

DABELSTEIN & PASSEHL

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Subrogation actions against Co-Assureds - The Law in Germany

by

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Subrogation

Sec. 79 Marine Insurance Act 1906

Where the insurer pays for a total loss ... he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss.

Subject to the foregoing provisions, where the insurer pays for a partial loss ... he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.





Subrogation

- Does not transfer a right of the Assured to the Insurer
- Avails the Insurer the right to pursue the rights of the Assured in the name of the Assured
- This concept does not exist under German law





Assignment

- **Section 86 German Insurance Contract Act**

Assignment of claims

(1) If the policyholder is entitled to claim damages from a third party, this claim shall be assigned to the insurer insofar as the insurer compensates for the loss. The claim may not be assigned to the detriment of the policyholder.

- **Almost identical: § 45 ADS (General German Rules on Marine Insurance)**





Third Party

- Who is a *Third Party*

- First Party: Insurer ?

- Second Party: Assured ?

- Third Party: Any other Party than the Assured?





Third Party

- Can an Assured not be a *Third Party*?
If so: Recourse claims against an Assured would always be excluded
- Is a Co-Assured automatically a *Third Party*?
If so: Recourse claims against a co-Assured would always be possible





Scope of Application of Assignment Provisions

- Expressly addressed: Claims for damages of the Assured
- If this were all, there would be no room for recourse against the Assured:
 - statutory definition of *claim*: *right to demand that another person does or refrains from an act* (§ 194 Civil Code)
 - Consequence: No person can have a *claim* against itself





Scope of Application of Assignment Provisions

- Impliedly addressed:





Scope of Application of Assignment Provisions

- Impliedly addressed (in case of insurance for the benefit of a third party):





Scope of Application of Assignment Provisions

- Impliedly addressed (in case of insurance for the benefit of a third party): Claims for damages of the third party beneficiary





Terminology

- German wording:
 - *Versicherungsnehmer*
 - *Versicherter*
- Official Translation:
 - *Versicherungsnehmer* Policy Holder
 - *Versicherter* Insured Person

Translation used here:

Assured

Co-Assured





Scope of Application of Assignment Provisions

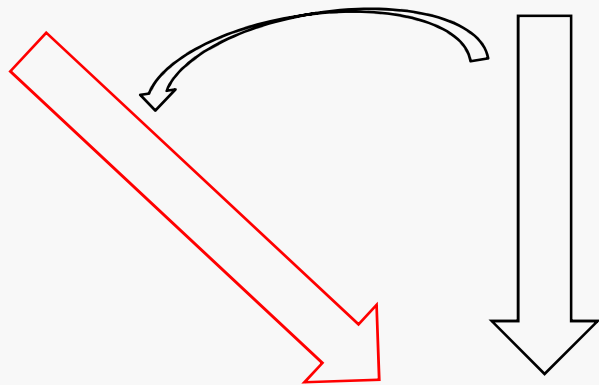
- Impliedly addressed (in case of insurance for the benefit of a third party): claims for damages of the Co-Assured
- In case of settlement of a cover claim: assignment of
 - claims of the Assured against a third party
 - claims of the Co- Assured against a third party





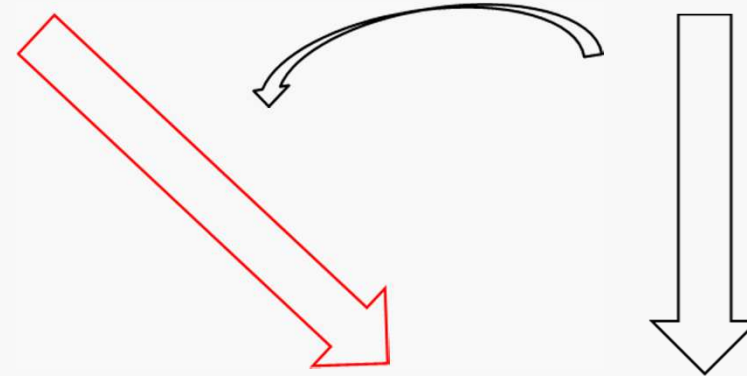
Scope of Application of Assignment Provisions

Insurer — €€€ — Assured



Third Party

Insurer — €€€ — Co-Assured



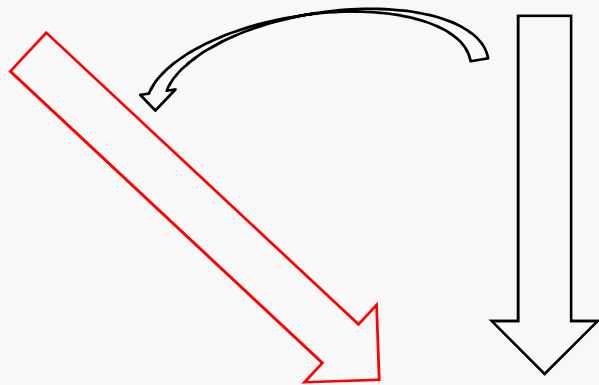
Third Party





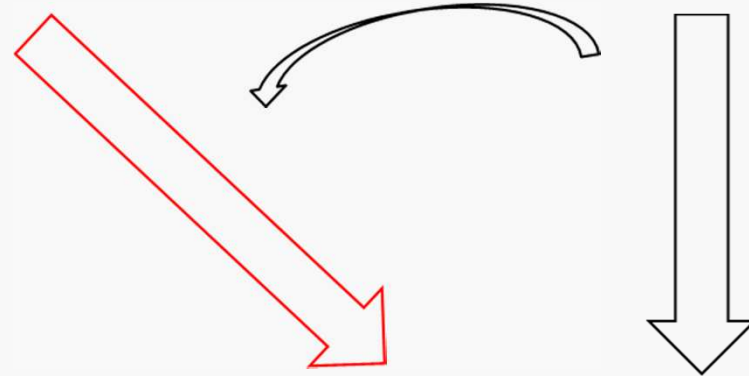
Scope of Application of Assignment Provisions

Insurer — €€€ — Assured



Co-Assured

Insurer — €€€ — Co-Assured



Assured





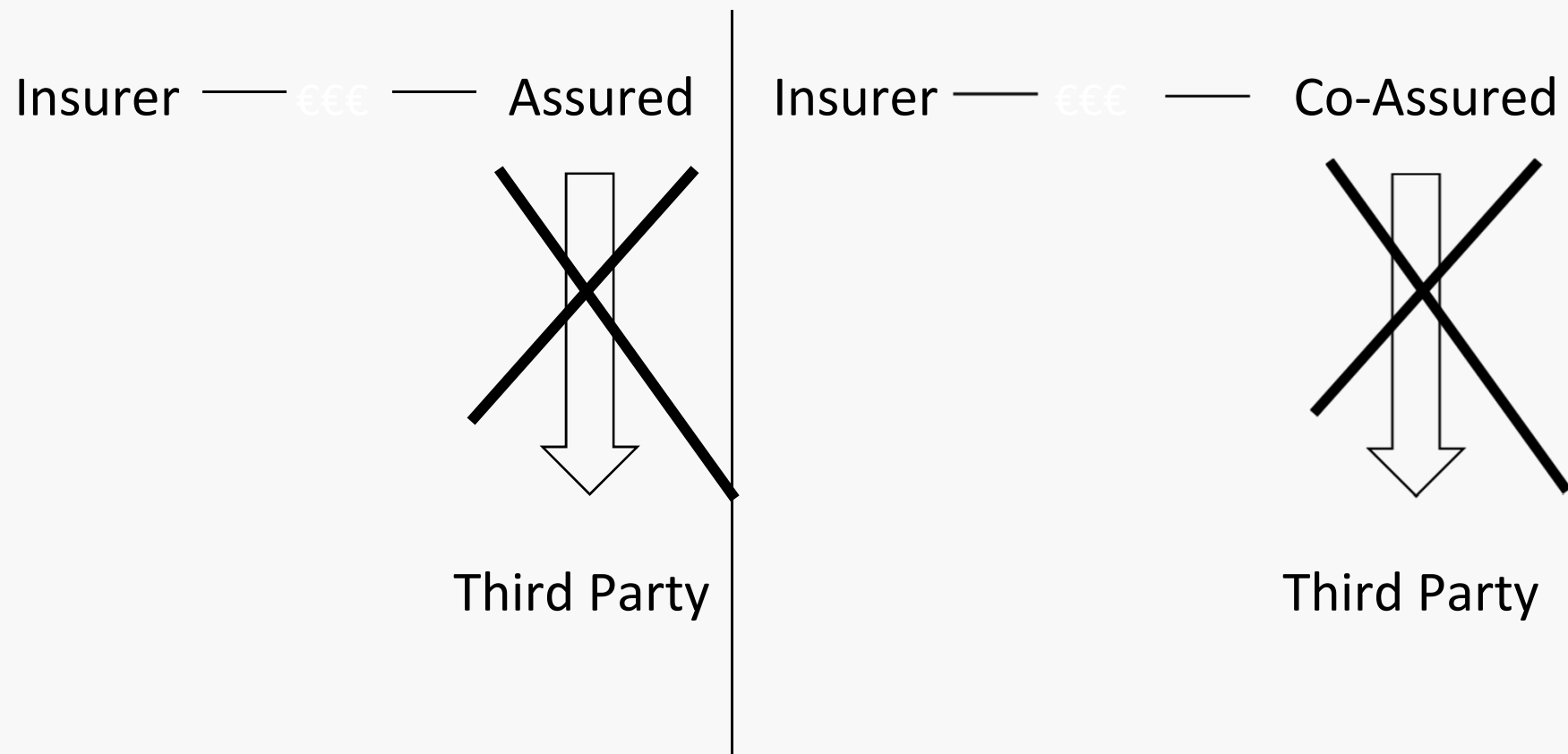
Scope of Application of Assignment Provisions

- Query:
Can the Insurer always take recourse against the Assured and/or the Co-Assured?
- Answers by the Federal Court of Justice:
Liability law approach: No, if the liability of the Assured or Co-Assured respectively is excluded





Scope of Application of Assignment Provisions





Scope of Application of Assignment Provisions

Insurer — €€€ — Assured



Third Party

Insurer — €€€ — Co-Assured



Third Party





Charterparty Forms

- **Supplytime cl. 12(a):**

Notwithstanding anything else contained in the Charter Party ... the Charterers shall not be responsible for loss of or damage to property of the Owners, ..., including the Vessel

- **Barecon cl. 14 (a)**

The Owners and/or insurers shall have no right of recovery and/or subrogation against the Charterers on account of loss of or any damage to the Vessel ...





Liability Law Approach

- Problem: Risk of prejudice of cover

- § 45 ADS:

If the Assured waives a claim he has on a third party ...the Insurer is discharged from liability insofar as he could have been able to make a recovery ...

- cl. 11.5 DTV Hull Clauses

The following especially is regarded to be an alteration of risk:

Waiver of recourse agreements in time charter parties exceeding customary practice

- Problem: civil law validity of waiver clauses





Scope of Application of Assignment Provisions

- Query:

Can the Insurer always take recourse against the Assured and/or the Co-Assured?

- Answers by the Federal Court of Justice:

Liability law approach: No, if the liability of the Assured or co-Assured respectively is excluded

Insurance law approach: In principle yes, unless the insurance contract aims at protecting the interests also of the Assured and/or Co-Assured respectively





Scope of Application of Assignment Provisions

- Who is Co-Assured?
 - anyone so named in the policy
 - anyone who, upon proper construction of the policy, is protected by the insurance contract
 - either by way of an implied actual insurance of the third party's interest
 - or by way of an implied waiver of recourse





Recourse against Assured and Co-Assured

- **Co-Assured:**

Generally no recourse of the Insurer out of rights of the Assured, as the contract generally aims at protecting the Co-Assured.

Exception: Insurer is free from liability in respect of Co-Assured

- **Assured:**

No general rule. Matter of construction of the policy whether Assured is protected from recourse





Cases - Federal Court of Justice, 7 May 2003, IV ZR 239/02

Haulier is Assured under an open cargo policy, under which he declares cargo of customers, if so instructed. Cargo is damaged in Haulier's custody. Insurer indemnifies customer under the cargo policy and takes recourse against the Assured, the Haulier.

Held:

- that the policy is a cargo policy which, as such, does not protect against liabilities against claims of third parties
- that the parties are free to include liability cover into a property insurance
- that they did not so here, as the Haulier was legally obliged to have and actually had an own liability cover





Cases - Federal Court of Justice, 13 September 2006, IV ZR 273/05

Apartment Owner has a property insurance for his apartment. Premiums are charged to the Tenant, who has an own liability insurance. Tenant damages the apartment. Property insurer indemnifies the Owner and takes recourse against the Tenant.

Held:

- that the Owner's claim against the Tenant is assigned to the property insurer
- that upon construction of the property policy, this contains a waiver of recourse for claims against the Tenant
- that the Owner's property insurer can demand from the Tenant's liability indemnity under the principles of double insurance





Conclusions

- Liability law solution (exclusion of liability) leads to clear results, if valid under civil law, but may prejudice insurance cover at least where not customary
- Insurance law solution requires construction of the policy in respect of
 - (co-) insurance of liability risks
 - waiver of recourse
- If neither applies, Insurer can take recourse against the Assured, but usually not against the Co-Assured, unless he is released from cover as regards the Co-Assured





Thank you very much for your continued attention

Please feel free to direct questions or comments to

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