

FOCUS ON:

SUBROGATION OF MARITIME UNDERWRITERS BEFORE THE IVORIAN JURISDICTIONS

*Summary of the comments of
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(cf. our French Legal news n°14)*

Definition: *Subrogation is a way of debts' transmission where the creditor, who is paid by someone else than his debtor, transfer his rights (he "subrogates") to that person – called the "subrogee", as for this latest to be reimbursed by the debtor.*

In the Ivorian civil code, article 1249, subrogation can be conventional or legal.

A. Legal or Conventional subrogation?

The CIMA Code refers to legal subrogation for terrestrial insurance while Civil Code, article 1251-3° only provides that "The person who, being bound with others or on behalf of others to satisfy a debt, had an interest in discharging it".

In the interests of simplification for maritime law, will be soon brought into force the article 968 of law 2017-442 issued on June 30th, 2017 concerning the new Ivorian maritime Code states the below:

"After payment of any insurance indemnity, the underwriter is subrogated in the rights and actions of its insured versus the third party up to payment".

Prior to its enactment, the maritime underwriters can still use of the conventional subrogation thanks to article 1250 -1) of the Civil Code.

B. Proof of Conventional subrogation

According to article 1250 -1) of the Civil Code:

"When the creditor, receiving payment from third party, subrogates to this latest its rights, actions, preferences, hypothecs versus the debtor, this subrogation has to be express and made concurrently with the payment".

1) "The subrogation has to be express"

The proof of the indemnification and subrogation must be established in writing.

It means that:

- There should be a subrogation form in which we will find that the indemnify insured is transmitting its rights to his underwriter and therefore waives his recourse against the debtor.
- The proof of payment should be also mentioned in the subrogation form or in a subrogation release where the insured confirm well receipt of payment, at X date. Also, the judges accept the evidence of a cheque or bank transfer.

The Abidjan Cour d'Appel decided that "from the reading of the [subrogation release], it is resulting the proof of the payment's effectivity and its concomitance with the subrogation at that date" (CAA civ. Com. N°201/22 mai 2015)

2) The subrogation must be made concurrently with the payment

In theory, the act transferring the insured's rights and actions should be dated and mentioning the same date for the payment's indemnity as to permit the concomitancy.

If the date of payment is not mentioned, the subrogation release could be void (CAA civ. Com 26 oct.1984 n°731).

However, the Supreme Court permits an evolution of the Ivorian jurisdictions by deciding that:

“Although the cheque from the insurer to its insured is dated of March 30th, 2000 while the subrogation form of March 28th, 2000, the concomitancy required by Civil Code, under article 1250, has to be assessed by the delivery of the subrogation form as the cheque is payable on demand”

C. Payment before court proceedings:

According to the Article 3 of the Civil Procedure Code, “the action is admissible if the applicant justifies of its direct, personal and legitimate interest, locus standi and capacity to go to court”

The insurer, third party to the contract between its insured and the debtor, can justify the above by the payment of the indemnity in concomitancy with the subrogation and therefore it should be before court proceedings (by opposition with French law where payment should be made before the decision of the judges - Civ. 3e. 8 sept. 2009, n° 08-17.012.).

The evolution of Ivorian jurisdictions seems to lead to a positive / favourable trend to the subrogated maritime underwriters.

It is now to be hoped that the Supreme Court re-established the admission of the insured as a proof of the indemnity payment.

Indeed, the “evidences may be established by any means” (Article 5 of the OHADA Acte - Organization for the Harmonization of Business Law in Africa).

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