Direct claim against liability insurer under Danish law and Norwegian law

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Under Danish law and Norwegian law, a party suffering damage or loss in some cases has a right to a direct compensation claim against the insurer of the party who is liable for the damage or loss.

We provide an overview of the main rules on such direct claims under the Danish Insurance Contracts Act of 1930, as amended, (the "DICA") and the Norwegian Insurance Contacts Act of 1989, as amended, (the "NICA").

We hope that the overview will be useful for companies and persons working with such direct claims and related matters in practice. You are welcome to contact us if you would like to discuss direct claims or related matters. We will be happy to provide advice and assistance to you if needed.

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1. Introduction

Danish law and Norwegian law are to some extent similar to each other as regards general and special rules on contracts and different types of contracts as well as non-contractual liability and payment of compensation.

This is to some extent also the case in relation to rules of the DICA and the NICA. Both acts contain rules on the right of a party suffering damage to make and obtain payment of a direct claim of compensation against the liability insurer of the party who is liable for the damage. The rights to such direct claims under the two acts are subject to some specific terms, conditions and limitations.

The rules on such direct claims in the former Norwegian Insurance Contracts of 1930 were to some extent similar to the rules on such direct claims in the Danish Insurance Contracts Act of 1930. The rules on such direct claims in the NICA are in some respects more similar and in other respects less similar to the rules on such direct claims in the DICA. Danish case law and Norwegian case law on the interpretation and application of these rules on such direct claims are also to some extent similar to each other in relation to the similar parts of these rules.

Under Danish law and Norwegian law, a party who suffers a damage or loss for which another party is liable may generally claim and obtain compensation for the damage or loss from the liable party. The liable party may be liable for the damage or loss to the party suffering the damage or loss based on different possible sets of rules on liability, including rules on non-contractual liability or rules or agreement terms on contractual liability.

In practice, the party who suffers a damage or loss will almost always seek and obtain payment of its compensation claim against the liable party from the liable party itself.

However, in some special cases, the party suffering the damage or loss may not be able to obtain payment of its compensation claim or part of the claim from the liable party. The reason for this may for example be that the compensation claim is subject to bankruptcy, compulsory composition or debt restructuring proceedings in a court of law. The party suffering the damage or loss may then want to seek to obtain payment of its full compensation claim against the liable party from the liability insurer of the liable party.

Under certain conditions, the party suffering the damage or loss has a right to make its compensation claim against the liable party directly against the liability insurer of the liable party. This follows from the rules on such direct claims in the DICA and the NICA.[1]

In the rules on such direct claims in the DICA and the NICA, the party suffering damage or loss is traditionally referred to as the "injured party" in unofficial translations of the acts. We therefore generally use the term the "injured party" below. The term may seem somewhat peculiar to readers who are not familiar with the Danish and Norwegian languages and these rules on direct claims. A more appropriate term may for example be the "party suffering damage". Under the laws of many common law jurisdictions, the party suffering damage or loss is called the "third party".[2]

1 See generally the comments on the rules on such direct claims in the DICA and the NICA and related matters and rules in the following book and articles. Denmark: Jønsson and Kjærgaard, Dansk Forsikringsret, 11th edition, 2024, pages 868-878, Tegldal and Højerup, Forsikringsaftaleloven med kommentarer, 2020, § 95, pages 599-610, and Vestergaard Pedersen in U1999B216 and U20023B173. Norway: Bull, Forsikringsrett, 2008, chapter 35, pages 541-561, Falkanger and Bull, Sjørett, 8th edition, 2016, pages 580-581, Munthe-Kaas, Direktekrav mot en P&I assurandør når sikrede er insolvent, MarIus 384, 2009, and Selvig's comment on Nordic judgments in Nordiske Domme i Sjøfartsanliggender, 2001 pages xviii-xxiv, 2003 page xxxi, 2009 pages xlvi-liv, and 2017 pages lxvi-lxxxvi.

2 See for example Rhidian Thomas, Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions, in: Abhinayan Basu Bal, Trisha Rajput, Gabriela Argüello and David Langlet (editors), Regulation of Risk -Transport, Trade and Environment in Perspective, 2022, pages 685-718, (also available online as open access document free of charge).

2. Does the injured party have a right to a direct claim against the insured's liability insurer?

DANISH LAW

According to section 95 of the DICA, the injured party has a right to a direct claim against the insured's liability insurer in the following two instances:

(1) If the insured's liability to the injured party has been established and the amount of compensation determined (either by acknowledgement of the insured, court judgment or arbitral award). See section 95(1).

(2) If the injured party's claim for compensation against the insured is comprised by the insured's bankruptcy, compulsory composition or debt restructuring. See section 95(2).

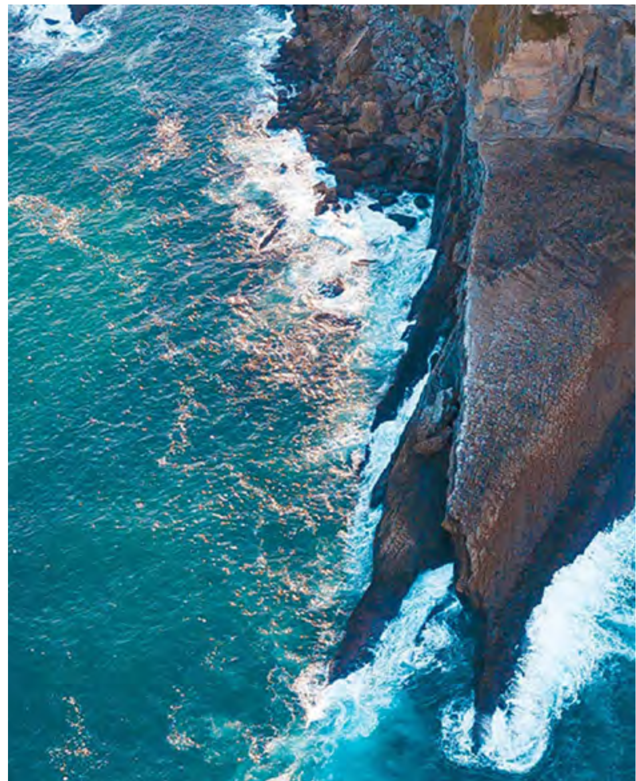
If follows from some Danish court judgments that the injured party also has a right to a direct claim against the insured's liability insurer in some other special instances where it is impossible for the injured party to get the insured's liability established and/or the amount of compensation determined. This may for example be the case if the insured was a person who is dead or a company which has been dissolved or ceased to exist.[1]

In addition to the general rules on direct claims in section 95 of the DICA, some special rules on injured parties' direct claims against insurer apply to some specific liability insurances required by law, for example liability insurances for motor vehicles and liability insurances for dogs. In relation to such mandatory liability insurances, the injured party has an immediate and unconditional right to a direct claim against the insurer of the liable party. This is provided in specific statutory rules on such direct claims.

NORWEGIAN LAW

According to section 7-6 first paragraph of the NICA, the injured party has an unconditional right to a direct claim against the insured's liability insurer.

The condition for initiating such direct action is that the injured party asserts to have a claim against the insured that is coverable under the liability insurance.



1 See for example the comments on such judgments in Jønsson and Kjærgaard, Dansk Forsikringsret, 11th edition, 2024, pages 871-874, Tegldal and Højerup, Forsikringsaftaleloven med kommentarer, 2020, § 95, stk. 1, pages 602-603, Vestergaard Pedersen in U1999B216 and U20023B173, and Bernhard Gomard in Fest FED 2000, page 51.

3. Does the injured party have a right to be informed of any liability insurance?

DANISH LAW

Generally, the injured party has no right to be informed of the insured's liability insurance. This is the case even if the liability of the insured and the amount of compensation has been determined.[1] If the insured does not want to disclose information of its liability insurance in such a situation, the injured party will not be able to make a direct claim against the insurer but can seek to collect the compensation amount from the insured.

An exception to the general rule applies in cases where liability insurance is required by law and an injured party has a right to a direct claim against the insurer of the liable party. For example, this is the case for mandatory liability insurances for motor vehicles[2] and dogs[3]. The injured party has a right to be informed of such a liability insurance.

Another exception to the general rule applies in cases where the injured party's claim for compensation against the insured is comprised by the insured's bankruptcy, compulsory composition or debt restructuring. In such cases the insured's bankruptcy estate or the insured under compulsory composition or debt restructuring may have an obligation to provide information on all assets and financial and contractual matters, including the liability insurance.[4]

1 See Tegldal and Højerup, Forsikringsaftaleloven med kommentarer, 2020, § 95, stk. 1, pages 603-604.

2 The Danish Road Traffic Act, section 108.

3 The Danish Act on Dogs, section 8.

4 See Tegldal and Højerup, Forsikringsaftaleloven med kommentarer, 2020, § 95, stk. 1, page 604.

NORWEGIAN LAW

Both the insured and the insurer are obliged to inform the injured party upon request whether there is liability cover, see section 7-6 first paragraph of the NICA. The insurer's duty to inform applies only to insurances taken out with the insurer and not with other insurance companies. Furthermore, the duty to inform also includes providing information about the amount of insurance cover and other matters that may be relevant to the injured party[1].

The insured is also obliged to provide information in the annual report regarding on whether there has been taken out insurance for the board members and CEO in relation to potential liability against the company and third parties, as well as information regarding the insurance amount[2].

1 Wilhelmsen, Kommentarutgave forsikringsavtaleloven § 7-6, 2021, footnote 198.

2 Section 3-3a eleventh paragraph of the Norwegian Accounting Act.

4. What are the effects of the injured party's direct claim against the insured's liability insurer?

DANISH LAW

Section 95 of the DICA provides a third-party right for injured parties which cannot be excluded, limited or changed to the detriment of injured parties by agreement between the insurer and the insured (the party making the insurance agreement or the party covered by the insurance agreement).

The third-party right provided by section 95 is a right for an injured party to be subrogated into the insured's rights against the insurer if the conditions for subrogation as stipulated in section 95 are met.

It is generally possible to derogate from section 95 by agreement between the insured and an injured party with effect for compensation claims based on liability in the contractual relationship between these parties. Whether such an agreement would also have effect in case of the insured's insolvency is not dealt with in the DICA and has not been decided by Danish courts. The possible effect of such an agreement would probably be subject to normal interpretation of the specific agreement.

NORWEGIAN LAW

According to section 7-6 of the NICA, the injured party has as a main rule an unconditional right to a direct claim against the insured's liability insurer. However, deviations are allowed in two instances:

(1) A business trader may in relation to the insured waive its right to claim compensation for business loss directly from the insurer, see section 7-6 sixth paragraph of the NICA. Thus, two contractual parties may agree that compensation claims arising in the contractual relationship shall not be subject to direct claim. The insurer will then be able to refuse a direct claim based on the contract and section 7-6 sixth paragraph. Such agreement is, however, without legal consequences if the insured is insolvent. It is not required that the insolvency has resulted in either bankruptcy or debt negotiations. It is sufficient that the insured will not be able to fulfil its obligations as they fall due.

(2) In relation to "*large risks*", see sections 2-3 second paragraph and 1-3 second paragraph of the NICA. Such large risks are defined in section 1 of the Regulation to the Insurance Contracts Act[1], and section 2-12 of the Regulation to the Financial Undertaking Act[2]. The injured party's right to direct claim, is typically deviated from under P&I and liability insurances for ships. P&I and liability insurance for ships is classified as "large risks", see section 2-12 number 6. Such an exception is for example made in the Nordic Marine Insurance Plan 2013, where clause 4-17 states that:

"If the insurance covers the insured's liability to third parties, an injured third party does not have any direct claim against the insurer".[3]

However, this will not apply if the insured is insolvent, see section 7-8 second paragraph. Thus, even though the insured and the insurer have agreed to deviate from the right to direct claim, the injured party will still be entitled to claim compensation directly from the insurer if the insured is insolvent. It is not required that the insured is bankrupt or under debt negotiations. It is sufficient that the insured is unable to fulfil its obligations as they fall due. Such an insolvency-exception is also made under clause 4-17 of the Nordic Marine Insurance Plan 2013.[4]

1 FOR-2022-03-04-323.

2 FOR-2016-12-09-1502.

3 Clause 14-7 of the Nordic Marine Insurance Plan 2013.

4 Comments to clause 14-7 of the Nordic Marine Insurance Plan 2013.

5. Can the liability insurer assert its defences against the insured also against the injured party?

DANISH LAW

The third-party right to a direct claim provided to an injured party under DICA section 95 is a right of subrogation. The injured party is subrogated into the insured's claim and rights against the insurer if the conditions for subrogation under section 95 are met.

This means that the injured party generally has a direct claim against the insurer only to the extent, and on the terms and conditions and with the limitations, (1) the injured party has a liability compensation claim against the insured and (2) the insured has an insurance compensation claim against the insurer under the liability insurance as regards the liability compensation claim from the injured party against the insured party.

Any delimitations and limits of cover in the insurance agreement between the insurer and the insured will also apply to the injured party's direct claim against the insurer. Any loss or limitation of cover due to the insured's matters or circumstances will generally also exclude or limit the injured party's direct claim against the insurer. The DICA section 96 provides an exception thereto in cases when the insurer has become aware of a claim for compensation against the insured under the liability insurance. In such cases, the insurer cannot with legal effect agree new terms with the insured which exclude or limit the injured party's rights to a direct claim under section 95. For example, this has the effect that the insurer cannot make an agreement with the insured regarding the covered amount with binding effect for the injured party.

Accordingly, the insurer may assert the same objections against the direct claim from the injured party as the insured may do in relation to the compensation claim from the injured party. However, such objections will often already have been decided by a court judgment or arbitral award or settled amicably with the approval of the insurer as the conditions for making a direct claim against the insurer would otherwise not be fulfilled.

Furthermore, the insurer may assert its own objections, including its exclusions, limitations and other objections in relation to the insurance claim from the insured, against the direct claim from the injured party. This applies provided that the objections are related to the insurance contract terms and/or the insured's matters or circumstances before the insurer became aware of the insurance event. However, in case of a mandatory liability insurance, the insurer's right to assert objections in this respect are more limited.

Beside cases subject to mandatory liability insurance and cases where the insured is subject to insolvency proceedings,

NORWEGIAN LAW

The Norwegian Supreme Court has stated that the injured party's direct claim and the insured's insurance claim are two separate claims[1].

Hence, the injured party does not enter into the insured's claim, but has its own separate claim against the insured's liability insurer.

The injured party can choose whether to sue the insured, the insurer or both.

If the injured party chooses to sue the insurer, the insurer may assert the same objections against the claim as the insured has in relation to the injured party, see section 7-6 fourth paragraph of the NICA.

Furthermore, the insurer may assert its own objections, including its objections towards the insured, against the injured party, provided that the objections are related to the insured's circumstances before the insurance event occurred.

However, note that the insurer's liability will be limited to the insurance amount (sometimes costs etc. may come in addition depending on the conditions). Hence, the injured party may want to include the insured in the claim where possible if the claim exceeds the insurance amount and/or to eliminate the effect of the insurer invoking that the deductible must be deducted from the claimed amount.

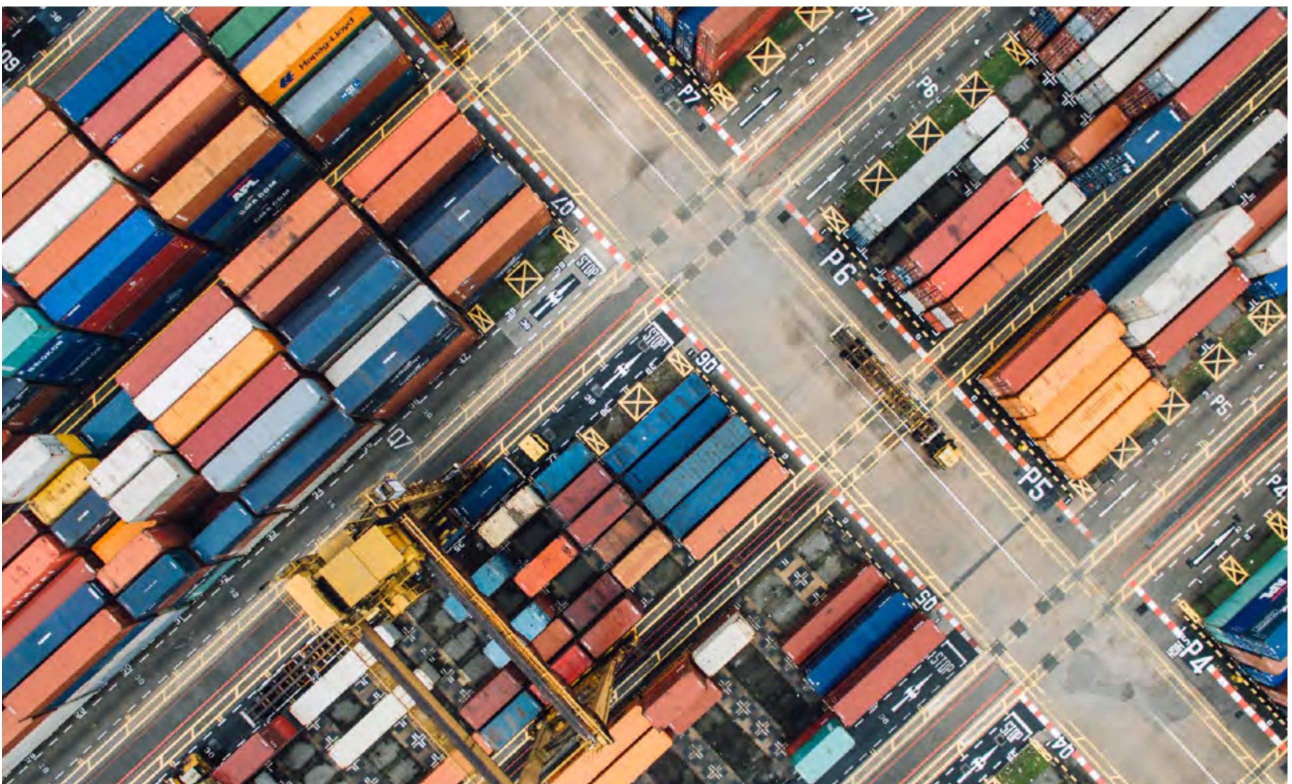
The insurer may also demand the injured party to sue the insured in the same lawsuit, see third paragraph.

However, the insurer's right to raise objections to the injured party's direct claim is significantly limited if the insured's insurance is a mandatory liability insurance, see section 7-7 second paragraph of the DICA. In the case of mandatory liability insurance, the insurer cannot raise objections which it could have raised against the insured or the insured if it knows or should have known that the insurance is a mandatory liability insurance.

1 See for example HR-2023-2252-2 and HR-2020-257-A.

the injured party should make the claim for compensation against the insured and not the liability insurer if the liability of the insured and amount of compensation has not yet been established. A lawsuit against the insurer may be dismissed by the court if the conditions for making a direct claim against the insurer are not fulfilled.

The insured may choose to join the insurer in a lawsuit commenced by the injured party against the insured. The insured can thereby ensure that the injured party's liability compensation claim against the insured and the insured's insurance compensation claim against the insurer are decided in the same judgment.



6. Must the injured party notify the liability insurer of the direct claim within a time limit?

DANISH LAW

The insured must notify the insurer about the insurance event without delay after the time the insured became aware of the insurance event. See section 21(1) of the DICA.

If the insured neglects to notify without delay, the consequence is that the insurer is not liable to a greater extent than it would have been if such notification had been given in due time. See section 21(2) of the DICA.

The insured's neglect to notify without delay does not automatically mean that the insurer is released from liability. The insurer must prove that it would have been better off if timely notification had been made. If the insurer is successful in proving this, any loss of coverage will also affect the injured party's direct claim.

NORWEGIAN LAW

The insured must notify the insurer about the insurance event within undue delay and no later than one year from the time the insured became aware of the circumstances that justify the claim, see sections 4-10 and 8-5 of the NICA.
There is no similar provision related to the injured party's direct claim. Therefore, the main rule is that the injured party must notify the claim before it becomes time-barred, see below. [1]

The insurer may, for example, not allege against the injured party that it cannot claim compensation as the insured's notification is later than one year from the insured became aware of the circumstances of the claim.

1 See paragraph 30-33 in HR-2023-2252-A.

7. What is the time-bar period for the direct claim?

DANISH LAW

As mentioned above, the injured party has a direct claim against the insurer only to the extent (1) the injured party would be legally entitled to claim compensation from the insured and (2) the insurance contract provides cover for the insured's liability for such a claim. This has the effect that the injured party's right to a direct claim against the insurer may be lost due to time-barring. This generally may be the case both with respect to the injured party's liability compensation claim against the insured and with respect to the insured's insurance compensation claim against the insurer. The risk of time-barring therefore must be considered in both relations.

The time-barring of compensation claims is governed by the Danish Act on Statutory Limitation ("Time Bar Act"). The Act provides an ordinary limitation period of 3 years counting from the earliest time when payment of the debt could be claimed. For claims arising from breach of contract, the limitation period counts from the date of the breach. For claims for compensation for non-contractual damage, the limitation period counts from the date on which the damage occurred. If the creditor was unaware of the claim or the debtor at that time, the limitation period counts instead from the time when the creditor became or should have become aware of the claim and the debtor.

Expiry of the limitation period will have the effect that the claim is time-barred. However, this can be avoided by interruption of the time-barring before the limitation period has expired. The Time Bar Act specifies the different means of interruption. The most relevant are the debtor's recognition of the debt and the initiation of legal proceedings with the aim to establish the existence and amount of the debt.

With respect to insurance claims, the DICA section 29 stipulates that the rules of the Time Bar Act apply, with certain derogations specified in section 29. The ordinary limitation period of 3 years also applies for insurance claims. The period will count from the time when the insurance event occurred or the later time when the insured became or should have become aware of the insurance event. Under a liability insurance on claims made terms, this will normally correspond to the time of the occurrence of the insurance event.

NORWEGIAN LAW

In the case of liability insurances, the insurer's liability is time-barred according to the same rules that applies to the insured's liability, see section 8-6 second paragraph of the NICA, meaning that claims against the insured and the insured's liability insurer, as a starting point, will be timed-barred at the same time. The purpose of this rule is that the injured party shall not be met with the fact that the insured's claim against the insurer is time-barred, as long as its own claim against the insured still exists. [1]

There is, however, an exception in section 8-6 third paragraph of the NICA stating that claims that have been notified to the insurer before the limitation period has expired, shall be timed-barred *"no earlier than six months after the insured, or injured party (see section 7-6 and 7-7), has received separate notification that limitation will be invoked".* This means that if the insured or the injured third party notifies the insurer about the insurance and/or direct claim – as the case may be – within the notification deadlines that apply, the insurer may not invoke time-bar before six months after notifying in a separate notice fulfilling certain criteria that such time-bar will be invoked.

The Norwegian Supreme Court has in HR-2023-2252-A ruled that the injured party must notify the insurer itself to be able to invoke the six months-deadline under the provision. This means that if the injured party has not notified the insurer within the three years limitation period, the injured party cannot be saved by the insured's notification to the insurer. Thus, the injured party's direct claim is time-barred, see section 8-6 third paragraph of the NICA. Note that exception may be allowed if the insured has forwarded the injured party's notification to the insurer.

Similar to the right to direct claim, the special regulation on limitation under section 8-6 third paragraph can be deviated from in relation to *"large risks",* see section 2-3 second paragraph and 1-3 second paragraph of the NICA.

1 Ot. prop. nr. 49 (1988-1989) page 97.

DANISH LAW

The ordinary means for interruption of time-barring apply as well. However, the DICA section 29 provides some additional means of interim interruption of the time-barring.

With respect to the insured's own interruption of the time-barring of the insurance claim, DICA section 29 provides that a notification of the insurance event to the insurer interrupts time-barring. In case of such notification, any insurance claims concerning the notified insurance event will be time-barred at the earliest 1 year after the insurer has rejected coverage of the claim or 3 years after coverage has been accepted but with a request for further information on the amount of loss. This has the effect that the insurance claim will not be subject to time-barring as long as the insurer has not informed the insured of its coverage position.

With respect to a direct claim by an injured party, DICA section 29 provides that an injured party's subrogation into the insured's right against the insurer before expiry of the limitation period for the injured party's compensation claim against the insured has the effect that time-barring occurs at the earliest 1 year thereafter. This presupposes that the insured has a right against the insurer that the injured party can subrogate into and that such right is not time barred. However, if that is the case, then the interim interruption of the time-barring of the injured party's direct claim happens automatically when the conditions for subrogation are fulfilled.

This has been confirmed by a resent order of the Danish Supreme Court.[1] The Supreme Court found that the insured's interruption of time-barring by notification of its claim for coverage before expiry of the limitation period had effect also for the later established direct claim of the injured party against the insurer due to the insured's bankruptcy. The insured had notified the insurer of the insured event in 2011 and then went bankrupt in 2012. This had the effect that the injured party from that time had a direct claim against the insurer and thereby then was subrogated into the insured's insurance compensation claim against the insurer under DICA section 95. This further had the effect that the injured party also was subrogated into the insured's insurance compensation claim against the insurer under DICA section 95 as regards time-barring and interruption of time-barring of that claim.

NORWEGIAN LAW

There is, however, no insolvency exception when deviating from the limitation rules under section 8-6 third paragraph, as it is when deviating from the right to direct claim, see above. This difference was, for example, relevant in HR-2020-257-A. The case concerned limitation of insurance claim in international marine insurance. The insured and the insurer had deviated the right to direct claim and the special limitation rules under section 8-6 third paragraph. As the insurance was a liability insurance for ships, the insurance fell under the definition of *"large risks",* see section 2-12 number 6 of the Regulation to the Financial Undertaking Act. After the damage occurred, the insured became insolvent, and the injured party therefore claimed compensation directly from the insurer. The Supreme Court stated that the derogation from the limitation rules did apply, but that the derogation from the right to direct claim did not apply, see section 7-8 second paragraph of the NICA. As a result of this, the injured party's direct claim was regulated by the ordinary limitation rules under the Norwegian Limitation Act. The Supreme Court concluded that the injured party had asserted the claim within the limitation period, and that the injured party's direct claim therefore was not time barred.

The decision shows that in such cases, where the right to direct claim nevertheless applies because the insured has become insolvent and the parties have deviated from the special limitation rules under section 8-6 third paragraph, the limitation period cannot start to run before the insolvency has occurred. The Supreme Court stated in that regard:

"SwissMarine could not have obtained sufficient knowledge of the direct claim before it arose, i.e. when Transfield became insolvent".[2]

In Denmark, however, the injured party – by stepping into the insured's claim in the event of bankruptcy – is subject to the insured's conduct, and is not granted a separate (additional) time limit.

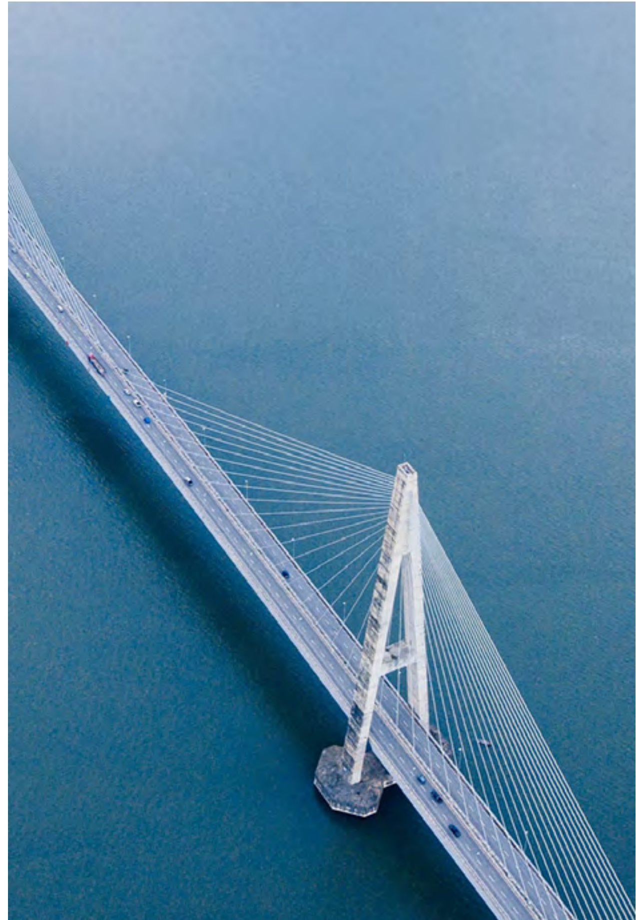
1 The Danish Supreme Court's order of 24 February 2022 (U2022.1812H).

2 HR-2020-257 paragraph 72.

DANISH LAW

The insured's notification of the insurance event to the insurer in 2011, which interrupted the time-barring of the insured's insurance compensation claim against the insurer, therefore also interrupted the time-barring of the injured party's direct compensation claim against the insurer under DICA section 95. Even though legal proceedings against the insurer were first commenced by the injured party in 2016, the claim was not time barred because the injured party benefitted from the insured's original notification to the insurer who had not rejected coverage.

In case that time-barring has not been interrupted by the insured, the injured party who has subrogated into the insured's right must make its own interruption in due time to avoid time-barring. Furthermore, it is important to note that such interruption will not interrupt the time-barring of the compensation claim against the insured which must be interrupted separately.



8. Does interests accrue on the direct claim?

DANISH LAW

The insurance amount due is payable on demand 14 days after the insurer has been able to obtain the information required to assess the insurance event and determine the amount of the insurance payment to be made. See DICA section 24(1).

Before the final calculation and determination of the insurance amount can be made, it may be indisputable that the insurer shall pay at least part of the amount claimed. In such a case, a demand for payment of such part of the insurance amount may be made in accordance with the rule in section 24(1) of the DICA. The insurer shall then pay interest on the amount from the time when a demand for its payment may be made under DICA section 24(1). Interest shall be paid at an annual rate corresponding to the reference rate fixed with the addition of 7 per cent. See DICA section 24(2).

In respect of liability insurances, DICA section 24(1)-(3) do not apply to the injured party's direct claim against the insured's liability insurer. It is instead subject to the rules on interest in the Danish Interest Act.

NORWEGIAN LAW

The insured is entitled to interest on the insurance claim when two months has passed since the notification of the insurance event was sent to the insurer, see section 8-4 first paragraph of the NICA. Interests shall be paid even if the insurance amount thereby is exceeded.

According to 2 of the Norwegian Act relating to Interest on Overdue Payments, the injured party can claim interest on the compensation claim from 30 days after it has sent the insured a written demand for payment.

The same applies to the injured party's direct claim, but then from 30 days after the written demand for payment was sent to the insurer.

9. What is the law applicable to the direct claim?

DANISH LAW

Danish law does not have any special private international law rules on the applicable law or choice of law in relation to a direct compensation claim from an injured party against an insurer of the liable party.

The applicable law or choice of law for such direct claims is therefore determined under the Danish general private international law rules on the applicable law or choice of law.

The main Danish judgment on this is the Danish Supreme Court's order of 9 October 2017 in the Port of Assens case[1]. The case and the order mainly concerned rules and matters in relation to determination of court jurisdiction. See the comments on this below.

As regards the applicable law or choice of law, the Supreme Court applied non-statutory general private international law rules on determination of the applicable law or choice of law as stated and applied in Danish court judgments.

In the Port of Assens case, damage was caused to port facilities of the Port of Assens in Denmark by a tug boat chartered and operated by a Swedish construction company. It was the liable party and went bankrupt after it had caused the damage to the port facilities. Its liability was covered by a liability insurance with an insurer which was a UK company.

The Supreme Court stated that there was no contractual relationship between the Port of Assens, as the injured party, and the insurer of the liable party. The court stated that the Port of Assens' direct claim against the insurer was based on section 95(2) of the DICA, and that there thus was no question of the Swedish company, as the liable party, having transferred its insurance claim against the insurer to the Port of Assens, as the injured party. The Supreme Court stated that Danish private international law rules on choice of law for contractual obligations, including the Rome Convention of 19 June 1980 (80/934/EEC), therefore did not apply to the question whether the Port of Assens had a right to a direct action claim against the insurer under section 95(2) of the DICA.

The Supreme Court also stated that the damage occurred in Denmark as a result of harmful actions in Denmark, and that the injured party was the Port of Assens, a Danish legal entity. The construction company, which caused and was liable for the damage to the port facilities, was domiciled in Sweden and was conducting business in Denmark at the time of the damage.

1 See the report on the order in U2017.461H. See the summary of the order in English provided here: https://domstol.dk/hoejesteret/decided-cases-eu-law/2017/10/danish-jurisdiction/.

NORWEGIAN LAW

In cases where both the insurer and insured are domiciled in Norway, and the insurance risk is situated in Norway, the question regarding choice of law will not raise any particular issues. The case will then be governed by Norwegian law, see section 9 of the Norwegian Insurance Choice of Law Act.

However, insurers have often included a clause in the insurance agreement stating which country's law that governs the insurance agreement. The insured is then bound by this clause, provided that it is in accordance with section 9 of the Insurance Choice of Law Act, when entering into the insurance agreement. Such a clause will not be binding for the injured party. However, if the injured party is domiciled in Norway and the damage has occurred in Norway, this will usually not raise any problems. Norwegian law will then apply. The problems arises when some of the parties involved are domiciled outside of Norway and/or the damage occurred outside of Norway.

Choice of law was one of the central issues in the Court of Appeal case LA-2018-82999[1]. The case concerned a collision between two ships in Indonesian territorial waters in the Singapore Strait. The case involved several jurisdictions, and the injured party claimed, inter alia, compensation directly from the insured's insurer. The Court of Appeal refrained from deciding whether a direct claim is a contract or a tort claim, and thus whether the Regulation on the law applicable to contractual obligations (Rome I) or the Regulation on the law applicable to non-contractual obligations (Rome II) was relevant. Instead, the Court of Appeal stated that the choice of law for direct claims in international relations must be determined on the basis of an overall assessment, the Irma Mignon formula.

Furthermore, the Court of Appeal stated that the Irma Mignon formula is based on the fact that the matter in question should preferably be judged by the law of the country with which the case, after an overall assessment, has its "strongest or closest connection". The Court of Appeal concluded that the case, including the direct claim, had strongest and closest connection to Norway, and the case therefore was governed by Norwegian law[2].

The Supreme Court decided in HR-2024-1117-A that section 6 of the Norwegian Insurance Choice of Law Act does not apply in a direct claim initiated by a Danish citizen towards his

1 The Appeal decision is the follow-up to the Supreme Court decision HR-2018-869-A.

2 The Appeal Court also reviewed the Danish Supreme Court decision H2017.5-2015, but stated that the decision could not change the Court's conclusion that the case had strongest connection to Norway. The insurer was domiciled in Norway, the insurance agreement was regulated by Norwegian law and Norwegian Courts.

The Supreme Court further stated that even though the insurer was domiciled in England, and that English law was agreed in the insurance contract, the Supreme Court found, after an overall assessment of all relevant matters, that the Port of Assens' direct claim was most closely connected to Denmark.

The Supreme Court concluded that the question whether the Port of Assens had a right to a direct action claim against the insurer therefore had to be decided according to Danish law, and that section 95(2) of the DICA thus applies.

Danish employer's Danish motor vehicle insurer before Norwegian courts. The argument was that such direct claim is not a contractual claim, but rather a non-contractual tort claim. The Danish employee pursued the matter in Norway due to personal injury following the overturn of a crane vehicle (tow truck). According to Norwegian rules, damage to the driver is coverable, whereas this is not the case under Danish law.

The Supreme Court relied on the above-mentioned Irma Mignon formula. However, the Supreme Court emphasized Article 4 no. 2 of Rome II stating – contrary to no. 1 allowing the law of the country in which the damage occurs – that where the insurance company and the injured party both reside in the same country at the time when the damage occurs, the law of that country shall apply. Since both the injured party and the insurance company were Danish, the Supreme Court decided that Danish law shall apply – even though the damage occurred in Norway.

10. What courts have jurisdiction over the direct claim?

DANISH LAW

National disputes in Denmark

The Danish Administration of Justice Act ("DAJA") contains rules on court jurisdiction in matters regarding national disputes in chapter 22, sections 235-248.

The DAJA does not have any special rules on court jurisdiction in relation to matters regarding an injured party's direct compensation claim against the insurer of the liable party.

Court jurisdiction in such matters is therefore determined by the general rules on court jurisdiction.

The injured party may sue the insurer in any of the following courts: (1) The court of the place where the insurer has its central administration office or, if it does not have a central administration office, the place where one of the members of its board of director or management is domiciled. See DAJA sections 235 and 238. (2) The courts agreed by the injured party and the insurer if they have made any such agreement. See DAJA section 245.

International disputes in Denmark

Under Danish law, the main rules on court jurisdiction in international civil and commercial matters are provided in the so-called Brussels I Regulation (Regulation (EU) No 1215/2012, as amended) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. See section 247 of the DAJA.

Denmark is a member state of the European Union ("EU") but does not take part in the judicial cooperation in civil matters, including in relation to court jurisdiction and recognition and enforcement of judgments, within the EU. Denmark has decided to not take part in this judicial cooperation and thus to opt-out under the rules on such opt-out in articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the Treaty on European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU). However, Denmark and the EU have made a so-called parallel agreement under which the Brussels I Regulation also applies in relation to Denmark.

In the Brussels I Regulation, section 3, articles 10-16, contain the rules on court jurisdiction in matters relating to insurance.

Article 13(2) is the main rule applicable to a direct action regarding a direct compensation claim from the injured party against the insurer of the liable party.

Article 13(2) provides that articles 10, 11 and 12 shall apply to such a direct action brought by the injured party directly against the insurer, where such direct actions are permitted.

NORWEGIAN LAW

National disputes in Norway

The main rule is that actions may be filed with the court of the ordinary venue of the defendant, see section 4-4 (1) of the Norwegian Dispute Act. Undertakings registered in the Register of Business Enterprises have their ordinary venue at the place where the head office of the undertaking is located according to such registration, see section 4-4 third paragraph.

Further, actions for damages for economic and non-economic loss in tort and actions against an insurer in matters relating to cover for such loss may be brought in the place where the damage originated or where its effect occurred or may occur, see section 4-5 third paragraph of the Dispute Act. Thus, the injured party may choose whether to file actions with the court of the ordinary venue of the insurer, or with the court where the damage originated or occurred.

In addition to options above, it seems that the actions against the insurer may also be brought at the ordinary venue of the injured party, see "actions against insurance companies" in section 4-5 ninth paragraph. It is not certain that the wording "insurance claims" covers also direct claims. However, it can be argued that the provision does apply as the injured party's claim in reality is an insurance claim. This is further supported by the fact that the provision also covers cases where an insurance company makes a recourse claim against another insurance company[1] and that the injured party has such a right in international disputes, see below.

International disputes in Norway

The general rule on court jurisdiction in international cases is that disputes only be brought before a Norwegian court if the facts of the case have a sufficiently strong connection to Norway, see section 4-3 of the Dispute Act. The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention"), applies as law, see section 4-8 of the Dispute Act. The Lugano Convention is lex specialis in conflict with national rules.

In HR-2018-869-A, the Supreme Court stated that the question regarding Norwegian jurisdiction for direct claims against Norwegian P&I clubs is exhaustively regulated in Article 11 of the Lugano Convention. Furthermore, the Supreme Court stated that the issue of choice of law shall be resolved in accordance with Norwegian private international law.

Articles 8, 9 and 10 of the Lugano Convention apply to actions brought by the injured party directly against the insurer, where

1 Schei, Comments to the Dispute Act (2023), footnote 30.

It is to be determined under the applicable national law, as determined under the choice of law rules of the court seised of the matter, whether such direct actions are permitted. In cases where the applicable national law is Danish law, it is to be determined under the rules on an injured party's direct claim against the insurer of the liable party in section 95 of the DICA, or other special rules on such direct claims, whether such direct actions are permitted. The Danish Supreme Court has determined in its order of 9 October 2017 in the Port of Assens case that such direct actions as stated in article 13(2) are permitted under section 95(2) of the DICA.[1] See the comments on the order below.

In a case where the applicable national law permits such direct actions as stated in article 13(2), article 13(2) provides that the injured party may bring such a direct action against the insurer in any of the following courts: (1) The courts of the Member State in which the injured party is domiciled. (2) The courts of the Member State in which the insurer or, in case of co-insurance, the leading insurer is domiciled. (3) The courts for the place where the branch which issued the liability insurance policy or made the liability insurance agreement is domiciled. (4) The courts for the place where the harmful event, for which the injured party claims compensation from the insurer, occurred.

Court jurisdiction is determined under the jurisdiction rules as stated above irrespective of whether the liability insurance agreement has any term on court jurisdiction for matters in relation to the agreement or claims under or in relation to the agreement.

The Danish Supreme Court has also determined this in its order of 9 October 2017 in the Port of Assens case.[2]

The Supreme Court stated that under the Brussels I Regulation, an agreement on jurisdiction between an insurer and an insured (a policyholder) was not binding on an injured party who was permitted under national law to bring an action directly against the insurance company.

The main issue before the Supreme Court was whether the Port of Assens was entitled to bring an action directly against the insurance company of the company causing the loss under section 95(2) of the DICA, or whether the Port of Assens was bound by the agreement on jurisdiction in the insurance agreement between the company causing the loss and the insurance company.

such direct actions are "permitted", see Article 11 number 2 of the Lugano Convention. In HR-2020-1328-A, the Supreme Court stated that the condition must be interpreted to mean that the decisive factor is whether the state in which the direct claim is asserted generally permits direct claims, and not whether it is permitted in the specific case. This means that when section 7-8 first paragraph of the NICA states that deviation from the right to direct claim pursuant to section 7-6 does not apply when the insured is insolvent, it is not necessary to consider whether the insured in fact is insolvent when determining whether the court is competent to hear the direct claim. It is sufficient that the direct claim is generally permitted.

Articles 8, 9 and 10 corresponds to sections 4-4 first paragraph and 4-5 third paragraph and ninth paragraph referred to above for national disputes. An insurer domiciled in a state bound by the Lugano Convention may be sued by the injured party in the courts of the state where it is domiciled, see Article 9 number 1 (a). Furthermore, an injured party may also bring the action before the courts for the district in which he/she is domiciled, see Article 9 number 1 (b). In addition to this, the insurer may be sued in the courts for the place where the harmful event occurred, see Article 10 of the Lugano Convention.

1 Danish Supreme Court's order of 9 October 2017 in the Assens Port case (U2017.461H).

2 Danish Supreme Court's order of 9 October 2017 in the Assens Port case (U2017.461H). See the summary of the order in English provided here: https://domstol.dk/hoejesteret/decided-cases-eu-law/2017/10/danish-jurisdiction/

During the case, the Supreme Court referred a question to the EU Court of Justice for a preliminary ruling regarding the interpretation of the jurisdiction rules of the Brussels I Regulation.

The Supreme Court stated that the EU Court of Justice in its judgment of 13 July 2017 (C-368/16) had found, among other matters, that the jurisdiction rules of the Brussels I Regulation must be interpreted as meaning that an agreement on jurisdiction in an agreement between an insurer and a policyholder is not binding on an injured party who wishes to bring an action directly against the insurer before its home court or before the courts for the place where the harmful event occurred. The Supreme Court stated that the judgment of the EU Court of Justice did not contain any reservations to the effect that, for this to apply, the injured party must be regarded as an economically or legally weaker party in the particular case.

Accordingly, the Supreme Court held that it follows from the Brussels I Regulation that the Port of Assens was entitled to bring an action before the Danish courts, if it was permitted to bring an action directly against the insurance company under the national rules applicable to the case.

As the Port of Assens' claim was most closely linked to Denmark, the Supreme Court found that the question whether the Port of Assens was permitted to bring an action directly against the insurer had to be determined under Danish law, and that section 95(2) of the DICA thus applied. Under section 95(2), the Port of Assens, as the injured party, had a direct claim against the insurance company, as the liability insurer.

Based on this, the Supreme Court concluded that the Port of Assens had a right to bring the direct action against the insurance company in Denmark.

The Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 21 December 2007 (the "Lugano Convention") has been agreed by the EU, Denmark, Iceland, Norway and Switzerland. The Lugano Convention applies between these parties, including between Denmark and Iceland, Norway and Switzerland. Article 11(2) of the Lugano Convention generally contains the same rules on jurisdiction in relation to direct action claims as article 13(2) of the Brussels I Regulation.

11. What effect does an arbitration agreement have for the direct claim?

DANISH LAW

It follows from Danish non-statutory general rules on contracts and their effects, as stated and applied in Danish judgments, that a contract generally only is binding on the parties and not on any third party.

A contract can only create *obligations* for the parties and not for any third party. However, a contract can create *rights* for the parties and also for a third party. If a contract creates rights for a third party, it can also create related obligations for the third party, but the obligations will only have effect in relation to the third party if it directly or indirectly accepts the obligations by its exercise of the rights.

Accordingly, terms on arbitration in an insurance contract between an insurer and an insured are not binding on, and do not have effect in relation to, an injured party which makes a direct compensation claim against the insurer under section 95 of the DICA or other special rules on such direct compensation claims.[1]

This probably also follows from the general rules and principles stated and applied by the Danish Supreme in its order of 9 October 2017 in the Port of Assens case. See the comments on the order above.

1 Compare Bull, Forsikringsrett, 2008, page 548, and Selvig's comment on Nordic judgments in Nordiske Domme i Sjøfartsanliggender, 1999 pages ix-x and 2009 pages li-lii.

NORWEGIAN LAW

It is a general principle under Norwegian law that a contract and its provisions are only binding on the parties. This also applies to the insurance between the insured and the insurer, which means that the injured party is, as the main rule, not bound by an arbitration clause between the insured and the insurer. This is also explicitly stated in the preparatory works and HR-2023-573-A.[1]

HR-2017-1932 illustrates the main rule, even though the decision does not concern insurance law issues. In the decision, the Supreme Court reviewed two separate arbitration clauses. A Norwegian shipping company had ordered ships from a shipyard in China. The shipping company had decided to use engines from a German supplier, and demanded therefore that the Chinese shipyard entered into a contract with the supplier. The contract contained a clause for arbitration in China. Later, the shipping company entered a contract with the engine supplier's Danish subsidiary regarding purchase of more engines. This contract contained a clause for arbitration in Denmark. The question before the Supreme Court was whether the lawsuit had to be dismissed because the dispute was subject to arbitration. The Supreme Court rejected the shipping company's claim for damages against the engine supplier with regard to the engines purchased from the Danish subsidiary, as the claim fell under the arbitration clause. The Supreme Court stated that whether or not a claim falls under an arbitration clause depends on an assessment of the context between the claim and the contract entered into. The question must therefore be decided one *"the basis of the closeness of the connection between the claim and the contract"*.[2]

The distinction between non-contractual and contractual liability is not decisive. However, the claim for damages was not rejected with regard to the engines that had been delivered to the shipyard. The Supreme Court stated that a third party, in this case the shipping company, may be bound by an arbitration clause between two parties to a contract in certain situations, for example if the third party has actively participated in the contract negotiations or is trying to pursue the claim of its legal predecessor.[3]

1 NOU 1987:24 page 159 and HR-2023-573-A paragraph 42.

2 HR-2017-1932-A paragraph 92.

3 See paragraph 117 and 122.

NORWEGIAN LAW CONTINUED

The Supreme Court emphasized in that regard the fact that the shipping company had not entered into the shipyard's contract with the supplier, and that the shipping company's claim was another claim than the shipyard's claim.[1]

Thus, the conclusion was that the shipping company was not bound by the arbitration clause between the shipyard and the supplier.

The general principle also applies where the injured party and the insured has agreed to an arbitration clause. The insurer cannot in such a situation invoke the arbitration clause in relation to the injured party's direct claim under section 7-6 of the NICA. Section 7-6 sixth paragraph can only be invoked by the insurer in relation to an agreement between the injured party and insured regarding the right to direct claim, and not in relation to arbitration clauses.

Arbitration clauses may, however, apply in relation to third parties claiming recourse. HR-2023-573-A is an example in that regard. The case concerned damage insurance, and not liability insurance. The insurer had paid compensation to the insured, and then claimed recourse from the insured. The question before the Supreme Court was whether the claim had been *"transferred"* from the insured, see section 10 of the Arbitration Act. If so, the insured and the insured's arbitration agreement and arbitration clause would accompany the transferred claim, see section 10 of the Arbitration Act. The insurer alleged that the recourse claim against the insured had not been transferred from the insured, as it was independent and based on general legal principles, and not the contract between the insured and damaging party. The insured alleged that the insurer was bound by the arbitration clause, as the recourse claim was based on the insurer entering the insured's claim against the insured. The Supreme Court concluded that the claim had been *"transferred"* from the insured to the insurer, and the arbitration clause therefore applied. The Supreme Court pointed out that contrary to a direct claim under section 7-6 of the NICA, the insurer's recourse claim had not arisen on an independent basis, but on the basis of the contract between the insured and the damaging part. Further, the Supreme Court stated that it is not decisive whether the recourse claim arises from the contract or general statutory or non-statutory rules on transfer of claims, so called *"subrogation"* or *"cessio legis"*.

1 See paragraph 118.