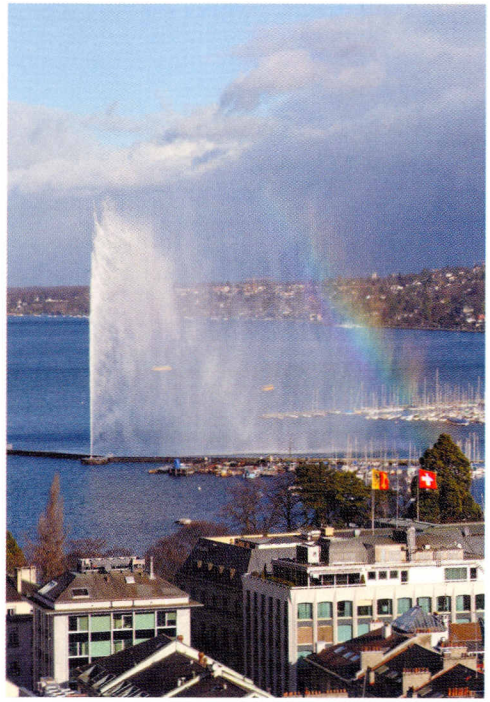
# Swiss Law

## 1. Does Swiss law recognise the right of subrogation? When does the right arise?

A fundamental distinction in Swiss insurance law is the one between indemnity insurance (like property insurance and liability insurance) and stated benefit insurance (like life insurance).



The principle for indemnity insurance is that the insured shall be compensated for a loss but shall not benefit from the insured event. On the other hand, as far as stated benefit insurance is concerned, accumulation of benefits is possible. Consequently, there is subrogation of the insurer in the context of indemnity insurance but not in the context of stated benefit insurance.

Pursuant to art 72 of the Insurance Contract Act (ICA) the insurer subrogates to the extent it has indemnified the insured into the insured's rights against a third party which is liable *vis-à-vis* the insured for torts.

The right of subrogation is complemented by the general concept of recourse promulgated in art 51 of the Code of Obligations (CO). Art 51 CO states as a rule that, if several persons are liable for the same damages based on different legal grounds, the damages shall be borne as follows:

- in the first instance by the person having caused them through an unlawful act ie tort;
- in the second instance by the person who is liable based on contract; and
- in the last instance by the person who is liable as a matter of law only (strict liability).





## 2. How does the right of subrogation arise? What is the extent of the insurer's right?

Art 72 ICA confers the right of subrogation on insurers if:

- the insured under an insurance contract has a claim against a third party for losses suffered by the insured;
- such third party claim is based on tort; and
- the insurer has indemnified the insured for the losses suffered as a result of such tortious act.

The insured, however, is entitled to the so-called preferential quota of damages which means that the insurer cannot assert its claim against the third party to the extent that the insured is not fully indemnified for its loss.

Subrogation pursuant to art 72 ICA means that, together with the main claim for compensation, all ancillary rights are passed on to the insurer. This includes possible objections and defences of the tortfeasor *vis-à-vis* the insured. The running of the statute of limitations is not interrupted by the subrogation and if, for example, the insured's claim against the tortfeasor is already time-barred when the subrogation takes effect, the subrogated claim is time-barred as well.

Art 72 ICA is subject to the disposition of the parties to the contract. The parties are therefore free to exclude the insurer's right of subrogation, which in practice is often done in favour of family members or employees of the insured.

### Recourse

Recourse is a right separate to subrogation. Recourse pursuant to art 51 CO means that the insurer acquires a new and independent claim against the third party upon indemnification of the insured. While the tortfeasor still maintains his other defences against the original claim of the insured, a new limitation period starts to run at the moment in time when the insurer indemnifies the insured. It is the predominant legal theory that the ordinary contractual prescription period of 10 years should apply. However, a conclusive decision from the Federal Supreme Court to this end is still outstanding to date. In any event, and different from subrogation, the claim of recourse cannot be time-barred before it comes into existence. However, an insurer may be stopped from bringing such a claim if it remained passive for too long and making such a claim at a later stage would be considered against good faith.

If the insured has only a contractual claim for damages against a third party and a claim under an insurance policy against an insurer (which, obviously, is also a contractual claim), he can choose

which claim he wants to pursue. Usually, the insured will choose to claim benefits from the insurer because it is often easier to prove the insured's right to indemnification under the policy than a liability claim against the third party.

The difficulty which the insurer then faces is that the liability of the third party and the liability of the insurer are both contractual liabilities. They are, so to speak, on the same level in the cascade of art 51 CO. In this situation, it is not fully clear under which conditions a claim of recourse can be made by the insurer against the third party. In particular, it is disputed whether a recourse of the insurer against a third party who is liable for breach of contract, is generally admissible or only when the third party has acted with gross negligence. The latter position is the more traditional one.

However, the Swiss Federal Supreme Court has indicated in a decision rendered in 2001 that it might be prepared to allow a recourse against a third party that is liable based on breach of contract in the absence of gross negligence. This, indeed, would be appropriate because there is no reason why a third party liable in contract law should benefit from the fact that the damaged party had bought insurance cover.





## 3. What are the insured's obligations?

According to art 72 para 2 ICA, the insured is liable for each of his acts curtailing the insurer's rights. Omissions to protect insurer's interests should entail the same consequences. The provisions of art 72 para 1 ICA are supplemented by art 61 ICA, which stipulates that the insured is obliged to do anything he can to mitigate damages once the insured event has occurred. This obligation to mitigate damages includes the duty to protect insurer's rights of recourse. Culpable violation of these duties entitles the insurer to reduce the indemnification.

There is no obligation in the ICA to co-operate with the insurer in pursuing rights of recovery. Therefore, a duty on the insured to co-operate must be contractually stipulated, which is routinely done in the course of a settlement and release agreement.

## 4. Who is liable for costs?

Under both concepts, subrogation and independent recourse, the insurer itself in its own name must bring an action against the third party. The insurer has full control of the pursuit of its claim and bears all costs connected therewith.

## 5. What is the position for joint and composite insurance?

The ICA does not contain a provision on the insurer's right of subrogation against an insured. However, art 14 ICA allows the insurer to refuse coverage if the insured has intentionally caused the insured event, or to reduce indemnification according to the degree of fault if the insured has caused the insured event in a grossly negligent way.

However, subrogation against an insured is not excluded as a matter of principle. While we are not aware of any precedent to this end, it is conceivable that the insurer can make a subrogation claim against insured "A" in a collective insurance contract covering multiple insureds if the insurer indemnified another insured (insured "B") who had a claim for damages against insured "A", but only to the extent the insurer would have been entitled to reduce indemnification to insured "A" based on art 14 ICA.

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