

**IBA INSURANCE COMMITTEE SUBSTANTIVE PROJECT 2016**

**INSURERS' RIGHTS OF RECOVERY  
(SUBROGATION/RECOURSE)**

**2016 REPORT**

# SWITZERLAND

Prager Dreifuss

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**1. Does your jurisdiction grant insurers rights to pursue recoveries in respect of losses suffered by the insured which the insurer has indemnified ('rights of recovery')?**

Yes, it does. Swiss law differentiates between two concepts: the concept of subrogation, and the general concept of recourse against mutually liable persons.

The right to subrogation is an insurance-specific concept conferred to insurers. It typically applies in the context of indemnity and liability insurance and allows the insurer to succeed to the rights of the insured. However, subrogation applies only to cases in which the original claim of the insured arose from an 'unlawful act'. This has been interpreted by the Swiss Supreme Court to be synonymous with 'tortious act'. Together with the main claim for compensation, all ancillary rights, but also possible objections and defences of the tortfeasor vis-à-vis the insured, are passed on to the insurer.

Recourse on the other hand is a general concept applying to a situation in which two or more persons are liable for the same damage or loss on different legal grounds. In this situation, the damage shall ultimately be borne firstly by those liable in tort, secondly by those contractually liable and lastly by those who are deemed liable by statutory provision without being at fault or in breach of a contractual obligation (strict liability). The insurer is considered contractually liable. Therefore, the insurer can take recourse against persons who are liable for tort. As far as other parties liable based on contract are concerned, according to case law, the insurer can only take recourse if the other liable party breached its contractual obligations wilfully or grossly negligently. A recourse of the insurer against a party that is only liable as a matter of law is not possible. Contrary to subrogation, recourse constitutes a separate, independent claim to the original claim of the insured.

*1.1. If the answer is yes, do such rights arise pursuant to statute or case law?*

Subrogation arises from article 72 of the Insurance Contract Act, whereas recourse has its basis in articles 50 and 51 of the Code of Obligations. However, important case law has developed in defining and completing these statutes as well as their interaction. Most notably, the Swiss Federal Supreme Court had decided that the right of recourse arises between an insurer and a person contractually liable for gross negligence only (see above). This decision from 1954 still has to be considered a leading case despite fierce criticism and significant voices calling to expand the right of recourse to cover any type of contractual liability.

**2. What is the nature and scope of the rights of recovery? In particular:**

*2.1. Which types of rights or claims of the insured can the insurer pursue using its rights of recovery?*

As mentioned above, subrogation allows for the insurer to succeed directly to the rights of the insured against a third party. Independent recourse on the other hand constitutes a separate, independent claim against the third party arising with indemnification of the insured by the insurer.

*2.2. Are there any types of rights or claims of the insured which the insurer may not pursue using its rights of recovery, if so, what are they (in general terms)?*

As mentioned above, rights of recovery do not cover claims against persons who are deemed liable by statutory provision without being at fault or in breach of contractual obligation, or against persons who are contractually liable without fulfilling the requirements of gross negligence.

*2.3. Is there a prescribed time period (for example, a limitation period) within which the insurer must pursue its rights of recovery?*

If the rights of recovery arise from subrogation, the statute of limitation of the original claim applies as the insurer succeeds to the rights of the insured, as they are at the moment in time when the insured is indemnified by the insurer. Therefore, a claim may be time-barred already when it passes on to the insurer.

If the rights of recovery arise from recourse, a separate statute of limitation period of one year applies. It starts to run when the insurer indemnifies the insured for the loss (relative limitation). According to case law of the Swiss Federal Supreme Court, this is even the case if the original claim of the insured against the third party is already time-barred. However, the insurer has a good faith obligation to notify the third party of their intent to take recourse as soon as practicable. Failure can lead to forfeiture of the right of recourse. In addition, an absolute statute of limitation period of ten years after the harmful event applies.

**3. What, if any, criteria must be fulfilled in order for the insurer to be entitled to exercise its rights of recovery?**

In addition to the above-mentioned criteria, the insured has a right to the 'preferential quota of damages'. As long as the insured has not been fully compensated for the loss – for example, in case a deductible applies under the insurance contract – the claim of the insured against a third party prevails over the claim of the insurer.

**4. To which types of insurance do the rights of recovery apply?**

Typically, rights of recovery apply to indemnity insurance (for example, property insurance) and liability insurance. It usually does not apply to fixed sum insurance.

**5. Against whom can the rights of recovery be exercised?**

See question 1 above.

Article 72 paragraph 3 Insurance Contract Act excludes subrogation if the damage was caused in a slightly negligent way by a person living in the same household with the insured, or for whose acts the insured is responsible (for example, the employer who is responsible for an employee).

**6. Where an insurer pursues a claim or right against a third party using its rights of recovery, does this alter the rights or defences of the third party? If so how? In particular:**

**6.1. *Are there any additional defences that the third party can raise against a claim brought by an insurer using its rights of recovery, which could not have been raised if the claim had been brought by the insured directly?***

Subrogation means that the insurer succeeds to the rights of the insured. The insurer 'steps into the shoes' of the insured. Therefore, all accessory rights and defences remain unchanged.

In recourse, the defences of the third party against the insured person can be raised against the insurer as well. Moreover, according to case law, recourse is only possible against persons who are liable for tort or against persons who have breached their contractual obligations wilfully or grossly negligently. Therefore, the third party liable for a breach of contract has the additional defence of having acted slightly negligently only. Lastly, the third party can raise all defences it has against the insurer directly.

As recourse constitutes a separate claim by the insurer, the statute of limitation period is separate (as discussed above, see question 2.3).

**6.2. *Are there any defences that the third party cannot raise against a claim brought by an insurer using its rights of recovery, which could have been raised if the claim had been brought by the insured directly?***

See question 6.1. The third party has more objections and defences at its disposal if the claim is brought by the insurer.

**7. Does the insurer pursue the rights of recovery in its own name, in the name of the insured, or both?**

The insurer exercises the rights of recovery in its own name.

**8. Where an insurer pursues rights of recovery in the insured's name:**

*8.1. Who has control of the claim; and*

N/A.

*8.2. Are there any procedural requirements (for example, court filings or execution of specific documents) that the insurer and/or insured must comply with – if so what are they?*

N/A.

**9. When exercising rights of recovery, does an insurer owe any obligations to the insured? If so, what are they?**

In both, subrogation and recourse, the insured has been indemnified by the insurer. Therefore, in general, the obligation of the insurer towards the insured has expired.

**10. Does an insured have any duties towards its insurer requiring it to preserve or not prejudice the insurer's rights of recovery. If so, what are they?**

Yes. Article 72 paragraph 2 Insurance Contract Act provides that the insured is liable for all acts which prejudice the insurer's Right of Recovery. These include settlements or the assignment of the claim. The insured can be held liable for such acts by the insurer and should, therefore, always seek the consent of the insurer.

It should be noted that this rule also applies to prejudicial *omissions* of the insured, such as an omission to interrupt a statute of limitation period.

**11. Where an insured has suffered a loss that is only partially insured:**

*11.1. Does the insurer still have a right of recovery and if so to what extent; and*

The rule of the preferential quota of damages applies, see question 3 above. The right of recovery of the insurer is contingent on the full satisfaction of the insured.

*11.2. If the proceeds of any recovery action brought on behalf of both the insurer and insured are insufficient to reimburse both the insurer and the insured in full, how are the proceeds distributed?*

Again, the rule of the preferential quota of damages applies, see question 3 above – that is, the insured will be fully compensated, the insurer only partially.

**12. Can insurers and insureds agree that the insurer will have no rights of recovery? If so:**

The insurer can agree to waive the right to subrogation before or after a claim has been made. Article 72 paragraph 1 Insurance Contract Act does not belong to the mandatory provisions of the Insurance Contract Act and can be contractually modified.

*12.1. In what circumstances might they do this; and*

By law, subrogation is excluded if the damage was caused in a slightly negligent way by a person living in the same household with the insured or for whose acts the insured is responsible (article 72 paragraph 3 Insurance Contract Act). If it is a contractual waiver, the waiver is typically part of a settlement agreement and release.

*12.2. Where would evidence of such agreement be found (for example, in the insurance policy or in separate contracts)?*

Parties would agree to such a provision either in the insurance policy – the provision would then be applicable to the insurance agreement at large – or, as mentioned above, include it in a settlement agreement with regard to a specific claim brought by the insured under the insurance contract.

- 13. Can an insurer's rights of recovery be invalidated or restricted in any other way? If so, please describe how.**

N/A.

- 14. Please specify any important issues regarding rights of recovery in your jurisdiction, which are not covered by these questions.**

In terms of private international law, please note that according to Article 144 paragraph 1 of the Private International Law Act, recourse in international matters is only possible if both the law applicable to the relationship between the insured and the liable person, as well as the law applicable to the relationship between the insured and the insurer, allow for recourse to be taken.