The Supreme Court cancelled the VIG Precedent: A Foreign Insurer is entitled to file a Subrogation Claim in Israel

Teva Pharmaceutical Industries Ltd v. T&M Goshen Services Ltd. and Ayalon Insurance Co. (13.12.21)

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A. **Facts:**

Teva Pharmaceutical Industries Ltd. (Teva) was insured under a global insurance policy issued by a foreign insurer, National Union Fire Insurance Company of Pittsburgh PA (the foreign insurer). The policy covered losses which may have occurred worldwide and /or in Israel. Teva had an agreement with a security company (Goshen) which safeguarded its premises. A malfunction in one of its freezers led to a loss of the stored material in the value of $5.6 million. The foreign insurer indemnified Teva and raised the argument that Goshen failed to carry out its services which led to the loss.

The question dealt with by the court was whether a foreign insurer is entitled to file a subrogation claim against the wrongdoer.

In view of a previous judgment (VIG) the claim against Goshen was filed by Teva in its name and on behalf of its foreign insurer.

Legal Discussion

B. **VIG- The Previous Judgment relevant to this issue**

The background of the Teva claim is a judgment of the Central District Court in the **VIG Vienna Insurance Group v. the Sharon Drainage Authority and others** of 13 October 2015. The appeal of same was denied in 23 January 2017.

VIG, a foreign insurer paid insurance benefits to its insured for damage caused in Israel and sued the wrongdoers. The defendants requested the court to strike out the claim arguing that the foreign insurer is not entitled under the Israeli law to submit a subrogation claim in Israel in the

absence of a license under the **Supervision of Financial Services (Insurance) Law, 1981**) (**the Supervision Law**).

The District Court accepted the motion and determined to strike out the claim, stating that the subrogation right is provided only to an insurer which complies with the **Supervision Law**.

At the end of the judgment, the judge recommended that in similar cases the insured would file a claim against the wrongdoer and hold the awarded damages in trust for the benefit of the foreign insurer.

The Supreme Court did not intervene in the VIG District Court judgment and stated in a short and unreasoned judgement that no legal mistake was found in the judgement of the first instance.

In line with this judgment, Teva sued Goshen (and its liability insurer) in its name and on behalf of the foreign insurer. The defendants argued that the foreign insurer is not entitled to file a subrogation claim, nor is the insured on its behalf, as the recommendation of the court was a side remark and not part of the rationale of the judgment. The District Court in the Teva claim decided to strike out part of the claim which related to the foreign insurer.

Teva appealed the judgment before the Supreme Court, which on 13 December 2021 overturned the VIG judgment.

C. **The Supreme Court Analysis:**

The Triangle: Insured-Insurer-Wrongdoer

The payment of insurance benefits to the insured releases the wrongdoer from its obligation towards the injured party but this does not mean that it is proper to release the wrongdoer from any liability. On the contrary, the insurer which fulfilled its obligation will be entitled to a recourse against the wrongdoer for its payment.

Subrogation, considered as an assignment of right by law, enables the insurer to claim indemnification from the wrongdoer.

The main objectives of the subrogation are based on the **Law of Unjust Enrichment** i.e. avoiding the unlawful enrichment of the wrongdoer on account of the insurer.

The subrogation may be based on either a provision of the law or on the general principle of the **Law of Unjust Enrichment**.

Article 62 of the **Insurance Contract**

Law requires the proof of 3 elements: duty vis a vis the insured under a valid policy, payment, and liability of a third party to indemnify the insured due to an insured event.

Where an insurer does not fulfill these requirements**, f**or example, in case of non-valid insurance, where an insured event did not occur, or an exclusion is applicable, it cannot enjoy the mechanism of subrogation provided by the **Insurance Contract Law**. However, such insurer can sue recovery based on the **Law of Unjust Enrichment** as it had released the wrongdoer from its liability.

The claim based on unjust enrichment, stands side by side with the mechanism of subrogation being two parallel arrangements which serve the same objectives of the law.

D. **The Position of the Foreign Insurer under the Supervision Law**

In the current case, the foreign insurer concluded with Teva, an Israeli Company, a global insurance contract which also covers losses which occur in Israel. The question whether in issuing this policy, the foreign insurer breached the prohibition of the **Supervision Law**, was not raised by the parties and therefore was not dealt with by the first instance. This Court is also not called to deal with it. It is enough to point out the difficulty which is raised concerning the application of the **Supervision Law** on policies purchased by global corporations, which also act in Israel. For this discussion, it suffices that the foreign insurer does not meet the definition of Insurer in the **Supervision Law**.

E. **The Position of the Foreign insurer under the Israel Insurance Contract Law**

This law defines the transaction to which it applies –the insurance contract as "a contract between an Insurer and Insured which obliges the Insurer against payment of premium, to pay the beneficiary insurance benefits, upon the occurrence of an insured event". The law does not define "Insurer" nor does it refer to the definition in the **Supervision Law** (the linkage thereto which was proposed during the Knesset discussions upon the legislation of the **Insurance Contract Law** was specifically rejected).

The Court interprets the term "Insurer" in the Insurance Contract Law in a substantive way i.e. by checking the relationship between the parties. The definition of Insurer under the **Insurance Contract Law** is broader than that under the **Supervision Law**.

Therefore, for example, an Israeli Insurer, whose license was revoked, or a company which actually does insurance business without a license, or even a person who is actually engaged in insurance business, they are not Insurers as defined in the **Supervision Law**, but they should be subject to the terms of the **Insurance Contract Law**. This interpretation is aimed at protecting the Insureds.

F. **Conclusions:**

Where the policy is subject to Israeli Law and the Insured received insurance benefits from the foreign Insurer, the latter is entitled to sue the wrongdoer in a subrogation claim according to Article 62 of the **Insurance Contract Law**, or, by virtue of the **Law of Unjust Enrichment**. Alternatively, the Insured may sue on behalf of the foreign insurer. The reason for that being that the position of the foreign insurer is not different from that of an Israeli Insurer.

Where the policy is not governed by Israeli Law, the foreign insurer is entitled to file a subrogation claim by virtue of the general principle of the **Law of Unjust Enrichment**.

Comments:

This judgement rectifies the wrong results of the VIG judgement which for the last 5 years, has placed unnecessary and unjustified difficulties on the way of foreign insurers in recovery actions. The Law is now clear: the foreign insurer is entitled to file a subrogation claim in Israel, just like the Israeli insurer.

The principles of the **Law of Unjust Enrichment,** which are based on the ideas of justice, can afford solutions where the application of the law creates unjust results as in this case – assisting the wrongdoer to evade liability**.**

As a matter of practice, Israeli companies occasionally purchase insurance policies directly from foreign insurers. This practice is based on the interpretation of the Supervision Law, pursuant to which the issuance of a policy to an Israeli insured, without being engaged in any actual business in Israel (including solicitation) is not considered as engagement in insurance business in Israel and thus does not require a license.

The court did not discuss this practice nor did it deal with the interpretation of the Supervision Law; Nevertheless, in a side remark the court noted that there is a question re the legality of a policy when issued by a foreign insurer to cover an Israeli risk without a license.

While the court decided not to address

this issue, it stated that even if such foreign insurer acts unlawfully from the regulator perspective, this does not affect its right of subrogation.

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