

## LEGAL FOCUS

# Insurance, recourse and the scope of the choice of law in an insurance contract

Amsterdam Court of Appeal judgment shows scope of the chosen law may eventually prove to be more limited than intended

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In a recently published judgment by the Amsterdam Court of Appeal, the question arose of which law determines the extent of the rights an insurer may exercise against a debtor of the insured: the law applicable to the insurance contract, or the law applicable to the claim of the insured against the debtor?

Article 15 of European Regulation (EC) No 593/2008 of June 17, 2008 on the law applicable to contractual obligations (Rome I) determines that, where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law that governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights the creditor had against the debtor under the law governing their relationship.

In light of this rule, the question the Amsterdam Court of Appeal had to answer appeared to be straightforward; the law applicable to the insurance contract must also apply to the content of the subrogated claim and to the question of whether the insurer may initiate a claim against the debtor of the insured and to what extent.

But a closer look reveals the outcome may be unfair because the debtor is confronted with the consequences of the contractual law agreed between the insured and the insurer. And what happens if the law applicable to the claim dictates that a third party cannot be subrogated to this right?

In this specific case, Zurich Insurance settled with its insured, Guess Europe, for damage suffered by one of Guess's shops caused by flooding that occurred in a building situated above the shop. Zurich Insurance subrogated to all Guess's rights and remedies on the basis of article 79 of the Marine Insurance Act. It then claimed in respect of the damage from the owner of the building where the flooding started on the basis of article 6:173 of the Dutch Civil Code (DCC), which is a law governing a specific subject matter (*lex specialis*) of the general rule on tort (article 6:162 DCC).

DCC article 6:173 creates a strict liability for the owner of a structure that does not meet the reasonable requirements that apply for structures of that type in the given circumstances and which therefore constitutes a

danger to persons and/or other objects. If the danger materialises, causing damage, the owner is in principle liable for this damage.

### **Strict liability**

When DCC article 6:173 – and other articles that impose the same strict liability – were introduced, the Dutch legislator determined that the favourable rule on strict liability would only be accessible to a limited circle of claimants, and not everyone should be able to benefit from the rule. Insurers were excluded through DCC article 6:197, subsection 2.

The Amsterdam Court of Appeal held that, although the subrogation itself was governed by English law, this only applied to the question of – and to what extent – Guess's rights and remedies were transferred to Zurich Insurance. The question of whether these rights and remedies were able to be transferred was subject to the law applicable to the claim, in this case, Dutch law. As a consequence, Zurich Insurance could not claim from the owner of the faulty building on the basis of DCC article 6:173 but only on the basis of the general rule for a claim in tort.

The Rotterdam District Court had reached the same conclusion a couple of years earlier in a similar case and it would appear these two judgments set out the rules on how to determine the law applicable to subrogation and recourse. Moreover, the Amsterdam Court of Appeal decision appears to reflect the rule set out in article 14 (2) of the Rome I regulation on voluntary assignment and contractual subrogation for contractual claims, and applies the same rule to other type of claims such as a claim in tort. It seems fair and reasonable to conclude that the same rules apply to contractual subrogation as well as to subrogation on the basis of the law.

The judgment by the Amsterdam Court of Appeal means insurers may be confronted with restricted recourse possibilities that they did not expect on the basis of the law applicable to an insurance contract. In addition to DCC article 6:197, Dutch law contains more provisions in respect of the right of recourse and subrogation.

For instance, DCC article 7:962, subsection 2 determines that insurers cannot seek recourse if this would jeopardise the insured's possibilities to receive payment for uninsured damage.

According to article 14(2) of the Rome I Regulation, the law governing subrogated claims should determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor, and whether the debtor's obligations have been discharged. Furthermore, following the decision by the Amsterdam Court of Appeal, Zurich Insurance's right of recourse could also be restricted by DCC article 7:962, subsection 2.

Other pertinent examples in this regard include DCC article 7:962, subsection 3 (restricting the insurer's right to seek recourse against co-insureds, employees and family members of the insured) and the code of conduct for fire insurers (Bedrijfsregeling Brandregres) as determined by the organisation for insurers (Verbond van verzekeraars), which can unexpectedly qualify any insurance contract also covering fire as a fire insurance, thus preventing recourse.

It is clear there is more to an insurance contract and the right of recourse than meets the eye and what is to be expected on the basis of the law applicable to the insurance contract. The scope of the chosen law may eventually prove to be more limited than intended. Additionally, one needs to tread warily in case of any international recourse case, as peculiarities need to be addressed in the very early stages of drafting a recourse claim, as well as the even earlier stages of settling an insurance claim. Steps taken at such times can avoid difficulties at a later stage.

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