

THE INSURER'S RIGHT OF SUBROGATION IN CROATIAN LAW

Drago Pavić
savjetnik
Croatia - Zagreb

UDK 368.025.8(497.13:420)
izvorni znanstveni rad
primljeno(received): 30.05.1992.

The writer analyses and elaborates legal problems of the insurer's right of subrogation in Croatian law and compares Croatian with English law. The writer emphasises the differences between these two legal systems regarding law of subrogation. Under Croatian law, as well as in all other states of ex Yugoslavia, by payment of the indemnity all rights of the assured against third parties in respect of the loss for which indemnity has been paid are transferred to the insured. The consequence is that the insurer acquires the right of action to sue the wrongdoer in his own name. In English law, by contrast, the doctrine of subrogation does not confer a new and independent right of action on the insurer, but merely gives it the benefit of any personal rights that the insured himself has against the third party. It is, therefore, indisputable that subrogation action must be brought in the name of the assured. The writer considers that these differences have very important practical effect. The writer analyses and explains the differences which exist between subrogation in insurance law and agreements on cession in civil law. He considers that an ex gratia payment does not lead to subrogation rights for the insurer on the basis of insurance law.

INTRODUCTION

The history of the insurer's right of subrogation in Croatian law is a lengthy one, extending back over more than 100 years to the time when this right was first legally established (The Croatian Commercial Act, 1875). In Croatian civil law, the doctrine of subrogation is generally accepted. It is in insurance law that this doctrine is most commonly applied: Subrogation in insurance law is subject to separate legal treatment and to the application of specific regulations.

Under the concept of subrogation it is understood that the insurer thereby acquires the rights of the insured to claim compensation from any third party which may be wholly or partly responsible for the loss for which the indemnity has been paid. This covers both contractual and non-contractual claims.

Croatian theory maintains that there exist two basic legal justifications for the insurer's right of subrogation;

a) As a general legal principle, it is held that the party who has suffered loss or damage cannot be awarded indemnity exceeding the amount of the damage incurred. Consequently, the injured party is not entitled to claim double compensation for the same loss or damage - once from the insurer, and once again from the third party;

b) Third parties cannot benefit from the fact there exists an insurance contract in which the third party does not have the status of a contractual partner. The third party remains responsible for loss or damage regardless of whether or not the injured party - the insured - has received indemnity from the insurer. Otherwise, this would lead to unjust enrichment. Thus it can be seen that the doctrine of subrogation in insurance law ensures the implementation of the fundamental legal principles governing responsibility for loss or damage.

THE PRESENT STATE OF THE LAW. THE LEGAL POSITION OF THE INSURER. A COMPARISON WITH ENGLISH LAW

In marine insurance, the insurer's right of subrogation is regulated by the Marine and Inland Navigation Act, 1978. The relevant clause states:

Art. 727 - By payment of the indemnity all rights of the assured against third parties in respect of the loss for which the indemnity has been paid are transferred to the insurer, but only up to the amount paid.

Where the subject-matter is underinsured, the rights of the assured under paragraph 1 of this Article are transferred to the insurer only in such proportion as the sum insured bears to the agreed or real value of the subject-matter, as the case may be.

A regulation similar in content is to be found in the Law on Obligations (1978).

What is the basic characteristic of the Croatian concept of the Insurer's right of subrogation? According to Croatian court practice and from the

standpoint of Croatian legal theory, the above-mentioned Article has the following legal effect:

By payment of the insurance indemnity on the basis of the law, the insurer acquires the right to claim indemnity payments from any third parties which are either partially or wholly responsible for the loss for which the indemnity has been paid. In the legal relationship concerning responsibility for loss it is the insurer, in place of the assured, who now becomes the claimant. After the payment of the insurance indemnity, the assured loses - and the insurer gains - the right to claim compensation for loss against a third party up to the amount of the indemnity paid. The assured has no right to contest such a decision. A further consequence is that the insurer, by paying the indemnity, acquires the right of action (*legitimitas ad processum*) to sue the wrongdoer in his own name. He need not sue in the name of the assured, as must be done in English law. The insurer's right to sue need not be backed by an agreement on cession of rights (assignment by agreement) between the insurer and the assured. This is undoubtedly one of the fundamental characteristics of the Croatian concept of the insurer's right of subrogation.¹

In English law, by contrast, the doctrine of subrogation does not confer a new and independent right of action on the insurer, but merely gives it the benefit of any personal right that the insured himself has against the third party (*Hobbs v. Marlowe*, 1978)² It is, therefore, indisputable that the subrogation action must be brought in the name of the assured. (*James Nelson Line*, 1906).³ "The right of subrogation entitled the insurer to call upon the insured to permit his name to be used in a suit for the benefit of the insurer but it did not vest the cause of action in him" (*Central Insurance Co. v. Seacalf Shipping Co.*, "The Aiolos", 1983).

The right of subrogation did not have the effect of transferring to the insurer any cause of action which the assured might have had against the

1 The same present state of the law exists in all other states of ex-Yugoslavia.

2 For further detail, see Darham: *Subrogation in Insurance Law*.

3 There is some conflict in the authorities as to whether subrogation is a doctrine stemming from the operation of equity or whether it rests upon an implied term in every contract of insurance permitting the insurer to exercise the assured's rights. (*Yorkshire Insurance Co. v. Nisbet Shipping Co.*, 1962; *Morris v. Ford Motor Co. Ltd.*, 1973).

wrongdoer. Such transfer could only be effected by legal assignment to the insurers. Alternatively the insurer could join the assured in the action. (Morris v. Ford Motor Co., 1973; Smith v. Mainwaring, 1986). In addition, it was felt that the insurer had no right *at law* to make use of the name of the assured (Lord Denning in Morris v. Ford Motor Co.). It remains, however, undisputed that the assured can be compelled by the insurer to enforce his rights against the third party for the insurer's benefit (Morris v. Ford Motor Co., 1973; Smith v. Mainwaring, 1986).

One may readily understand, therefore, why Croatian insurers should feel so surprised at learning from English lawyers that the extension of the time bar - which is guaranteed only to the Insurer, and not also to the Insured - has no appropriate legal effects.

THE RIGHTS TO WHICH THE INSURER IS SUBROGATED

Through subrogation, the insurer must be placed in the position of the assured.⁴ In the Navigation Act, it is explicitly stated that the insurer acquires "all" the rights of the assured. This relates to loss or damage sustained, and to the relative cost. The insurer has the right to claim from a third party for all loss or damage to which the assured is entitled, in conformity with the level of compensation paid. Thus, both contractual and non-contractual claims are covered under this interpretation. The insurer's rights of subrogation cannot be detrimental to the rights of the assured (nemo contra se subrogasse censetur). And even when damages may already have been claimed from the insurer, the assured does not lose the right to claim from a third party for damages which have not been compensated by the insurer, e.g. for loss of profits.

The insurer's claim is limited in extent to:

- a) the amount of indemnity paid,
- b) the amount owed by the wrongdoer to the assured for the loss caused, in accordance with the regulations enforced for the concrete legal relation. The insurer cannot claim for an amount higher than that which he has paid in insurance. The assured has the right to claim from a third party indemnity for

⁴ With the respect to English law, a classical case is considered to be that of "Castellain v. Preston" (1883)

the amount of loss suffered for which he did not receive insurance indemnity. For instance, in cases in which under-insurance is involved, or in which a deductible has been agreed. If the insurer charges a third party an amount greater than the amount of the insurance indemnity, he is bound to return the excess sum to the assured.

Subrogation is a derivative, rather than an original means of acquiring rights. In subrogation, the identity of the binding legal relationship regarding responsibility for damages is not affected. In the insurer's action against a third party, the responsibility of the third party is assessed in accordance with the same regulations as those enforced in relations between the third party and the assured. This means that even in recourse actions the principle of the legal limitation of liability is applied, as are exemptions from liability, the limit, etc., as prescribed for the party responsible for causing the loss.

SUBROGATION OR LEGAL ASSIGNMENT?

From the above, it will be seen that subrogation in Croatian insurance law is shaped by one of the basic characteristics of cession in civil law, i.e. the transfer of the rights of claim of third parties also involves the transfer of independent procedural authorization to start a law suit. Is one speaking, then, of subrogation or of cession?

Numerous differences exist between subrogation in Croatian insurance law and agreements on cession in civil law. Below are mentioned just a few of these:

- In cession, the right to sue is acquired through the signing of a contract. This right is automatically acquired by the insurer upon payment of the indemnity;
- In assignment agreements it is necessary for the debtor to be advised of the transfer of rights. For subrogation of the insurer, this is not required;
- The assured may, by means of an assignment agreement, transfer his rights to third parties, even before indemnity has been paid by the insurer. In such insurances, the insurer is not obliged to prove that indemnity has been paid. His right to sue the tort-feasor is established by the assignment agreement. Likewise, he is not required to prove that he had granted insurance for the risk which resulted in the subsequent

loss. For the right to subrogation, it is necessary to prove that the specific loss was covered by insurance;

- On the basis of the assignment agreement, the insurer acquires the right to claim up to the amount of the rights transferred. And he is not limited by the amount of the insurance indemnity already paid. He may even sue for an amount higher than that of the insurance compensation. Under the law of subrogation, the insurer cannot demand compensation in excess of the sum paid indemnity;
- In the case of assignment of rights by cession, the debtor retains the right to raise with the new creditor whatever objections he might have raised with the party which has ceded his rights. In subrogation, the debtor may raise objections with the insurer only in relation to legal liability for the specific loss, or in connection with personal relations towards the insurer (this opinion is not generally accepted in Croatian legal theory.)

From the above, it may be clearly seen that in Croatian law one is dealing with a specific form of legal cession (legal assignment) which differs substantially from assignment in civil law. In order that there should be no dispute over the matter, this right is designated as "the Insurer's Right of Subrogation". This means, then, that the term corresponds neither to cession nor to the generally subrogation of civil law, but that it is a specific legal concept: "the Insurer's Right of Subrogation", to which specific legal norms apply. This distinction has been influenced by the fact that the expression subrogation is a generally accepted term in comparative law. The law on Obligations (1978) makes specific reference to the expression "subrogation" (Art. 939).⁵

FORM OF SUBROGATION

For the insurer's subrogation rights, the following legal conditions must be fulfilled:

5 The French Law on Marine Insurance (1976) contains the expression "attaining the rights" (acquiert....). In the opinion of Prof. Rodière, this term is equally valid for legal subrogation and for assignment, but he feels that it in fact relates to subrogation. See R. Rodière, Droit Maritime, assurances et ventes maritimes, Paris 1983, p 200.

a) that the insurer has paid the indemnity,

b) that a third party is responsible for the loss for which the indemnity was paid,

c) that the insured has a claim for damages against a third party.

In such a case, the insurer by payment of indemnity acquires, on the basis of the law itself, the right of action against a third party. In order to realise this right he does not need to have a certificate on cession of rights, since his subrogation is by *virtue of law*. The insurer is required only to prove:

a) that he has paid the indemnity for the specific loss,

b) that he has paid the indemnity on the basis of an insurance contract.

Independently of this, the insurer may for various reasons be interested in obtaining a certificate on cession. If on the basis of subrogation the insurer has no right to claim for damages against a third party, since this right is also not held by the assured, it is the duty of the insurer to prove that his claims against a third party are based on an agreement on cession. This is why it is prescribed in the Marine and Inland Navigation Act that:

It is the duty of the assured to give the insurer on his demand every assistance to realise any rights against third parties and to provide him with a certificate on cession of his rights duly filled in and signed. (Art. 727, para. 3.)

In certain cases, without cession of rights the insurer is completely unable to realize his right of subrogation. If the insured did not have the right to claim indemnity for loss from the third party (the condition mentioned under c) above), then this right also cannot be acquired by the insurer through the payment of indemnity. For instance, if in a contract for carriage of goods the assured does not have the right to claim indemnity from the carrier, then the insurer will likewise not possess this right. In such an instance, it is necessary for the insurer to have a certificate on cession in order to be able to realize his rights of subrogation. Two typical examples are:

a) if the insurance indemnity is paid to an export-import firm, while the consignee or indorsee is the forwarding agent. The assured is duty-bound to provide the insurer with a certificate on cession from the forwarding agent.

b) In a contract for carriage of goods by rail or road, the insured is the sender of the goods, but since the goods have been received from the carrier,

claims for loss can be made against the carrier only by the consignee. It is the duty of the assured to provide the insurer with a certificate on cession from the consignee.

It should be noted that, under Croatian law, a contract on cession of rights is regarded as being an informal contract, i.e. the validity of the contract does not have to be established in writing - it may also be concluded orally. The declaration of the existence of a contract may be given by the contracting parties, e.g. by letter, or by any other means of proof.

EX GRATIA PAYMENT

If the insurer makes an *ex gratia* (voluntary) payment, this payment does not lead to subrogation rights for the insurer on the basis of insurance law. As, for instance, when indemnity is paid for loss arising from an uninsured risk. This question is not strictly regulated by law, nor has it yet been tested in court practice, but the law does state that the rights pass to the insurer on payment of the insurance indemnity (art. 727.1). This, in my opinion, is understood to mean a payment based on the insurance contract, and not an *ex gratia* payment.

CONCLUSION

In attempting to summarise the basic characteristics of the **Croatian** concept of subrogation, I would indicate the following:

- The insurer is subrogated to the assured's rights against third parties by payment of the indemnity;
- Through subrogation, the insurer assumes the legal position of the assured with respect to the loss for which indemnity was paid;
- Rights acquired by subrogation are limited up to the amount of indemnity paid;
- Through subrogation, **all rights** of the assured against the person liable for the damage are transferred to the insurer;
- Subrogation is a derivative rather than an original means of acquiring rights;
- Subrogation cannot occur to the detriment of the assured;

- Through subrogation, the insurer acquires the individual and independent right of action against a third party. In this respect, **Croatian** law differs substantially from English law according to which, as we have seen, the insurer can sue a third party only in the name of the assured, or he can join the assured in the action;
- The insurer's subrogation is neither cession nor civil law subrogation, but a specific form of "*ex lege*" subrogation;
- If all the legal preconditions for subrogation have been fulfilled, no agreement on cession of rights is required since subrogation comes into effect by virtue of law;
- The existence of an agreement on cession (if any) may be demonstrated by a certificate on cession, or by other means of proof;
- Ex gratia payments do not give rise to a right of subrogation.

Sažetak

PRAVO SUBROGACIJE OSIGURATELJA U HRVATSKOM PRAVU

Autor obrađuje pravnu problematiku instituta prava subrogacije osiguratelja u hrvatskom pravu i uspoređuje ga s rješenjem engleskog pravnog sistema. Ukazuje da isplatom naknade iz osiguranja u našem pravnom sistemu dolazi na temelju samog zakona do promjene subjekata na strani vjerovnika u obaveznopravnom odnosu odgovornosti za štetu. Subjekt spornog obaveznopravnog odnosa na aktivnoj strani umjesto osiguranika postaje osiguratelj. Time osiguratelj postaje i aktivno procesno legitimiran (legimatio ad processum). Autor analizira pravni položaj osiguratelja u engleskom pravnom sistemu koristeći se relevantnom sudskom praksom. Zaključuje da pravna doktrina subrogacije u tom pravnom sistemu, za razliku od našeg prava, ne pribavlja osiguratelju samostalno pravo na tužbu, nego samo pravo na korist od svakog prava kojeg osiguranik ima protiv treće osobe. Usprkos isplati osigurnine, u obaveznopravnom odnosu odgovornosti za štetu ostaje i dalje osiguranik. Zato osiguratelj nema procesno ovlaštenje da štetnika tuži u vlastito ime, već to može učiniti samo u ime osiguranika ili mu se pridruži kao stranka u sporu. Pisac ukazuje na izuzetno praktično značenje poznavanja razlika između našeg i engleskog prava zbog mogućnosti vođenja tzv. regresnih postupaka od strane subjekata jednog protiv subjekata drugog pravnog sistema.

Autor iscrpno analizira pravnu prirodu instituta prava subrogacije osiguratelja i uspoređuje taj institut s građanskopravnom cesijom. Zaključuje da se subrogacija osiguratelja propisana našim pravom u mnogim elementima bitno razlikuje od građanskopravne cesije prava. Autor je mišljenja da je riječ o institutu koji osiguratelju pribavlja potpuni učinak zakonske cesije prava, uključujući i samostalno procesno ovlaštenje za vođenje parnice. Sugerira da se taj institut označava kao "pravo subrogacije osiguratelja" budući da taj izraz ukazuje na njegovo specifično pravno obilježje.

Autor posebno razmatra problematiku dokazivanja prava subrogacije. Navodi materijalnopravne pretpostavke potrebne za subrogaciju osiguratelja. Uz ispunjenje tih pretpostavki, za ostvarivanje prava subrogacije osiguratelja u našem pravnom sistemu nije potrebna isprava o cesiji. Taj problem autor razmatra s praktičnog stajališta ostvarivanja prava subrogacije u nekim specifičnim trgovačkopравnim odnosima. Na kraju autor zaključuje da se institut prava subrogacije osiguratelja ne odnosi na isplate iz osiguranja učinjeno ex gratia.