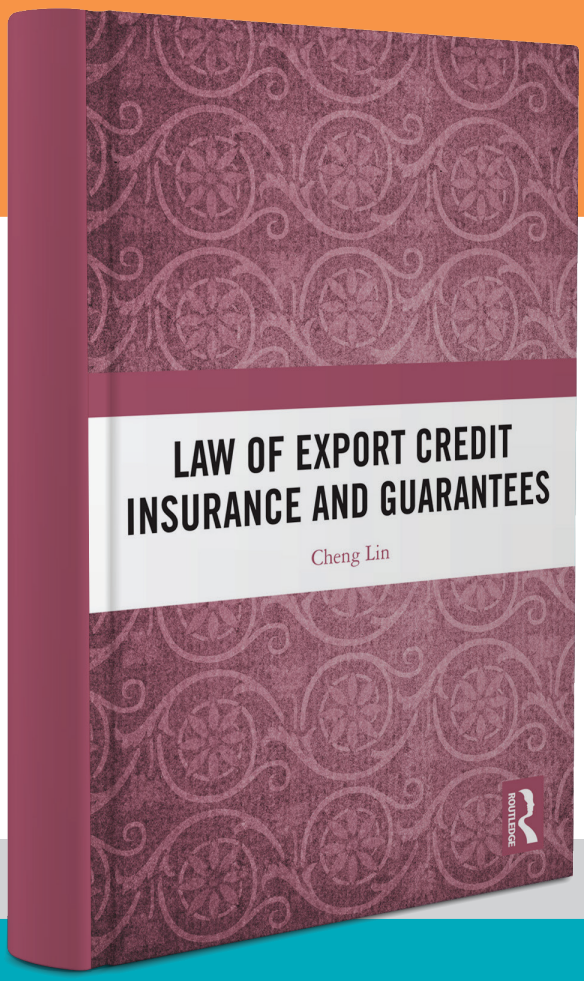

فراخوان ترجمه کتاب

تمدید شد
تا ۲۰ اردیبهشت

پژوهشکده بیمه

پژوهشکده بیمه، به منظور کمک به گسترش دانش بیمه‌ای، ترجمه کتاب

Law of Export Credit Insurance and Guarantees

را در دستور کار خود قرار داده است. لذا از کلیه اساتید، پژوهشگران، صاحبنظران و کارشناسان دعوت می‌شود که در صورت تمایل به ترجمه کتاب مذکور، کاربرگ درخواست ترجمه پیوست را به همراه سوابق علمی و اجرایی خود و ترجمه صفحات ذکر شده با ذکر عنوان کتاب، حداکثر تا تاریخ ۱۴۰۲/۰۲/۱۵ به آدرس ایمیل nashr@irc.ac.ir ارسال فرمایند.

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کاربرگ درخواست ترجمه کتاب

عنوان کتاب:	Law of Export Credit Insurance and Guarantees

الف- اطلاعات عمومی

نام و نام خانوادگی	
شغل و سمت فعلی	
مرتبه علمی (ویژه اعضای هیات‌علمی)	
آخرین مدرک تحصیلی و رشته	
آدرس	
شماره تماس ثابت	
شماره تماس همراه	
پست الکترونیک	

ب- سابقه تالیف/ترجمه (حداقل ۳ عنوان از آثار خود را اعلام بفرمائید)

ردیف	عنوان کتاب/ترجمه	سال انتشار	ناشر

ج- سابقه اجرایی

ردیف	محل خدمت	مدت زمان خدمت

expect. Therefore, ECGD was held in breach of its duty of care and liable for its negligent advice to the plaintiff.

Notably, the court in *Culford* was only concerned with the issue of liability, whereas the issue of damages remained untouched. Nevertheless, it is suggested by the commentators that principles established by *Hedley Byrne* regarding tortious liability for negligent misstatement are perfectly applicable to public bodies such as the ECA.[68] Therefore, the ECA could be liable for any pecuniary damages caused to the inquirer by the negligent advice (for instance, the losses the plaintiff suffered due to the non-payment by the contractor in *Culford*).

How to obtain an ECI cover from private credit insurers?

The early attempt to introduce ECI business at Lloyd's

There was an attempt to introduce ECI business as an admitted line at Lloyd's in the early 20th century, when Mr Cuthbert Heath, a respected Lloyd's underwriter and the first Chairman of the Trade Indemnity Company, a major credit insurance company at that time, proposed "eight principles of credit insurance" as the foundation of professional underwriting of political and credit risks:[69]

1. Credit risks for goods sold and delivered;
2. Losses due to insolvency;
3. No guarantee of payment at due date or payment of disputed items;
4. Insured debts to be self-liquidating;
5. Terms of payment should be short;
6. Coverage of no more than 75% of sums at risk;
7. No cover for existing commitments;
8. No insurance of loans or advances by banks.

However, that attempt failed in 1923 as a result of a fraud case of which the details were discussed in *Industrial Guarantee Corp Ltd v Corporation of Lloyd's*.[70] The assured in that case ran a car hire–purchase business and wished to insure the risk of default of the buyers with underwriters at Lloyd's. Such insurance was, in essence, a domestic credit insurance cover that shared the very identical legal nature with ECI.[71] Mr H, an underwriter at Lloyd's, placed the risks even knowing that the assured did not have sufficient security for its business. Mr H charged

68 Clive Lewis, *Judicial Remedies in Public Law* (10th edn, Sweet & Maxwell 2014), [15-039].

69 Whilst some of those principles seem no longer applicable in today's industry, they were helpful guidelines to establish the underwriting discipline for such risks that were not well understood at that time. See Glenn Sexton, "The English Legal View of Trade Credit Insurance – A Practitioner's View", <http://aida.org.uk/pdf/Glenn%20Sexton%20Credit%20Insurance.pdf> accessed 1 February 2022.

70 (1924) 19 Ll L Rep 78.

71 For a detailed description of the nature of the hire-purchase business, see ibid, 80–1 (Bailhache J).

a premium of £20,000, which was inadequate to meet his liability of over £2m. The assured then suffered from fraudulent bills of exchanges and made a claim amounted to £428,000 in total. Mr H, however, found himself unable to pay: underwriters were required to place deposits at Lloyd's, but if he withdrew his deposits, then Lloyd's would have known that he was in "hopeless difficulty" and stopped his underwriting. Mr H then sought to forge further bills of exchanges to meet his liability. Unsurprisingly, none of them was honoured, and Mr H was only able to carry on his business for a few months longer until Lloyd's was eventually aware of his fraud.

To preserve the reputation of the Lloyd's market, all syndicates and members trading alone agreed, unprecedently, to subscribe a policy of £2m insuring the amount of Mr H's deficiency on his credit insurance account.[72] However, because many of the transactions on which claims were based had been fraudulent, the Committee of Lloyd's paid only such portion as they saw fit. The assured then sued Lloyd's, relying on a pamphlet called "The Story of Lloyd's" which the assured received in purchasing its cover. The pamphlet stated that Lloyd's was a reputable insurance market where each underwriter's account was annually audited to ensure that his assets were sufficient to meet his liabilities. The pamphlet emphasised that the committee of Lloyd's had taken "ample measures to provide for any expected contingencies that could possibly arise". The assured contended that the pamphlet constituted an offer of insurance and further alleged that Lloyd's failed to make an effective compulsory audit of Mr H. Whilst Bailhache J was critical of some "misleading" promotions in the pamphlet, he did not regard it as an offer. The judge clarified that there had been no such reliance on the pamphlet: the assured previously insured its business in the company market until 1921, when it switched to Lloyd's merely because Mr H offered a cheaper premium. The judge held that Lloyd's did take reasonable precautions to ensure that underwriters should be solvent, as Mr H kept two sets of books: one set he showed to Lloyd's auditors and the other set he concealed from them. The former recorded that his underwriting account was in credit, but the latter contained his personal account which was heavily overdrawn. Bailhache J thus ruled that it was hardly possible for Lloyd's to detect such a fraud on the assumption that Mr H was an honest underwriter; since it was in this way deceived by Mr H, it was not liable to pay for his liability under the policy.

Despite the judgment in favour of Lloyd's, *Industrial Guarantee* led directly to a prohibition on the underwriting of credit risks at Lloyd's.[73] The Lloyd's Policy

72 It was reported that a further £100,000 was paid from the Corporation of Lloyd's resources and £88,468 from the Mutual Fund, a fund which the non-marine underwriters had voluntarily accumulated for some years and a precursor of the Central Fund established in 1927. See Julian Burling, *Lloyd's: Law and Practice* (1st edn, Routledge 2013) [2.33–4].

73 John Dunt, "When Marine Cargo Insurance Became Credit Risk Insurance" [2021] (3) LMCLQ 431, 431–2.

Liberty indicates that the judgment in *Turner* was incorrect: the surety's subrogation right stems from equity rather than being based on the contract. The surety need not create a trust to secure its subrogation right. On the contrary, subrogation is inherent in equity and natural justice, exclusion of or limitation on which requires clear words. It is therefore submitted that the ECA was entitled to the subrogation right against the debtor under ECGs, based on all abovementioned common law authorities as well as s 5 of the Mercantile Amendment Act 1856.

Although the legal basis of the ECA's subrogation right under ECGs now seems ascertained, further questions remain to be answered. First, how does the subrogation right operate under ECGs? Second, do ECG contracts share similar characteristics with ECI policies regarding subrogation and recoveries? Third, if so, what should the law be regarding subrogation and recoveries under ECGs? The following paragraphs will explore how the subrogation right operates under ECGs by reading the subrogation provisions in a sample ECG contract kindly shared by an anonymous Berne Union member during the Berne Union Academic Survey.

The subrogation provisions under ECGs

The subrogation protection clause

This research found that the sample ECG contract from the anonymous Berne Union member includes as detailed provisions regarding subrogation as ECI policies do. It stipulates a subrogation protection clause to ensure that the creditor will not prejudice the ECA's subrogation right. Clause 10 of the sample ECG contract provides that:

> Assignment and Subrogation of Lender's Rights Under the Financing
>
> In consideration of a Guarantee Payment by [the ECA] to Lender regarding a Financing (and pro-rata to the extent that the Guarantee Payment represents a portion of the obligations of Debtor under such Financing), immediately after a disbursement from [the ECA] to Lender of such Guarantee Payment …
>
> (a) Lender shall unconditionally and irrevocably transfer and assign to [the ECA] all of its right, title in or to, all claims of Lender against Debtor under such Financing,
> (b) [The ECA] shall be subrogated to such claims of the Lender against the Debtor (and any guarantors thereof) and
> (c) [The ECA] shall succeed to any liens held by the Lender against any assets of the Debtor or otherwise granted in respect of the Financing.
>
> The Financing Documents shall provide Lender with sufficient rights to transfer and assign to [the ECA] all of Lender's right, title in or to, all claims thereunder.

It appears that the subrogation protection clause under ECGs is highly identical to the subrogation protection clause under ECI discussed above. Under provisions such as Clause 10, the creditor is obliged to preserve the ECA's subrogation right.

The collection of recoveries clause

ECG contracts may also include a collection of recoveries clause stipulating that the creditor shall at the ECA's election either effect recoveries itself or authorise and assist the ECA to effect recoveries in its name. Meanwhile, some ECAs might emphasise that it is the creditor's sole duty to effect recoveries under ECGs. For instance, Clause 11(a) of the sample ECG contract from the anonymous Berne Union member provides that (1) the bank, as the creditor, should seek to collect debts from the debtor buyer, whether judicially, extra-judicially or by arbitration; (2) in particular, the bank should commence legal proceedings against the buyer within 60 days of the ECA's guarantee payment; (3) the bank should make regular reports to the ECA, every six months, on the progress of the collection proceedings; (4) if, after collection proceedings, the bank cannot recover the debts, it should provide evidence of such "non-recoverability" by submitting relevant documents including "an opinion of outside counsel … confirming the extent of such non-recovery …"; and (5) if the non-recovery of the debts is because of the bank's negligence or omission, then the bank should fully refund the ECA the guarantee payment plus interest.[99]

It is submitted that although such a detailed clause seems onerous to the bank, it merely specifies the bank's duty to collect recoveries. It cannot indicate that under ECGs the bank is under a heavier duty to effect recoveries than under ECI: the bank under the ECG cover is obliged to refund the ECG payment only if the non-recovery of debts is because of its negligence or omission.

The allocation of recoveries clause

ECG contracts also include an allocation of recoveries clause, just as ECI policies do. For instance, Clause 10 of the ECG contract from the anonymous Berne Union member provides that the bank should, deducting the collection costs it incurs, hold the recoveries in trust for the ECA:

> For the avoidance of doubt, if the Guaranteed Amount equals 100% percent of the amount of the Financing, [the ECA] shall retain all amounts recovered

99 Clause 11(c)(iii) provides that:

> In the event that recovery of some or all of the unpaid portion of a Financing…is not possible because (a) Lender did not commence a judicial, extra-judicial or arbitral proceeding in a timely manner, (b) Lender does not act with reasonable diligence in the course of such collection efforts or (c) there is a final adverse decision against Lender or [the ECA] because of a procedural right which has been barred or not timely exercised, to the extent such bar or failure to exercise has adversely impacted the outcome of the proceeding and is attributable exclusively to actions or inactions of Lender, Lender shall immediately reimburse [the ECA] the amount of the Guarantee Payment plus interest. Interest on such reimbursement shall accrue at the Financing Rate from the date such Guarantee Payment was made through the date the amount of the Guarantee Payment is returned; provided that interest shall be at the Default Rate to the extent reimbursement payment is not received within such five (5) Business Day period.

> under any such Financing to the extent that the Guaranteed Amount is less than the full amount of Debtor's obligations under the relevant Financing, then [the ECA] shall retain a pro rata portion of all amounts recovered under such Financing that correspond to the Guaranteed Amount.
>
> In the event that … Lender receives any payment, distribution or other property after such assignment which should have been paid or distributed to [the ECA], Lender shall hold such payment in trust for [the ECA] and
>
> (i) deduct the amount equal to Lender's out of pocket expenses (including reasonable attorneys' fees) incurred in connection with its attempts to collect payments from the Debtor and
> (ii) promptly pay or transfer the balance to [the ECA].

It is uncertain whether, by including an allocation of recoveries clause as above, the ECA will be entitled proportionately to both the recoveries up to the guaranteed amount and any surplus of the recoveries. Therefore, it is necessary to explore what the law should be regarding subrogation issues in ECG contracts.

What should the law be regarding subrogation and recoveries issues in ECG contracts?

The paragraphs above show that the subrogation provisions in ECGs are highly similar to that in ECI. However, whilst the English courts have fully elaborated the law on subrogation in ECI cases, there have been no reported English ECG cases confirming what the law should be regarding subrogation issues in ECGs. The lack of English case authorities on ECGs is due to the fact that ECG products are less common in the market than ECI covers. The Berne Union Academic Survey found that only 4 of the total 27 respondents members provide ECG products. However, that does not mean that ECGs are not as important to the export industry as ECI. On the contrary, an ECG is a very important type of export credit facilities product in the market because it is unconditional, on-demand and highly preferred by banks. The ECA sometimes issue both an ECG and an ECI cover to support one single transaction and an ECG is sometimes irreplaceable for some transactions, which will be discussed in Chapter 7. That said, despite the limited availability of ECG products, it is equally necessary to consider what should the law be regarding subrogation issues in ECG contracts.

This research submits that the well-established law on subrogation in English ECI cases can be referred to by the English courts in future ECG cases as a helpful analogy. Whilst the Scottish court in *Turner* held that the principle of subrogation did not apply to ECGs, its judgment was questionable. The English courts, in both early and recent guarantee cases, all held that the principle of subrogation fully applied to guarantee contracts. Moreover, the sections above show that the subrogation provisions in ECGs are highly similar to their counterparts in ECI policies. Therefore, whereas the difference between ECGs and ECI is important regarding issues such as the duty of fair presentation and claim settlement, there