UDK 368
347.426
DOI: 10.5937/TokOsig2403635D

***Assistant Professor Jasmina Š. Đokić, PhD*[1]**

SUBROGATION CLAIMS BY FOREIGN SOCIAL SECURITY INSURERS AGAINST DOMESTIC MOTOR LIABILITY INSURERS

Abstract

In economically stronger European countries, quality social insurance mechanisms have been established, providing various types of compensation to their insured individuals in cases of bodily injury or death resulting from cross-border traffic accidents. These mechanisms aim to facilitate quicker recovery and mitigate the impact of unfortunate events. Upon the payment of compensation, foreign health and pension insurers claim reimbursement of the paid amounts through the legal subrogation process from the domestic insurance company with which the compulsory liability insurance contract was concluded for damages caused to third parties by tortfeasor. Given that these claims involve an international element, this paper will first analyze the applicable law concerning active standing and the determination of the rights of the foreign insurer. Considering that the extent of the motor liability insurer's obligation is defined by the insurance contract concluded in accordance with the provisions of the Law on Compulsory Traffic Insurance, this paper will examine whether the foreign social security insurer is entitled to full reimbursement of the paid amounts in accordance with the regulations of its home country or within the limits of the motor liability insurance contract of the tortfeasor.

Keywords*: subrogation, health insurance, pension insurance, foreign insurer, motor liability insurance*

[1] PhD in Law, Faculty of Law, University of Zenica, *email: jasmina.djokic@unze.ba.*
Paper received on: 19. 07.2024.
Paper accepted on: 19. 08. 2024.

I Concept of Subrogation in Insurance

When an insured event in property insurance occurs due to the civil liability of a tortfeasor, the insured party has the right to claim damages on two grounds: from the tortfeasor according to the rules of civil liability, or from the insurer based on the insurance contract (contractual liability). The prohibition of accumulation of claims means that the insured cannot simultaneously pursue rights on both grounds in full, nor can they receive more from both sources than the amount of damage they have suffered.[2] This leads to one of the fundamental characteristics of property insurance, which is the application of the principle of indemnity (compensatory principle). According to this principle, compensation for damage can be obtained only by the person who suffers a material loss due to the occurrence of the insured event, and that person cannot obtain an amount greater than the damage suffered.

However, this does not mean that by fulfilling the insurer's obligation under the insurance contract, the tortfeasor remains unaccountable. On the contrary, by establishing **the insurer's right of subrogation**, the tortfeasor's liability for the damage caused is prevented from being avoided.[3] Subrogation in insurance is based on statutory law, which means it arises *ex lege* upon the payment of insurance compensation and represents the transfer of the insured's rights to a person who is liable for the damage, up to the amount of the paid damage.[4] Since it involves a transfer rather than the acquisition of a new right, the insurer's right of subrogation is considered a derived right against the person liable for the damage. There are two conditions for the occurrence of legal subrogation by the insurer. The first is that the insurance compensation has been paid to the insured or the injured party, with the insurer bearing the burden of proof for the payment made.[5] The second condition is that there is a right of the insured to claim damages from the person liable for the damage. The purpose of this condition is to ensure that the liable party bears the burden of compensating the damage caused to the insured.

[2] Nataša Petrović Tomić, *Osnovi prava osiguranja*, 1st ed., Belgrade, 2021. p. 192.

[3] B. Matijević, „Pravo subrogacije osiguratelja", *Zbornik XXV Međunarodne naučne konferencije „Prouzrokovanje štete, naknada štete i osiguranje"(eds. Zdravko Petrović et al.),* Beograd – Valjevo, 2022, p. 387.

[4] The Law of Contract and Torts – LCT *(Official Gazette of the RBiH*, No. 2/92, 13/93, 13/94; *Official Gazette of the FBiH*, No. 29/03; *Official Gazette RS*, No. 17/93, 3/96, 39/03, and 74/04), Article 939.

[5] In the judgment of the Cantonal Court in Mostar, No. 58 0 Mals 194895 20 Pž, the claim of the comprehensive insurer against the auto liability insurer was rejected because it did not prove the validity and legality of the transfer of rights to the liable insurer. According to the court's reasoning, the comprehensive insurer did not provide proof of the payment of the comprehensive insurance premium. The only evidence of active standing submitted was an extract from the comprehensive insurer's database showing details of the policy, including information about the policyholder, insured, insurer, the subject of insurance (vehicle with specified make, type, and chassis number), covered risks, coverage period, and premium amount. Although it was stated that the premium was paid in full at the time of the policy's issuance, the court held that active standing was not proven.

Since personal subrogation in an obligatory relationship involves the substitution of one creditor for another, the insurer, as the creditor, can only acquire those rights that the insured has against the responsible party or their liability insurer.[6] Upon the payment of insurance compensation, all of the insured's rights against the person liable for the damage (legal subrogation) are transferred to the insurer, up to the amount of the compensation paid. Consequently, it is necessary to determine whether the insured is liable for the occurrence of the harmful event and the damage suffered by the injured party.[7]

We will briefly recall that the Law of Contract and Torts (LCT) adopts a dualistic concept of dividing insurance contracts based on the subject of insurance into property insurance (which includes liability insurance) and personal insurance. The insurer's obligation in property insurance is to compensate for damages according to the rules of indemnity law and with the application of the previously mentioned indemnity principle. In contrast, in personal insurance, the insurer's performance consists of paying a pre-agreed sum which does not constitute damage compensation, and therefore, the accumulation of claims is permitted. This leads to a mandatory legal provision that subrogation is not allowed in personal insurance.[8] Consequently, the rules on legal subrogation discussed earlier apply only to property insurance. The content of the insured's rights under property and personal insurance contracts, as well as the prohibition of subrogation in personal insurance, is significant for defining the content of the motor liability insurer's obligations in subrogation claims by foreign social insurance institutions, which will be discussed further in this paper.

II Subrogation Claims by Foreign Social Security Insurers

Crossing national borders for business, tourism, and other purposes has become a routine part of life for an increasing number of people. Additionally, migration within the Western Balkan region for economic and/or political reasons has also contributed to a rise in cross-border road traffic, which consequently leads to more traffic accidents involving drivers and passengers from different countries. The issue of subrogation in insurance particularly raises concerns when a social insurance institution based in one country seeks reimbursement for benefits paid out as a result of a traffic accident occurring in another country. Such claims, as observed, involve an international element, and determining the obligation of the subrogation debtor — typically a motor liability insurer — requires addressing the issue of applicable law to establish the existence and extent of that obligation.

[6] Nataša Petrović Tomić, *Pravo osiguranja – Sistem*, Knjiga I, Beograd, 2019, p. 485.

[7] Jadranka Nižić Peroš, „Personalna subrogacija u odnosu prema pravu regresa osiguratelja i ustupanju tražbine – cesiji", *Oeconomica Jadertina*, No. 1/2021, pp. 79-90, 81.

[8] LCT, Article 948.

People who are residents or usually reside in one of the developed European countries, or their relatives in the case of death, receive various benefits paid out by foreign pension and health insurance institutions to whom they pay mandatory contributions. In practice, insurance companies in Bosnia and Herzegovina and the region frequently encounter subrogation claims from such institutions. These claims are typically very high and sometimes include types of demands not recognized by our legislation.[9]

For example, Austrian health insurance institutions pay their insured persons a benefit known as *"Krankengeld"* (sickness benefit) in daily amounts during the estimated duration of treatment resulting from injuries sustained in a traffic accident. According to the Austrian Social Insurance Act, if the persons entitled to these benefits have the right to claim compensation for the damage caused by the insured event under other legal provisions, the right to compensation transfers to the insurance provider to the extent that it is obligated to provide benefits.[10] However, in such cases, this is not a reimbursement of actual medical service and medication costs based on invoices issued by healthcare institutions, but rather a lump-sum payment for treatment. This type of compensation is not recognized under domestic law, and the provision of lump-sum daily amounts as *"Krankengeld"* cannot be considered as actual damages to which the injured party is entitled under the provisions of the Law of Contract and Torts[11] and the Law on Compulsory Traffic Insurance of the Federation of Bosnia and Herzegovina (FBiH).[12] It is undisputed that this is a form of compensation recognized by the Austrian legal system for its citizens as a way to alleviate the difficulties resulting from injury, but these benefits do not have a compensatory nature. Instead, they represent social rights of the insured under the compulsory insurance system in Austria.

Since in Bosnia and Herzegovina, victims of traffic accidents do not have the right to *"Krankengeld"* under domestic regulations, and therefore domestic health and social insurance institutions cannot claim reimbursement for such payments, the question arises whether the same right can be recognized for foreign institutions. If it can, are these institutions privileged compared to domestic institutions that provide compulsory insurance based on the principles of intergenerational solidarity?

[9] Dino Torlak, „Mjerodavno pravo za rješavanje zahtjeva za naknadu štete iz saobraćajnih nezgoda s posebnim osvrtom na subrogaciju", *Anali Pravnog fakulteta u Zenici*, No. 20., vol. 10., p. 195.

[10] See Josef Schörghuber, „Pravo regresa nosilaca socijalnog osiguranja nakon saobraćajne nezgode prema osiguravaču obaveznog osiguranja odgovornosti, s posebnim osvrtom na austrijsko pravo", *Revija za pravo osiguranja*, Beograd, No. 3, 2007.,3.

[11] LCT, Article 195.

[12] The Law on Compulsory Traffic Insurance of the Federation of Bosnia and Herzegovina (FBiH) - LCTI, *Official Gazette of FBiH*, No. 57/2020. This law includes the Framework Criteria for determining compensation in cases of injury to physical or psychological integrity, or death. The Criteria establish the rules for determining the amount of compensation for both material and non-material damages in specific cases.

Another very common example that causes confusion in the practice of insurance companies and courts involves subrogation claims by German pension insurance providers who pay so-called widow's pensions, i.e. pensions to widows and children of insured persons who died in traffic accidents in other countries.[13] When such a claim is made against the motor liability insurer of the at-fault party, the question arises whether the insurer is obligated to settle the claim in full or only up to the limits prescribed in the insurance contract.

III Determining the Applicable Law for Subrogation Claims by Foreign Social Security Institutions

Case law in Bosnia and Herzegovina, Serbia, and Croatia is varied, ranging from full recognition to complete dismissal of claims by foreign institutions against domestic motor liability insurers. Similarly, there is no consensus in legal scholarship regarding the nature of the obligation between the foreign social insurance institution and the at-fault party, or their motor liability insurer. Some authors argue that the liability of the at-fault party in such cases is viewed as contractual liability, which would imply that the applicable law for determining the obligation in a subrogation claim by a social insurance institution is governed by the contractual statute, i.e. the law of the country where the social security is established.[14]

Criticism of this viewpoint can be directed at the fact that there is no prior agreement between the social insurance institution and the liable party, or the insurance company with which the liable party is insured, and therefore the application of the applicable law for the contract is not justified. An argument supporting this claim is that the right to subrogation is not an original but a derived right that

[13] Denis Lauc, „Regresni zahtjevi njemačkih nositelja socijalnog osiguranja", *Anali Pravnog fakulteta u Zenici*, No. 17, 2016., pp. 385-397, 386.

[14] Older case law in the Republic of Serbia supports this view. For example, in a decision by the Supreme Court of Serbia in a case brought by German social insurance, it was determined that the commercial courts correctly applied the substantive law when assessing the amount of damage, which included payments for treatment, sick leave, subsistence allowances, transportation, pensions (temporary pensions), and other benefits from social, health, and pension insurance, according to the amount of actual costs incurred under the regulations of the Federal Republic of Germany where the payments were made. This is because the damage to the plaintiff represents all that they had to pay to their insured under the regulations of their own country. Therefore, the lower courts correctly concluded that the plaintiffs were entitled to compensation for the amount of damage they paid to their insured according to the regulations of the Federal Republic of Germany, as the insured person is entitled to benefits from health and pension insurance according to the regulations of the country where they worked. Thus, the insured party is entitled to all rights granted by the regulations of the Federal Republic of Germany, regardless of whether such rights exist under Yugoslav regulations. See: Judgment Prev. 28/94 dated June 28, 1995, Judicial Practice of Commercial Courts No. 1/1996, p. 109., cited according to Petar Đundić, „Regresna potraživanja stranih fondova socijalnog osiguranja i neka pitanja međunarodnog privatnog prava", *Zbornik Pravnog fakulteta u Novom Sadu,* 2007, vol. 41, No. 1-2, p. 315.

the social insurance institution acquires after paying compensation to its insured. Upon payment of compensation to its insured, the social insurance institution has the right to a direct claim against the party liable for the damage, and this claim does not directly arise from its relationship with the liable party but is derived from the rights of its insured against the liable party.[15] This implies that for both types of claims — the claim of the direct injured party, i.e. the insured of the foreign social security institution for damages against the motor liability insurer, and the subrogation claim made by that institution — the basis of the claim is the same and consists of civil tort liability of the liable party or their insurer. Therefore, the applicable law for determining the liability of the responsible party is the law indicated by the conflict of laws rule for civil liability, and it would be contrary to public policy to apply different laws to multiple claims arising from the same civil liability relationship.

1. Location of Damage in Traffic Accidents

To determine the applicable law for compensation claims arising from traffic accidents, the primary regulation is the Hague Convention on the Law Applicable to Traffic Accidents[16] adopted by all states formed after the breakup of Yugoslavia. However, claims for recourse (subrogation) are excluded from the scope of *ratione materia*e of this Convention.[17] Therefore, the applicable law for subrogation claims should be determined according to domestic regulations in the field of private international law, specifically in Bosnia and Herzegovina, the Law on the Resolution of Conflicts of Laws with Regulations of other countries,[18] which stipulates that for non-contractual liability for damage, the law of the place where the harmful act was performed or where the harmful consequence occurred should apply, depending on which is more favorable for the injured party.[19]

Although subrogation claims are excluded from the provisions of the Hague Convention, the Convention can be useful in interpreting the concept of the location of damage in road traffic accidents with a foreign element. When establishing the basic rule of the Convention, *lex loci delicti commissi*, the drafters of the Convention emphasized the main advantage of applying the connecting factor of the place where the accident occurred. This approach is beneficial because determining the

[15] Predrag Šulejić, *Pravo osiguranja*, Novi Sad, 4th edition, 1997., p. 319.

[16] Hague Convention on the Law Applicable to Traffic Accidents, 1971, entered into force on June 3, 1975, Bosnia and Herzegovina a member through succession; text published in "*Official Gazette of the SFRY*", Supplement No. 26/1976.

[17] Hague Convention on the Law Applicable to Traffic Accidents, Article 2.

[18] Law on the Resolution of Conflicts of Laws with Regulations of Other Countries - LRCL, *Official Gazette of the SFRY, No.* 43/82 and 72/82 – 1645, *Official Gazette of RBiH*, No. 2/92-5, 13/94-189. The same regulation is still in force in Serbia, *Official Gazette of the FRY, No.* 46/96, *Official Gazette of RS, No.* 46/2006.

[19] LRCL, Article 28.

location of the road traffic accident is generally straightforward and rarely leads to difficulties or misunderstandings. The place of the harmful act is almost always the location where the consequences occurred, and only in exceptional cases do these two places differ (e.g. accidents that occur in border areas, i.e. roads or other public areas belonging to two states).[20]

The LRCL does not contain a specific conflict rule for subrogation claims. In the absence of an explicit provision, the law applicable to the underlying obligation should be applied, precisely because subrogation occurs when the insurer indemnifies its insured, thereby acquiring all the insured's rights against the party liable for the damage, up to the amount of the indemnity paid.[21]

From this, it follows that the applicable law for subrogation claims by foreign social insurance institutions against the motor liability insurer is the law of the place where the traffic accident occurred. This view is supported by the recent interpretations of the EU Court of Justice when interpreting the Rome II Regulation on the law applicable to non-contractual obligations concerning the provisions on the applicable law for subrogation claims.[22]

The case involved a request for a preliminary ruling in a dispute before a French court between the French Guarantee Fund, which indemnified an injured party of an accident caused by the use of a motorboat in Portugal, and the Portuguese liability insurer. The Court determined that the law applicable to a claim by a third party to whom the injured party's rights have been subrogated against the perpetrator of the damage, including rules on prescription, is, in principle, the law of the state where the damage occurred. Therefore, although the Guarantee Fund insisted on applying French law as the governing law, the Court expressed the view that such an interpretation would result in the debtor being placed in a different position because the claim was brought against him by a subrogated third party rather than the injured party. This position could, depending on the case, be less favorable than if the creditor were to exercise their rights personally and directly against him.[23]

[20] Essén, Eric W., *Rapport explicatif*, in: Conférence de la Haye de droit international privé, Actes et documents de la onzième session, 7 au 26 Octobre 1968, Tome III, Accidents de la circulation routière (Explanatory Report of the Hague Convention), p. 14.

[21] Jasmina Alihodžić, Anita Duraković, Assessment of Damage and Recourse Actions in 1971 Hague Convention, Rome II Regulation and Bosnian PIL Act: What is Wrong with Respective Case Law in Bosnia and Herzegovina? South East European Law Journal, Vol. 1, No. 2 (2014), p. 75.

[22] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") (OJ 2007, L 199).

[23] Judgment in Case C-264/22, *Fonds de Garantie des Victimes des Actes de Terrorisme et d'Autres Infractions (FGTI) v. Victoria Seguros,* ECLI:EU:C:2023:417.

2. International Agreements - Social Security Agreements and the Issue of Subrogation

Due to the intense migrations of people during the 1960s and 1970s, bilateral international agreements on social insurance were concluded in the former Yugoslavia with a large number of countries in Europe and around the world. These agreements served as coordination instruments, allowing harmonized application of the national legislations of the contracting states in the field of social security. Some of these agreements were carried over into the legal systems of the newly formed states through succession, while others were concluded by these states after gaining independence.[24] Foreign social insurance institutions, in their subrogation claims against motor liability insurers, refer to these Agreements on social security and seek reimbursement for all benefits paid to their insured individuals. They ground their claims on a provision stipulating that *if a person, under the laws of one contracting state, is entitled to compensation for damage incurred in the territory of another contracting state, and according to the latter's regulations has the right to compensation from a third party, this right to compensation is transferred to the institution of the first contracting state in accordance with its applicable legal regulations*.[25]

As previously noted, the case law in Bosnia and Herzegovina and neighboring countries does not have a consistent stance on the issue of subrogation for foreign social security institutions. There are rulings where courts have awarded social security institutions of one contracting state reimbursement for amounts paid in compensation for damages incurred in the territory of another contracting state, according to the legal provisions of the state where the insurance institution is based, even though the damage occurred in another country, i.e. without determining the applicable law. Unfortunately, this issue extends beyond just subrogation claims. Despite the general principle that conflict-of-law norms are mandatory, it is widely acknowledged that in practice, judges often apply domestic law, deliberately avoiding the application of foreign law at all costs. [26]

In some rulings, legal interpretations have been presented stating that Agreements on social security pertain specifically to the field of social security, including regulations on health and pension insurance, insurance for work-related injuries and occupational diseases, unemployment insurance, and maternity and child benefits, but not to the area of compulsory traffic insurance contracts. Earlier

[24] A list of bilateral social security agreements signed by Bosnia and Herzegovina with other countries and adopted by the succession agreement is available at: https://zzofbih.ba/ino-osiguranje/, accessed on: 09.07.2024.

[25] All Social Security Agreements contain similar wording. The provision on compensation is stipulated in Article 33 of the Agreement.

[26] Maja Stanivuković, Mirko Živković, *Međunarodno privatno pravo – opšti deo*, VIII Edition, Belgrade, 2023, p. 245.

case law automatically granted foreign social security institutions full reimbursement for amounts paid out, citing the basic provisions of the Agreements, which state that they apply to pension, health, disability insurance, and other related areas. The transfer of rights, i.e. subrogation was based on the domestic the Law of Contract and Torts (LCT) without scrutinizing the compensation provisions contained in these agreements.[27]

However, more recent case law has been largely focused on the issue of determining the applicable law for such claims. Essentially, courts start from the premise that international social security agreements are relevant only for the transfer of rights (subrogation), while the content of the foreign institution's rights, as well as the extent of the obligations of the motor liability insurer, are determined by applying domestic law under the principle of *lex loci delicti commissi*.[28] In doing so, they do not address the issue of compensation as defined by the cited provision of Article 33 of the Agreement but rather establish that, based on the scope of the Agreement's application *ratione materiae*, it does not apply to compulsory traffic insurance.

Some courts conduct a more detailed analysis of the issue of applicable law, specifically referring to the cited provision of Article 33 of the Social Security Agreement, particularly the phrase *"and according to its regulations has the right to compensation from a third party."* One such case involves a subrogation dispute between a German pension insurance institution and a Croatian motor liability insurer regarding pensions paid following the death of an insured individual in an accident in Croatia. The court determined that, under Croatian law, *it is necessary to establish whether the person receiving social security benefits in Germany has the right to claim compensation from the liable party's motor liability insurance*. The court concluded that the Social Security Agreement is only applicable to the transfer of rights to the German social security institution, i.e. for the purpose of establishing active legitimacy, while all other questions concerning the validity and amount of the claim are governed by Croatian law.[29]

[27] Judgment of the Cantonal Court in Sarajevo No. 65 0 Ps 040370 12 Pž dated 08.12.2015, confirmed by the Supreme Court of the Federation of Bosnia and Herzegovina Judgment No. 65 0 Ps 040370 16 Rev dated 21.02.2017. The reasoning stated: Article 2, paragraph 1, of the mentioned agreement stipulates that it applies, among other things, to health and pension insurance. In this particular case, the matter involves a recourse claim by a foreign insurer for amounts paid based on family pension, against a domestic insurance company responsible under mandatory liability insurance in traffic (subrogation issue Article 939 of the LCT). Therefore, by law, upon the payment of the insurance compensation, all the insured's rights against the party liable for the damage, for any reason, are transferred to the insurer up to the amount paid.

[28] Judgment of the Cantonal Court in Sarajevo, No. 65 0 Ps 446900 18 Pž dated 08.04.2021.

[29] Judgment of the Supreme Court of the Republic of Croatia, VSRH Rev x 97/2014-2 from 14.05.2014. The same position was taken in the Judgment of the Municipal Court in Split, P-455/09, final on 25.11.2014., as well as in a recent Judgment of the High Commercial Court in Zagreb, No. 11 Pž-2634/2023-2.

The subrogation right of a social security institution against a motor liability insurer in a cross-border traffic accident was also considered by the Court of Justice of the EU in the case of *Kordell and others*. The Court held that the law applicable to the transfer of rights (subrogation) is the law of the state in which the institution is registered, but the content of those rights is determined by the law of the place where the accident happened. In addition, the ruling clarified that the subrogation right of a social security institution from one member state cannot exceed the rights of the victim in another member state where the accident took place.[30]

We can agree with this opinion because, in the relationship between social security institutions and insures, it is first necessary to determine the rights of the accident victim or their close relative according to the applicable substantive law. Following that, it must be verified whether, and to what extent, these rights have been transferred to the social security institution. Therefore, the social security institution cannot claim more rights than those held by the victim, the directly injured party, or the immediate family members of the deceased person.[31]

3. Regulation 883/2004 on the Coordination of Social Security Systems

In order to achieve the freedom of movement for workers, one of the fundamental freedoms on which the common market of the European Union is based, it was necessary to regulate the right to an old-age pension at the European level, thus enabling workers the freedom to move and work in a country of which they are not citizens.[32] Despite the regulatory autonomy of national legislations, it was necessary to establish a legal framework that would enable mobile workers to exercise their right to an old-age pension and other forms of social protection in another member state. Issues of social security that were previously regulated by international agreements needed to be harmonized through a unified European regulation that would be directly applicable in the member states. To this end, Regulation 883/2004 on the coordination of social security systems was enacted.[33]

This Regulation contains rules regarding the subrogation rights of social protection institutions, which have been subject to varying interpretations by the courts of member states. Namely, the provision regulating the rights of institutions specifies two obligations on all member states. The first obligation is to recognize

[30] Judgment of 21.09.1999., in case C-397/96, Kordell et al., ECR 1999 p. I-5959, ECLI:EU:C:1999:432.

[31] Josef Schorghuber, p. 23.

[32] Tomislav Sokol,„Pravo na starosnu mirovinu mobilnih radnika temeljem Uredbe o koordinaciji sustava socijalne sigurnosti Europske unije", *European Studies*, 2015, 1, pp. 81-106, 86.

[33] Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.4.2004, p. 1–123. The Regulation replaces all social security conventions applicable between member states that relate to the same scope (Article 8. para. 1 of the Regulation).

the right of subrogation as a derived right of the institution that makes a payment to its insured person, meaning that the insured person's rights against the liable party are transferred to the institution that made the payment under the applicable regulations for that institution. The second obligation is for member states to acknowledge the right of recourse as a direct right of the institution against the liable party.[34] The cited provision only determines the law that will be used in assessing the transfer of rights from the immediate injured to the social security institution, but not the law applicable to the content of the obligation of the liable party towards the social security institution.

This is confirmed by the Higher Court in Ljubljana in its judgment in the case of Austrian pension insurance against a Slovenian insurance company for disability benefits and pensions related to a traffic accident that occurred in Slovenia. The court explains that for the transfer of rights from the immediate injured to the social security institution, the law of the seat of the social security institution is applied — in this case, Austrian law according to the claimant's seat — while the content of the rights and the applicable law regarding those rights (passive standing) is judged according to Slovenian law. The scope of the compensation that the defendant is required to pay, as the liable insurance company, is determined by the Law on Compulsory Traffic Insurance, which is *lex specialis* in relation to the Pension and Disability Insurance Laws.[35]

From the presented analysis of conflict-of-law rules for subrogation claims, as well as numerous examples from recent case law of domestic courts and the Court of Justice of the European Union (CJEU), we highlight that international social security agreements, as well as Regulation 883/2004, allow for the transfer of rights from the direct injured party to the social security institution and obligate member states to mutually recognize subrogation claims. However, these acts do not contain provisions regarding the content of the liability of the tortfeasor or their liability insurer, who is usually the party responsible for paying such claims. The determination of the existence and amount of the insurer's liability based on the concluded insurance contract for damages arising from the use of a motor vehicle is done in accordance with the relevant Law on Compulsory Traffic Insurance.[36]

The EU Court is also consistent in interpreting that member states are free to regulate rules and criteria for compensation for damage resulting from the use of motor vehicles differently from those applied to other non-contractual damage

[34] Regulation 883/2004, Article 85, Paragraph 1.

[35] Judgment of the Higher Court in Ljubljana, No. VSL I Cpg 533/2017, of 22.11.2018.

[36] See: Loris Belanić, „Redefiniranje obveze osiguratelja od automobilske odgovornosti s obzirom na upotrebu vozila u kontekstu prakse Suda EU", *Croatian Academy of legal sciences yearbook*., Vol. XII, 1/2021, p. 346; Jasmina Đokić, „Kriteriji za odmjeravanje naknade nematerijalne štete nastale upotrebom motornog vozila u praksi Suda EU i Ustavnog suda BiH", *Proceedings of the 34th Meeting of Insurers and Reinsurers*, Sarajevo, 2023, p. 118.

claims.[37] Directives in the field of motor insurance mandate that civil liability for damage caused to third parties should be covered by compulsory insurance, but the extent of damage compensation is subject to national legislation. Therefore, member states are free to independently regulate their system of liability that applies to compensation for damage resulting from the use of motor vehicles.[38]

IV Determining the Scope of Compensation in Subrogation Claims of Foreign Social Security Institutions by Applying the Law of the Place of Accident

In subrogation claims by foreign pension and health insurance institutions against domestic motor liability insurers, where the legal relationship involves a foreign element and the conflict-of-law rule directs the application of the law of the place of the accident, the question arises as to which domestic regulation determines the obligation and the scope of rights for such institutions. An analysis of international social security agreements reveals that they allow foreign institutions to submit subrogation claims against domestic tortfeasors or their civil liability insurers. In the following, we will see that the scope of rights for foreign insurance institutions is an area that is not regulated by our legislation, indicating a legal gap. In legal theory, it is held that a legal gap is an area that the legislator has not regulated for certain reasons.[39] Several tools are used to fill legal gaps, with the primary method being interpretation by **analogy**. This means that a legal norm intended for another case, which is similar to the specific case, is applied exactly due to that similarity.[40] We will analyze how analogical interpretation can assist in resolving subrogation claims of foreign health and social insurance institutions.

1. Subrogation Claims of Health Insurance Institutions

As previously mentioned, the scope of insurance coverage under the compulsory motor vehicle liability insurance contract is regulated by the provisions of the Law on Compulsory Traffic Insurance. In the Federation of Bosnia and Herzegovina, insurers are obligated to compensate the actual damages to the competent Health

[37] Judgment in Case C-577/21, LM and NO v HUK-COBURG-Allgemeine Versicherung AG, ECLI:EU:C:2022:992.
[38] Judgment in Case C-371/12, *Petillo v. Unipol SAI*, ECLI:EU:C:2014:26
[39] Prof. Visković cites two main causes of legal gaps: first, when the lawmakers of a new legal order, following a revolution or similar event, do not immediately create legal norms to replace those that were abolished, leaving certain relationships unregulated; second, the emergence of socially significant conflicting relationships that the legislator has not recognized or regulated in time. (Nikola Visković, *Država i pravo*, Zagreb, 1997., pp. 218-220.)
[40] Hrvoje Kačer, Blanka Ivančić Kačer, „O rješavanju antinomija i pravnih praznina ..." *Collection of Papers of the Faculty of Law in Split*, vol. 54, 2/2017, p. 410.

Insurance Fund.[41] In the Republic of Srpska, this right belongs to the Health Insurance Fund of RS.[42] We notice that both entity laws use the incorrect term "recourse claim" when it actually pertains to a subrogation claim. The difference is not merely terminological but also substantive. While in insurance terminology a recourse claim is often equated with a subrogation claim, legal theory generally holds that recourse in insurance represents an original right of the insurer to pursue its own insured whose civil liability the insurer covers. This applies when the insured was driving under some circumstances (e.g. under the influence of alcohol above the legal limit) that give the insurer the right to seek partial or full reimbursement of the amount paid for damage compensation.[43]

In both entities, the insurance company compensates the actual damage within the limits of its insurer's liability and the obligations assumed under the insurance contract.[44] Actual damage is considered to be the costs of medical treatment and other necessary expenses of the injured party, in accordance with the health insurance regulations.[45] A reciprocal provision is also contained in the Health Insurance Act of FBiH, which stipulates that cantonal Health Insurance Funds have the right to a direct claim for compensation against the motor liability insurer of the tortfeasor if the damage was caused by the use of a motor vehicle.[46]

The entity-level Laws on Compulsory Traffic Insurance do not regulate the rights of foreign health and pension insurance institutions, but instead grant such rights exclusively to domestic institutions that are explicitly designated to administer compulsory health insurance at the entity level.

The active standing of foreign health insurance institutions is most often based on an international agreement, specifically the Social Security Agreement. Since the rights of such insurers are not regulated by our legislation, by analogously applying the provisions of the Law on Compulsory Traffic Insurance and the Health Insurance Law, we can conclude that they are entitled to actual damages, which include medical expenses and other necessary costs recognized by domestic health insurance regulations. The term "other necessary costs" can be interpreted as other forms of actual damages resulting from bodily injury or death, which may include,

[41] In FBiH, health insurance and healthcare are administered at the level of ten cantons. The framework law is the Health Insurance Act of FBiH, *Official Gazette of FBiH*, Nos. 30/1997, 7/2002, 70/2008, 48/2011, 100/2014 - Constitutional Court decision, 36/2018, and 61/2022, which mandates the establishment of Health Insurance Funds in each canton to ensure the realization of rights and the provision of funds from compulsory health insurance.

[42] The Law on Compulsory Traffic Insurance of the Republic of Srpska, *Official Gazette of RS*, Nos. 82/15, 78/20, 1/24, Article 31.

[43] More on this: B. Matijević, 387.; Slobodan Stanišić, „Regres i zakonska subrogacija u osiguranju od autoodgovornosti", *Yearbook of the Faculty of Law Sciences, Apeiron*, Banja Luka, 5/2015, p. 85.

[44] LCTI of FBiH, Article 28, Paragraph 1.

[45] LCTI of FBiH, Article 28, Paragraph 2.

[46] Health Insurance Act of FBiH, Article 70.

inter alia, transportation costs, repatriation expenses, and similar items. However, lump-sum payments in the form of daily allowances for treatment costs, which do not constitute actual damages and are recognized as health insurance rights by the legislation of certain European countries, would not fall under this category.

2. Subrogation Claims of Pension and Disability Insurance Institutions

In the Law on Pension and Disability Insurance of FBiH, the right to recourse for pension and disability insurance institutions is conditioned on the damage being caused intentionally or through gross negligence. Similar to health insurance, these insurers have the right to make a direct claim against the motor liability insurer if the damage resulted from the use of a motor vehicle.[47]

In the Republic of Srpska, there is only a general provision stating that the Pension Insurance Fund is obligated to seek compensation from the tortfeasor, i.e. from the person who caused the disability or death of the insured.[48]

Although targeted interpretation might conclude that passive standing exists on the part of the tortfeasor's insurer, the law in RS does not provide the possibility of submitting a direct claim against the liability insurer.

As we have already noted, the Law on Compulsory Traffic Insurance (LCTI) in both the Federation of Bosnia and Herzegovina (FBiH) and the Republic o Srpska (RS) has allowed only domestic health insurance institutions to submit subrogation claims directly to the motor liability insurer, and not to pension and disability insurance institutions. We see that the entity laws on pension and disability insurance (PDI) and LCTI regulate the same issues, i.e. subrogation claims of pension and disability insurance institutions, in different ways, with neither of these laws mentioning foreign insurers. Considering the timeframe for the enactment of these two laws, i.e. that the PDI Law was adopted in 2018 and LCTI in 2020, it leads to an interpretation based on the principle of *lex posterior derogat legi priori*. This would ultimately mean the exclusive application of LCTI, which would entirely dispute the rights of those insurers because LCTI does not regulate subrogation claims of pension and disability insurance institutions but grants this right only to the explicitly designated cantonal health insurance institutes.

Equally to health insurance claims, the active standing for subrogation claims by foreign pension insurance institutions is grounded in international social security agreements, and the content of these rights can be determined through the analogical application of the Pension and Disability Insurance Law (PDI). According to the relevant provision of the PDI Law in FBiH, such a claim is valid only if the bodily

[47] Law on Pension and Disability Insurance FBiH, *Official Gazette FBiH*, Nos. 13/18, 93/19, Articles 132 and 135.
[48] Law on Pension and Disability Insurance of the Republic of Srpska, *Official Gazette RS*, No. 134/2011 with amendments up to 43/2023, Article 164.

injury, disability, or death of the insured person was caused intentionally or through gross negligence. The amount of damage is calculated based on the amount of the recognized pension or monetary compensation for bodily injury, as well as the expected average duration of that right.[49] Thus, the obligation of the domestic motor liability insurer to a foreign pension insurance institution exists if the damage was caused intentionally or through gross negligence, and the extent of this obligation is determined in a lump sum, depending on the amount of the recognized pension or disability compensation and the average duration of that right.

To avoid uncertainties and analogical application, it would be advisable to regulate subrogation claims by pension and disability insurance providers in the entity legislation in Bosnia and Herzegovina concerning compulsory traffic insurance. In this regard, the current Laws on Compulsory Traffic Insurance of the Republic of Croatia and the Republic of Serbia could serve as models. These laws detail the rights of such providers and the method for calculating the amounts as actual damage resulting from the payment of pensions or disability compensation due to the use of motor vehicles, and which do not limit these rights solely to domestic insurance institutions.

In a recent judgment by the Supreme Court of the Republic of Croatia in a dispute between an Austrian pension insurance provider and a Croatian motor liability insurer concerning a subrogation claim for payment for disability pensions, it was determined that the substantive law governing the specific insurance contract, namely the provisions of the Law on Compulsory Traffic Insurance (LCTI), applies to the relationship between the claimant and the defendant regarding the determination of the amount and scope of the defendant's liability as an insurer. An interesting point was made in the reasoning of the cited judgment that the claimant's demand cannot exceed the limits prescribed by the LCTI. Otherwise, the claimant, as a foreign pension fund, would be placed in a more favorable legal position under Croatian law compared to the position of the defendant relative to a domestic (Croatian) pension fund. This would be contrary to public order and the Social Security Agreement between Croatia and Austria.[50]

V Conclusion

Resolving subrogation claims by foreign health and pension insurance institutions is a challenge not only for domestic insurers under compulsory motor liability insurance, who are often the parties required to make payments, but also for courts, which, often due to neglecting the foreign element and conflict-of-law regulations, interpret the scope of the rights of these institutions differently. From

[49] Pension and Disability Insurance Law FBiH, Article 133.

[50] Judgment of the Supreme Court of the Republic of Croatia, case no. Rev 1005/2020-2 of 27.2.2024.

the analysis of regulations and case law, we can conclude that Social Security Agreements, as bilateral international treaties, are designed to facilitate the realization of social rights, as well as Regulation 883/2004, which allows for the transfer of rights (subrogation) from the insured to the insurance provider. However, the determination of the obligation of motor liability insurers and the extent of that obligation is governed by the state's national law, which states that the insured event occurred due to the use of a motor vehicle. This involves the application of the Law on Compulsory Traffic Insurance, which establishes the limits of insurer liability concerning subrogation claims by foreign social security institutions. Entity-level compulsory traffic insurance laws in FBiH and RS prescribe subrogation solely for domestic health insurance institutions, but through analogy, the same provisions can be applied to foreign health insurance institutions. In the absence of provisions regarding subrogation for foreign pension insurance institutions, the extent of the liability of motor liability insurers for claims from foreign pension insurance institutions should be determined by applying relevant domestic pension insurance regulations. Nevertheless, in any case, the insurance contract for motor liability establishes the limits of the insurer's obligations for the submitted claim.

Literature

- Petrović Tomić, N., "*Osnovi prava osiguranja*" 1. izdanje, Beograd, 2021.
- Petrović Tomić, N., "*Pravo osiguranja – Sistem*" Knjiga I, Beograd, 2019
- Šulejić, P., "*Pravo osiguranja*" Novi Sad, 4. izdanje, 1997.
- Stanivuković, M., Živković, M., "*Međunarodno privatno pravo – opšti deo*" 8. izdanje, Beograd, 2023.,
- Visković, N., "*Država i pravo*" Zagreb, 1. izdanje, 1997.
- Matijević, B., "Pravo subrogacije osiguratelja", *Zbornik XXV Međunarodne naučne konferencije „Prouzrokovanje štete, naknada štete i osiguranje"(ed. Zdravko Petrović et al.),* Beograd – Valjevo, 2022., pp. 381-99.
- Nižić Peroš, J., "Personalna subrogacija u odnosu prema pravu regresa osiguratelja i ustupanju tražbine – cesiji", *Oeconomica Jadertina*, No. 1/2021, pp. 79-90, 81.
- Torlak, D., "Mjerodavno pravo za rješavanje zahtjeva za naknadu štete iz saobraćajnih nezgoda s posebnim osvrtom na subrogaciju", *Anali Pravnog fakulteta u Zenici*, No. 20., vol. 10., pp. 167-198
- Josef Schörghuber, „Pravo regresa nosilaca socijalnog osiguranja nakon saobraćajne nezgode prema osiguravaču obaveznog osiguranja odgovornosti, s posebnim osvrtom na austrijsko pravo", *Revija za pravo osiguranja*, Beograd, No. 3, 2007., pp. 3-23.

- Lauc, D., "Regresni zahtjevi njemačkih nositelja socijalnog osiguranja", *Anali Pravnog fakulteta u Zenici*, No. 17, 2016., pp. 385-397.
- Đundić, P., "Regresna potraživanja stranih fondova socijalnog osiguranja i neka pitanja međunarodnog privatnog prava", *Zbornik Pravnog fakulteta u Novom Sadu*, 2007, vol. 41, No. 1-2, pp. 313-324
- Essén, Eric W., *Rapport explicatif*, u: Conférence de la Haye de droit international privé, Actes et documents de la onzième session, 7 au 26 Octobre 1968, Tome III, Accidents de la circulation routière (Explanatory Report of the Hague Convention)
- Sokol, T., "Pravo na starosnu mirovinu mobilnih radnika temeljem Uredbe o koordinaciji sustava socijalne sigurnosti Europske unije", *Europske studije*, 2015., 1, pp. 81-106
- Belanić, L., "Redefiniranje obveze osiguratelja od automobilske odgovornosti s obzirom na upotrebu vozila u kontekstu prakse Suda EU", *Godišnjak Akademije pravnih znanosti Hrvatske*, vol. XII, 1/2021, pp. 345-366
- Đokić, J., "Kriteriji za odmjeravanje naknade nematerijalne štete nastale upotrebom motornog vozila u praksi Suda EU i Ustavnog suda BiH", *Zbornik 34. Susreta osiguravača i reosiguravača*, Sarajevo, 2023. pp. 113-125
- Alihodžić, J., "Duraković, A., "Assessment of Damage and Recourse Actions in 1971 Hague Convention, Rome II Regulation and Bosnian PIL Act: What is Wrong with Respective Case Law in Bosnia and Herzegovina?", *South East European Law Journal*, Vol. 1, No. 2 (2014), pp. 67-80
- Kačer, H., Ivančić Kačer, B., "O rješavanju antinomija i pravnih praznina ..." *Zbornik radova Pravnog fakulteta u Splitu*, vol. 54, 2/2017. pp 397-414
- Stanišić, S., "Regres i zakonska subrogacija u osiguranju od autoodgovornosti", *Godišnjak Fakulteta pravnih nauka Apeiron*, Banja Luka, 5/2015 pp. 84-96
- Zakon o obligacionim odnosima – ZOO (Sl. list RBiH, br. 2/92, 13/93, 13/94; Službene novine FBiH, br. 29/03; Sl. glasnik RS, No. 17/93, 3/96, 39/03 i 74/04), art. 948.
- Zakon o obaveznim osiguranjima u prometu FBiH - ZOOP, Službene novine FBiH, No. 57/2020
- Zakon o obaveznim osiguranjima u saobraćaju Republike Srpske, Sl. glasnik RS, No. 82/15, 78/20 and 1/24
- Konvencija o mjerodavnom pravu za saobraćajne nezgode, 1971. godine, stupila snagu 03.06.1975. godine, BiH članica temeljem sukcesije; tekst objavljen u „Službeni list SFRJ" supplementary issue: 26/1976.
- Zakon o rješavanju sukoba zakona sa propisima drugih zemalja - ZRSZ, Sl.list SFRJ.43/082 i 72/82 – 1645, Sl. list RBiH 2/92-5,13/94-189
- Zakon o zdravstvenom osiguranju FBiH, Službene novine FBiH, No. 30/1997, 7/2002, 70/2008, 48/2011, 100/2014 - decision of the Constitutional Court, 36/2018 and 61/2022

- Zakon o penzijskom i invalidskom osiguranju FBiH, Sl. novine FBiH, No. 13/18, 93/19., arts. 132. and 135.
- Zakon o penzionom i invalidskom osiguranju Republike Srpske, Sl. glasnik RS, No. 134/2011 s izmjenama do 43/2023., art. 164.
- Uredba (EZ) br. 864/2007 Europskog parlamenta i Vijeća od 11. srpnja 2007. o pravu koje se primjenjuje na izvanugovorne obveze („Rim II") (SL 2007., L 199)
- Uredba (EZ) br. 883/2004 Europskog parlamenta i Vijeća od 29. travnja 2004. 883/2004 o koordinaciji sustava socijalne sigurnosti, SL L 166, 30.4.2004, p. 1–123.