Subrogated recoveries against third parties

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Introduction to BDM Law

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Subrogation

To give insurers the right of recovery

- Insurer pays a claim
- Insurer becomes subrogated to the assured’s rights

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1. Cargo damage claim

1. Subrogated recovery in respect of a cargo claim

- Insurer pays claim under cargo insurance policy
- Insurer seeks indemnity from the carrier/P&I Club under contract of carriage
- Actual payment to assured is a pre-requisite
- Subrogation vests no independent cause of action in the insurer:
    - Usually assured signs a subrogation form
    - Insurer stands in the shoes of the assured
    - Any limitations upon the assured's action equally bind the insurer
    - Insurer has no locus standi to sue in its own name
    - Rights are limited to the amount paid out to the assured

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- Alternative to subrogation - assignment of the insured’s cause of action:

  - Allows an insurer to recover more than the amount paid out
  - Insurer can initiate recovery proceedings in own name
  - But, need for notice or presence of assignor before the court

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Damage caused by a ship to port facilities

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2. The obligation to nominate a safe port

- *The Eastern City* [1958] 2 Lloyds Rep 127

"a port [berth] will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship"

2. Damage caused by a ship to port facilities

"safe"

- Port can be unsafe for physical, political, legal reasons or because of deficient systems or infrastructures
- Unsafety must have an element of permanence

"the relevant period of time"

- When the vessel, with the exercise of normal navigation, can be expected to arrive, remain and leave the port safely

"the particular ship"

- A port may be safe for one ship but unsafe for another

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“in the absence of some abnormal occurrence”

- Danger must be a usual characteristic of the port

“danger which cannot be avoided by good navigation and seamanship”

- Was the ship seaworthy or would a reasonably prudent Master or crew have taken steps to avoid the danger?
- Most unsafe port cases stand or fall on causation
- Unseaworthiness or crew negligence will break the chain of causation, i.e. even if port is considered unsafe, the loss does not flow from this unsafety but from the unseaworthiness/negligence

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- *The Ocean Victory* [2017] UKSC 35

    - Long waves
    - Storms
    - Were the long waves and storms a safety characteristic of Kashima port?

- Joint insurance policy – did the co-insurance regime in the bareboat charter prevent a subrogated action down the chain?

- Gard had taken assignments of the head owner's and demise charterer's rights

Head Owner
↓
Demise Charterer
↓
Sinochart
↓
Daiichi

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Collisions

3. Subrogated recovery in respect of a cargo claim as a result of a collision

3. Subrogated recovery in respect of a cargo claim as a result of a collision

- Ship X collides with ship Y – Ship X cargo damaged/lost
- Collison liability assessment – ship X 60% to blame and ship Y 40% to blame
- Where should the subrogated cargo insurer look to recover the loss?
- Contract of carriage with the carrier most probably in some form incorporates the Hague or Hague-Visby Rules:
  - Art. III r.2: "Subject to the provisions of article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"
  - Art. IV r. 2 "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from…
    a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship"

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- Ship X will be able to rely on the “error of navigation” defence
- Subrogated recovery action against ship Y in tort – ship Y has no contractual defences
- If ship Y pays out the full cargo claim, it will seek a 60% recovery from ship X
- But, ship X not liable to cargo X under bill of lading
- Solution?
    - Brussels Collision Convention of 1910: each ship shall pay damages to the other corresponding to the proportion of blame each ship is to bear for the collision
    - In relation to cargo claims the owner of each ship is liable to third parties only to the degree that it is at fault for the collision
    - US has not ratified the Collision Convention of 1910: cargo owners may hold both ships jointly and severally liable, hence the Both to Blame Collison Clause

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Thank you for listening

Any questions?