy, on the other hand the holder of the policy is obliged to pay the outstanding premiums jointly.[28]

G. Effect and Interpretation of a Contract of Marine Insurance

G.1 Doctrines of interpretation on contract

Section 142 stipulates the general doctrines on the interpretation of contract, Section 498 provides three rules on interpretation of format contract, whilst Sections 510 & 511 set specific provisions on the implementation of incomplete contract, so obviously the legislators fully understand the importance of the issue of contract interpretation in the judicial practice.

In accordance with Section 142 the real meaning of a contract clause should be found by reference to:

(a) the words used by the contract clause: literal interpretation;
(b) the other relevant clauses in the contract: overall interpretation;
(c) the nature of behavior and the purpose of the contract: purpose interpretation;
(d) customs of transaction: customs interpretation; and
(e) the principle of good faith: Emperor clause.

G.2 The insurer's duty of instructions on the format contract and the adverse interpretation rule

Compared with the Contract Act the Civil Code enlarges the insurer's duty to clearly instruct the format contract and the application of the adverse interpretation rule.[i]

To govern the format contract the Civil Code has formed the integration rules (Section 496), the effect rules (Section 497) and the interpretation rules (Section 498).

G.2.1 The integration rules

The drafter of a format contract should follow the equity principle to balance rights and duties of both parties to the contract, should properly draws the attention of the other party to clauses which matter, including clauses of exclusion and/ or mitigation of the drafter's duties etc., and should give instructions to such clauses according to the requirement of the other party. Otherwise, the other party which does not notice or

[27]the Maritime Code ss.227 & 228, the Insurance Act s.34
[28]the Maritime Code s.229

understand such clauses, may take it that such clauses are not the integral part of the contract.

As to the exclusion clause in the format insurance contract Section 17 of the Insurance Act provides that the insurer should clearly instruct it to the assured when the insurance contract is concluded, otherwise, the exclusion clause will not bind the assured. Now the Civil Code extends the scope of adverse clauses from the exclusion clauses to all clauses which matters from the view point of the assured; furthermore, the assured may take uninstructed adverse clauses as non-existence. The dust arising from Section 17 of the Insurance Act is still in air, and it is expected that Sections 496 will stir up fresh controversy soon.

These provisions really matters in the context of the contract of marine insurance, having considered the fact that almost all marine policy are based on standard clauses, that most clauses are with regard to qualification of the insurer's indemnity, and that revised marine policy clauses in 2009 still have many outdated clauses or provisions contrary to the Insurance Act and/or the Maritime Code.

The enlarged application of the insurer's duty of instruction and the adverse interpretation rule is proper in the context of the consumer insurance contracts such as motor insurance, life insurance and medical costs policy etc., but improper in the context of marine policies which are usually not of consumer insurance. Unfortunately, the Civil Code does not distinguish the consumer contract from the non-consumer contract. It is submitted that in the context of marine policies the above rules should be strictly applied to avoid indiscriminate use by the court or the arbitration tribunal; the scope of application should be limited to exclusion clauses as tested under the Insurance Act before, otherwise a commercial marine policy in China might be distorted to be a guarantee agreement, and the premiums charged by the insurer would not match with the indemnity undertaken by the insurer. The warranty and conditions precedent clauses in commercial marine insurance policies, in so far as being in line with international customs, should not be interpreted as the adverse clause, though it really matters.

Therefore, insurance companies have to concern the above rules in the Civil Code, and build corresponding placement models, including positively providing the applicant and the assured with the standard policy clauses and related important insurance information, supplementing the detailed insurance policy interpretation codes as the integral part of the insurance contract, clearly marking all adverse clauses in the application and the policy to draw the attention of the assured and the applicant, having the applicant and/or the assured signed/chopped the application in person etc.; furthermore, the insurance companies are suggested to take the double-recording practice as developed by banks and financial institutions in order to keep the evidence that the applicant and/or the assured does receive the policy clauses and all relevant insurance information, does understand it, and does agree in other special agreements.

G.2.2 The effect rules

To avoid substantially unfairness in the format contract the Civil Code also enlarges the effect rule, compared with Section 19 of the Insurance Act. This will substantially

reshape the consumer insurance contract. But in the context of non-consumer insurance it will be quite uncertain with regard to the proper interpretation of the standard clauses which "unreasonably exclude or mitigate the insurer's liability", "unreasonably limit the rights of the other party", or " eliminate the principal rights of the other party".

The above integration rules and the effect rules in the Civil Code will urge the amendment to the Insurance Act and the Maritime Code, for example, as in the Insurance Contract Act of German, the law reform needs to distinguish the consumer insurance contract and the commercial insurance contract, clearly exempt the above rules to the large exposures policies (the marine policy often belongs to it) and policies concluded through the insurance brokers and/or agents for the applicant and/or the assured.

G.2.3 The interpretation rules

Section 498 makes three doctrines on interpreting the format contract: the ordinary meaning doctrine, the adverse doctrine and the rider clauses' priority doctrine.

The ordinary meaning doctrine is a common rule of contract interpretation, which applies to all kinds of contract, not limited to the format contract.

The adverse doctrine applies to the format contract only: in the case that there are two possible ordinary meaning of the format clause the interpretation should not be in favor of the drafter of the format contract. The Insurance Act before 2009 has similar provision, but does not clearly express the application of the above common rule of the ordinary meaning, and once was often wrongly applied to the effect that the assured's interpretation should be prior to the insurer's. Now Section 30 of the Insurance Act has clarified this issue.

The Civil Code also makes it clear that the rider clauses have prior effect to the format clauses. By the way the common law also has rules that clauses in handwriting have prior effect to printed clauses.