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SUBROGATION RIGHTS OF INSURERS AND RECOURSE CLAIMS A COMPARISON OF TURKISH AND SWISS LAW

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Introduction

As outlined in the first article of the series comparing the insurance laws of Turkey and Switzerland, Turkish insurance law is an exception in the Commercial Code which is, in its majority, derived from Swiss law. However, Turkish insurance law has been backed up by general civil law principles for ever, and therefore, Turkish authorities and scholars have a cautious eye on the developments of Swiss law. This holds also true in respect of the subrogation rights and recourse claims of insurers.

This comparative analysis will look into the legal background of the insurers' subrogation rights under Turkish and Swiss insurance law, as well as it will summarise the key elements of the insurers' recourse claims against third parties in these jurisdictions. The assignment of a claim under general contract law is not subject to this analysis.

Legal Background of the insurers' subrogation rights

Turkey

The subrogation right of the insurer is regulated under Article 1472 of Turkish Commercial Code for property insurance whereas under Article 1481 for liability insurance. These two types of insurances comprise indemnity insurance, as the counterpart to life insurance where the agreed insurance sum is paid irrespective of any actual loss[1]. The wording of Article 1472 is very similar to Article 1481 and provides:

> *(1) The insurer shall legally succeed the insured upon payment of the insurance indemnity. If the insured has the right to sue third parties liable for the loss occurred, this right shall pass on to the insurer up to the amount it has paid. If legal action or enforcement proceedings had already been initiated against the parties liable, the insurer may continue these proceedings as per the rule of subrogation without the Court's or defendant's consent provided that it proves the payment made to the insured.*
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> *(2) The insured shall be liable against the insurer if it were in breach of the rights that have passed on to the insurer as per the first paragraph. If the insurer had partially indemnified the loss, the insured shall maintain its right to sue the persons liable for the remaining part of the loss.*

The insurer's subrogation is based on the principle of "prohibition of enrichment" in indemnity insurances. In other words, the aim of subrogation is to prevent the

[1] Subrogation does not exist in life insurances.

insured from claiming damages separately from both the insurer and the third party liable from the loss and enrichment of the insured as a result. On the other hand, subrogation is necessary to prevent the liable third party from getting out of its obligation to compensate the loss, due to the protection insurance provides. For these reasons, the insurer who pays indemnity shall succeed the insured's right to compensation without the need for any procedures.

Unfortunately, there is no regulation in Turkish law regarding an exception in terms of the parties the insurer can claim recourse against. In the context of Article 1472, the party liable to the insurer's recourse claim can be someone with a close family relationship with the insured; such as, its spouse, mother, father, child and sibling. The insurer can also bring its recourse claim against someone who lives under the same roof and shares a mutual budget with the insured. In these cases, the insured will bear the financial consequences of the liable party compensating the loss. Turkish scholars[2] suggest that the insurer should not be able to claim recourse against these parties, taking into consideration that the insured would not request compensation from them under normal circumstances. However, this suggestion has no legal or judicatory basis.

The right to recourse shall pass on to the insurer to the extent of its indemnification. If the insurer had partially indemnified the loss, the insured shall maintain its right to sue the persons liable for the remaining part of the loss. Whether or not there is an order of precedence between the insurer and the insured in regards to the right to recourse has been a matter of debate in Turkish Law. The law does not provide an order of precedence according to Article 1472/2. The insurer, upon partial indemnity, can claim recourse against third parties without waiting for the insured to be compensated entirely. Even though this matter has been criticised by commentators[3], the law's wording does not allow for a different interpretation.

Switzerland

On 1 January 2022, the revised provisions of the Swiss Insurance Contract Act of 1908 ("ICA") entered into force. Amongst these provisions is Article 95c (2) ICA which reads as follows:

> *"To the extent and at the time of its payment, the insurance undertaking shall subrogate in the rights of the insured for the corresponding claim for loss and damage which it covered under the policy."*

Swiss law provides with Article 95c (2) ICA an explicit legal basis for the insurer's subrogation into the position of the insured person. While the rule establishes the principle of subrogation, there are also definite exceptions in the law. If the damage was caused by slight negligence from a person who is in a close relationship with the insured person, then the insurer does not subrogate to the legal position of the insured person. The law identifies three instances in which it assumes a close relationship between the insured person and the third party who caused the damage: (a) If they live in a domestic household, (b) if the third party is in an employment status of the insured person, and (c) the third party is entitled to use the insured property (Article 95c (3)(a)-(c) ICA). In the event of non-indemnity insurance, the claims to

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2 Yazıcıoglu, Emine, Seker Ögüz, Sigorta Hukuku, p.198

3 Yazıcıoglu, Emine, Seker Ögüz, Sigorta Hukuku, p.199

which the beneficiary is entitled against third parties as a result of the occurrence of the insured event are not transferred to the insurer either (Article 96 ICA).

The insurer's right to subrogation accrues at the time the insurer indemnifies the insured person. It will exist to the extent of the insurer's payment. The insurer shall have the right to claim for recourse against the liable third parties also if it has not fully indemnified the insured person. While Swiss law provides an explicit legal basis for the precedence of the insured person over the social insurance carriers, it does not give a general rule for private insurance. The sole reference to precedence in private insurance is set forth in Article 88 of the Federal Road Traffic Act:

> *"If an injured person's loss is not fully covered by insurance compensation, insurers may only assert their rights of recourse against the liable party or its liability insurer insofar as this does not put the injured person at any disadvantage."*

The Federal Tribunal held in its judgment reported at BGE 117 II 627 that the rule of precedence of the insured person in the Federal Road Traffic Act shall apply to all liabilities under Swiss law and bind the insurers in the event of recourse claims. Hence, if an insurance policy does not provide full coverage for a loss or damage and the insurer indemnifies the insured person for the covered portion of the loss, then the insurer and the insured person will have separate claims against the liable third-party: The insured person keeps the initial claim for damages for the uncovered portion of the loss, and the insurer will invoke a claim for recourse for the covered portion of the loss.

The revised Article 95c (2) ICA looks clear: The insurer steps into the insured person's shoes once it has performed the indemnity under the policy to seek recovery for its loss from those parties which caused the loss and that are liable to the insured person.

However, Article 95c (2) ICA does not apply to insurance contracts that were concluded before 1 January 2022 (Article 103a ICA). Thus, the former subrogation principles developed by the practice of Switzerland's highest court, the Federal Tribunal, remains relevant as it will govern insurance contracts that were concluded before 1 January 2022 and insured events which occurred before that date. To this end, the Federal Tribunal's Judgment of 7 May 2018 (case no. 4A_602/2017) is the leading case. In this ruling, the Federal Tribunal held that the long-standing application of general contract law principles for internal recourse under Article 51 of the Swiss Code of Obligation ("CO") to the insurers' recourse was no longer to be considered. [4] The Federal Tribunal had developed the application of this general contract law principle in its previous practice taking into account that, before the revised ICA entered into force, the sole reference to the insurers' subrogation right was contained in Article 72 of the former ICA. This provision merely dealt with recourse claims against third parties liable in tort. Recourse claims against third parties for contractual liability had not been addressed in the former ICA, and therefore, the Federal Tribunal applied Article 51 CO to the insurers' recourse, too. On of 7 May 2018, however, the Federal Tribunal moved away from its former practice and considered that the insurers were wrongly deemed a contractually liable person as defined in Article 51 CO and it found that the insurers were indeed performing

[4] Art 51(2): As a rule, compensation is provided first by those who are liable in tort and last by those who are deemed liable by statutory provision without being at fault or in breach of contractual obligation

contractual obligations when they indemnified the assureds. Albeit the Federal Tribunal did not state it explicitly in its Judgment of 7 May 2018, Swiss doctrine has perceived the ruling as a new court practice granting insurers a comprehensive right of subrogation (at least in respect of claims made after 7 May 2018).[5]

Insurers' recourse claims against third parties

Turkey

Under Turkish law, the insurer's right to recourse against the third party who is liable for the loss, arises when: (a) There is a valid insurance agreement between the insured and the insurer, (b) the insurer pays the insurance indemnity to the insured in accordance with the insurance agreement, (c) the insured has a right to claim against the party liable from the loss.[6] When these requirements are met, the insured's right to claim against liable parties, passes on to the insurer in its entirety. In Turkish jurisdiction, the subrogated claim is presented in the name of the insurer and not the insured. Therefore, following the subrogation, the insurer can initiate, or resume the already initiated, legal action or enforcement proceedings against the liable party, in its own name and on its own behalf.

Since, the insurer's recourse claim against the third party, is essentially based on the insured's compensation claim, the scope of the right remains the same despite subrogation. As a result, the insurers right to recourse against third parties, will be subject to the same statute of limitations as the insured's right to compensation. The statute of limitations does not reset or suspend following the subrogation of the right. In addition, the party liable from the loss, can bring forward the defences it originally had against the insured, against the insurer as well. In this regard, Turkish Court of Cassation states:

> "Since, the claimant insurance company replaces the insured as per subrogation, the party liable from the loss can claim the defences it has against the insured, against the insurer as well. Therefore, the defendant, can make a counterclaim or use its right to set-off [against the insurer]."[7]

Switzerland

In principle, Swiss law requires a separate view in addition to the question of the right of subrogation as to whether the insurer is entitled to claim for recourse against the liable third party. Swiss court practice developed three requirements: (a) The insurer had an obligation to cover the loss or damage under an insurance policy, (b) the insurer paid the insurance benefits to the insured person, and (c) the insurer's compensation is congruent with the liability of the party against whom the claim for recourse is made.

The requirements (a) and (b) must indeed be met by the insurer in order to have a right to subrogation, too. If the insurer subrogates to the legal position of the assured, it will also meet the afore-mentioned two requirements.

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5 Before the revised ICA provisions entered into force, the statute of limitation was two years. Claims made before 7 May 2018 which have not been regulated for which the claimants have not interrupted the limitation period or obtained an extension of time would have prescribed meanwhile.

6 Bahar Kızılsümer, Sigortacının Kanuni Halefiyetinin Şartları ve Sınırları, On İki Levha Yayıncılık, p.55.

7 11th Civil Division of Court of Cassation, Case No. E. 2003/3736, K. 2003/10567.

The third requirement is somehow inherent to the concept of subrogation, too. The insurer is in fact deemed to subrogate to the legal position of the insured person in respect of the indemnity to which it was obliged under the policy. Therefore, the insurer shall only obtain the claims arising from the very loss or damage of the insured person against third parties. E.g. the travel insurance that covered the loss of baggage shall not have the right to claim for recourse against the motor insurer of a third party who caused a car accident with the insured person later. These circumstances refer to two separate losses and/or damages that are not linked and therefore, the claims for damages arising from these two events are not considered congruent.

The liable third party may invoke all the defence available from the original legal relationship with the indemnified insured person. An exception is, however, the statute of limitations. The Federal Tribunal held in its judgment reported at BGE 133 III 6 that the insurer subrogating into the legal position of the insured person is subject to an analogy with the law for unjust enrichment and is therefore granted a separate limitation period of one year, which starts to run from the time when the insurer becomes aware of the liability of a third party. This leads to situations where the insurer subrogates into a claim that becomes time-barred before the insurer learn of the liability of the third party. In these circumstances, the third party cannot invoke the defence of statute of limitations if the insurer takes action against the third party within the deadline of one year.

Conclusion

Turkish law and Swiss law, as two set of laws that have deep historical bonds, seem to have approached each other with the revised provisions of the Swiss Insurance Contract Act of 1908 ("ICA"). Turkish law, however, albeit featuring an older and wider practice of subrogation in certain aspects, still struggles to find answers to some controversies as seen in the question of insured's precedence when resorting to liable third party's assets. A comparative analysis of contemporary legal sources may therefore be helpful for the legislators as well as scholars to fill the gaps that emerges along with the evolving legal and commercial practices.

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