LAW & ORDER

Subrogation in Switzerland – still as perforated as a Swiss cheese?

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Around the world, it seems to be clear once a property insurer indemnifies the assured, the insurer steps into the assured's shoes to seek recovery for its loss from those parties that caused the loss and are liable to the assured. In short, this is the principle of subrogation.

The situation in Switzerland, however, is different. The whole jurisprudence in this respect originates from an old judgment of the highest court in Switzerland, the so-called *Gini/Durlemann* case of 1954.

In this case, the claimant insurance company insured a cottage of one Peroni against fire. Peroni instructed Gini to paint his cottage, but the actual work was performed by Durlemann, one of Gini's employees. Before Durlemann painted the cottage, he tried to remove the old coating by heating it with a blowlamp.

Unfortunately, inside the cottage there were easily flammable wood shavings, which Durlemann forgot to remove. The wood shavings caught fire and the cottage burnt down.

The claimant indemnified Peroni for the loss and then pursued its recourse claims against Gini, based on the contract for work and labour with Peroni.

Supreme Court decision

What did the Supreme Court decide? Surprisingly, it held the employer, Gini, not liable on the following grounds:

- The Swiss Insurance Contract Act comprises only one provision on subrogation: art 72;
- Article 72 solely deals with recourse claims against third parties liable in tort. For contractually liable parties there is no similar provision, hence the court had to apply general contract law; and
- Article 51 of the Swiss Code of Obligations provides if several persons are liable to the aggrieved party for the same damage based on different legal grounds, these persons shall be jointly and severally liable to the aggrieved party.

For the internal recourse among the liable parties, the damage shall then be primarily compensated by the person who caused it by negligence, then by the party liable in contract (without fault) and in the last instance by a person whose liability is based on causality only (ie, without a contract and without negligence). For instance, if a contractually liable party, party A, indemnifies the aggrieved party and if there is also a party B who actually caused the loss through negligence, party A would be able to hold itself harmless from the negligent party B, but not vice versa.

The Supreme Court further argued any recourse claim of an insurer against the contractual third party of the assured is a question of internal recourse between two contractually liable parties. Neither Gini as the contracting party with Peroni nor the insurer acted negligently. Their liability was, hence, based on contract only (without any fault). In terms of internal recourse, both parties were on the same level and such issue was not solved by art 51.

The Supreme Court held the insurer shall only be entitled to hold itself harmless from Gini if it can prove his employee Durlemann caused the loss through gross negligence, at least.

One argument for that outcome was if an assured seeks coverage from its insurer, the insurer can reduce the indemnity or deny it in full when the assured itself caused the damage by gross negligence or with intent. As a result, when the insurer assesses premium for its policy it assumes damages caused through negligence (but not gross negligence) are covered. If the insurer is unable to prove gross negligence, which can quite often be tricky, it does not step into the assured's shoes.

The *Gini/Durlemann* case does not only apply to national disputes. In international matters, Switzerland follows the so-called "principle of cumulation" based on art 144 of the Swiss Federal Act on International Private Law. This means if either the insurance policy or the contract based on which the insurer seeks indemnity are subject to Swiss law, the Swiss restrictive rights of recourse apply.

Light at the end of the tunnel?

Although the judgment was heavily criticised, the doctrine has remained good law for more than 60 years. Recently, it was thought there was a turning point for the *Gini/Durlemann* jurisprudence. In a case brought before the Supreme Court of Switzerland, reported at BGE 126 III 521, an employee was injured in a car accident and unable to work for a certain period of time.

Based on employment contract law, the employer remained obliged to pay the employee's salary. The employer initiated recourse proceedings for its loss against the liability insurer of the driver who caused the accident.

The Supreme Court approved the recourse action and held an employer is, when it continues to pay salary, not a liable party in the sense of art 51. The employer is rather a party performing its contractual obligation and, hence, entitled to hold itself harmless from any third party that caused the loss (even without negligence).

If anyone thought this could now be used as new authority in insurance related matters (since the insurer is not a liable party either, but one that performs a contractual duty), they would be disappointed by the very recent judgment of the Supreme Court of June 7 (case 4A_576/2010).

The Supreme Court made it clear in this matter the above judgment does not apply to insurance-related cases and referred again to the *Gini/Durlemann* judgment. Contrary to the position regarding employers, it held insurers still fall under art 51 and the *Gini/Durlemann* judgment remains good law.

The only light at the end of the tunnel is the new Insurance Contract Act in Switzerland, which is about to revise the existing Swiss Insurance Contract Law. The latest draft has not yet been passed by the Swiss parliament, but there is one new provision in the draft act that will, if passed, introduce a clear rule of subrogation and eliminate the old *Gini/Durlemann* ruling completely.

Since it is likely this provision will not be amended by parliament, we can expect the old *Gini/Durlemann* ruling will be eliminated when the new act comes into force (probably within the next three years). Contractual parties of the assured will then no longer be better protected than in other countries. ■

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Supreme Court of Switzerland: recently held that insurers still fall under art 51 and the Gini/Durlemann case remains good law

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