



**REPLIES OF IRISH MARITIME LAW ASSOCIATION TO
QUESTIONNAIRE**

Introductory Remarks:

Shipowners Liability Insurance in the area of the subject conventions is not written in the Irish Market. Where such insurance is in force for Irish Flagged vessels it is provided largely by the traditional UK P&I Clubs.

Licensing

Does an insurer wanting to insure the risks under the Convention referred to above need a license?

Life and General Insurance Divisions of the Central Bank of Ireland are responsible for regulation inter alia of all Non Life Insurance Undertakings. A License is required for each and every class of Insurance (including Marine) underwritten in Ireland. See (Central Bank Reform Act 2010)

If so,

1.1 must it be a national license, or do your respective authorities accept licenses issued by foreign bodies?

It need not be a national license but the Holder must firstly be licensed in the class and there must then be compliance with the “ passporting “ procedures from a licensing perspective as set out in SI. 359 of 1994 and the related Sienna Protocol as agreed by EU Supervisory bodies in October 1997 and updated in 2008.

1.2 What are the consequences if an insurer issues a policy without the respective license?

There are significant Financial and or Criminal Sanctions available to the Regulatory Authority for any breach of Financial Regulation. See “ Administrative Sanctions Procedures of the Financial Regulator 2005 “ and “ Central Bank Enforcement Priorities 2013 “ (effective 12 February 2013)

1.3 Is there an obligation of a licensed insurer to conclude insurance contracts?

There is no obligation on either party to conclude a marine insurance contract (such as might exist in motor insurance as a compulsory Class.)

1. Certification

2.1 Will a certificate issued by a convention state

2.1.1 be recognized in your state without any preconditions?

Normally Yes - the Marine Survey office of the Dept of the Marine would accept a certificate issued by a contracting state as prima facie evidence of compliance with convention regulation and would expect reciprocal recognition by a convention state of any Irish issued certificate

One needs to look carefully at what the law requires in this regard. The requirement is not directly a requirement to have insurance. The requirement is to have a certificate of insurance. For example to comply with the CLC in Ireland (as set out in the 1988 Act) a ship registered in a convention state must have a certificate issued by or under the authority of that state. In relation to a ship registered in a non-convention state, the 1988 Act provides that she must have a certificate issued by a Convention state or a certificate certified by the [Irish] Minister as complying with such requirements as may be prescribed.

2.1.2 be subject to investigation whether insurance satisfying the convention requirements actually exist?

By analogy with 2.1.1 – Normally No.

2.1.3 be rejected if there is evidence that there no valid insurance at all or that the insurance is not satisfying the convention requirements?

If there was evidence of non compliance such as a lack of requisite Insurance then the Marine Survey office would act upon it and take issue with the certificate.

2.2 Does the authority in your state in charge of issuing the certificate

2.2.1 require a license of your state or is it sufficient that the insurer is licensed in another state?

Licensed Insurers from a contracting state are routinely involved in practice as this type of Liability cover is not provided currently in the Irish Market.

2.2.2 investigate the insurance conditions before issuing a certificate?

MSO would satisfy itself in all material respects. A certificate is only issued on sight of the Insurance certificate

2.2.3 investigate the financial standing of the insurer?

Normally a reputable P&I Club will be involved and this would be accepted as prima facie evidence of compliance with convention requirements

2.2.4 investigate the license of the insurer?

Likewise with 2.2.3.

3. Statutory Law

3.1 Does your national law contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law?

CLC Convention – The Oil Pollution of the Sea (Civil Liability and Compensation) Acts 1988 – 2005.

HNS Convention – The Sea Pollution (Hazardous Substances) Compensation Act 2005 (Commencement Order 2007)

Bunkers Convention – The Sea Pollution (Miscellaneous Provisions) Act 2006 Part 2. (Commencement Order 2008)

Nairobi Wreck Removal Convention – No legislation.

Athens Protocol 1974 (as amended) – The Merchant Shipping (Liability of Shipowners and others) Act 1996.

(2002 Protocol) – no legislation but EU Regulation 392/2009 in force for member states currently implemented by national regulation (EUROPEAN UNION (LIABILITY OF CARRIERS OF PASSENGERS BY SEA) REGULATIONS 2012 S.I.552 of 2012) – based on the Protocol and the IMO guidelines)

If so, could you

3.1.1 summarize the main characteristics of those provisions?

The enacting legislation above provides that the Conventions (unless otherwise provided) shall have the force of law in the state and that judicial notice shall be taken of them

3.1.2 provide the IWG with an English translation of those provisions?

Copies of relevant legislation as above available on line.

3.2 If your national law does not contain any provisions specifically designed to transform the above mentioned provisions in international conventions into your national law, does your national law then contain general provisions on mandatory insurance, which also apply to the mentioned provisions in the international conventions?

If so, could you

3.2.1 summarize the main characteristics of those provisions?

3.2.2 provide the IWG with an English translation of those provisions?

3.3 What does your private international law provide for as the applicable law,

3.3.1 if the claimants are national persons or companies, but if the insurer is a foreign company?

3.3.2 if the claimants are foreign persons and companies, but if the insurer is a national company?

3.3.3 if the claimants and the insurer are foreign companies?

4. Jurisdiction/Proceedings

4.1 Does your national law contain provisions on jurisdiction of courts for direct claims against Insurers?

There is no Third party rights against Insurers Act in Ireland such as exists in neighbouring jurisdictions though as pointed out in the introductory remarks the provision of shipowners liability cover to Irish Flagged vessels in the area of the subject conventions is via those shipowners P&I clubs and those contracts would be subject to English Law and Practice and thus the relevant legislation in the UK - Third Party Rights against Insurers Act 2010 would presumably be relevant.

There is in Ireland the Civil Liability Act 1961 which provides at S62;

62.—Where a person (hereinafter referred to as the insured) who has effected a policy of insurance in respect of liability for a wrong, if an individual, becomes a bankrupt or dies or, if a corporate body, is wound up or, if a partnership or other unincorporated association, is dissolved, moneys payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those moneys are payable, and no part of those moneys shall be assets of the insured or applicable to the payment of the debts (other than those claims) of the insured in the bankruptcy or in the administration of the estate of the insured or in the winding-up or dissolution, and no such claim shall be provable in the bankruptcy, administration, winding-up or dissolution.

Without a definitive judgement at this point there is some doubt as to whether S 62. per se creates a direct right of action against an Insurer in Ireland though there is a supreme Court judgement in 1989 which suggests that by logical extension the Section does confer a direct right of action.

Of course to the extent that the Conventions themselves confer a direct right of action then by virtue of their incorporation into Irish Law that right exists whether or not one considers it to be part of the National law – for example ;

CLC – Art **VII** Liability of guarantor provisions (Insurers or other providers of security as guarantors) **has been transposed into Irish law by the** 1988 CLC Act and provides a direct right of action against the guarantor (i.e. the insurer) at section 17 as follows:

Liability of guarantor. **17.**—(1) Where it is alleged that the owner of a ship is liable under *section 7* for pollution damage as a result of any discharge of oil, and there is, at that time, in force in respect of that ship a contract of insurance or other security to which a certificate referred to in *section 16* relates, proceedings to enforce a claim in respect of any damage caused by the discharge of oil may be brought against the guarantor.

(2) In any proceedings brought against a guarantor under this section, it shall be a defence, in addition to any defence affecting the liability of the owner, for the guarantor to establish that the discharge of oil in respect of

which the proceedings are brought was due to the wilful misconduct of the owner of the ship.

(3) A guarantor may limit his liability under this section in like manner and to the same extent as an owner may limit his liability whether or not the discharge of oil in respect of which the proceedings are brought occurred without the actual fault or privity of the owner of the ship.

4) Where both the owner of a ship and his guarantor each apply to the Court to limit his liability, any money paid into court in pursuance of either application shall be deemed to have been paid in also in pursuance of the other application.

While this section makes the guarantor (i.e. the insurer) jointly liable with the shipowner in Irish law, it is not at all clear if the Irish court would have jurisdiction to hear a claim brought against a foreign guarantor. Without legislative clarity on this issue though we feel that speculative answers to the remaining questions at 4 and 5 in the questionnaire would be of little assistance to the working group.

If so, does your national law

4.1.1 allow foreign claimants to directly sue national insurers in your national courts?

4.1.2 allow foreign and national claimants to directly sue foreign insurers in your national courts?

4.2 Does your national law allow that the direct claims against an insurer are subject to an arbitration clause?

4.3 Does a judgement against the liable party bind the courts of your country in a direct action against an insurer as regards the merits and quantum?

If so,

4.3.1 does this also apply to judgements in default?

4.3.2 can the insurer invoke that the court having decided on the claim against the party liable has not had jurisdiction?

4.3.3 can the insurer invoke that the party liable has not been properly served with proceedings and no opportunity to defend itself?

4.3.4 can the party liable invoke that the party liable has not defended itself properly?

4.5 Can the claimant under your national law sue the person liable and the insurer in the same proceedings?

If so,

- 4.5.1 are there any requirements as to the domicile of the party liable or the insurer?
- 4.5.2 Does your national law contain provisions on what has to happen if the insurer requires that the party liable is joined as a further defendant?

5. Particulars of direct action

- 5.1 Does your national law contain provisions according to which a direct claimant has to fulfil requirements for commencing a direct action against an insurer?
- 5.2 Does your national law contain provisions on burden and measure of proof which distinguish between a claim against the party liable under the respective convention and a direct claim against the insurer of such party?
- 5.3 What defences does your national law allow an insurer against a direct claim?
- 5.4 Can the insurer take over the defence of the party liable, and has the insurer a statutory power of attorney to act for the party liable?
- 5.5 Are there any time limits in your national law for a direct action against an insurer?

If so,

- 5.5.1 what protects such a time limit (e.g court proceedings; demand letters)?
- 5.5.2 can the time limit be extended by agreement? If so, is the agreement with the insurer sufficient or does the party liable have to agree to the extension as well?

- 5.6 Under your national law, are the party liable and the insurer jointly liable?

If so,

- 5.6.1 what legal consequences does your national law provide for such joint liability?
- 5.6.2 can the insurer file a cross action against his insured in the same proceedings?
- 5.6.3 do your courts in such a situation give effect to a jurisdiction or arbitration clause in the insurance policy?

- 5.7 Does your national law allow that the claimant assigns his direct claims to a third party?

If so,

- 5.7.1 are there any requirements for the validity of the assignment?

- 5.8 What qualifies under your national law as a *wilful misconduct*?

- 5.9 Does the insurer acquire rights against his own insured (the party liable) if he has to indemnify the direct claimant in circumstances, under which he would have avoided cover if he had been sued by the party liable and not by the direct claimant?
- 5.10 How is limitation of liability affected under your national law in cases of direct actions?
- 5.11 Does your national law contain consequences, if the insurance contract contains provisions which are not consistent with the Conventions referred to above?

If so,

- 5.11.1 are such provisions invalid?
- 5.11.2 is the whole contract invalid?
- 5.11.3 does the contract including such conflicting conditions remain valid, so that the insurance does not fulfil the requirements of the Conventions? What effect does that have under your national law?

6. State Liability

Does your national law provide for liability of the state where to appropriate authority issues a certificate under the Convention, if it turns out

- 6.1 that there is no insurance contract at all?
- 6.2 that the insurance contract is not consistent with the provisions of the Conventions?
- 6.3 that the insurer is not financially stable and cannot satisfy all direct claims?

The HNS enabling legislation provides for example that

“Any action for compensation under the Convention (otherwise known as a “ Convention Action “) shall be deemed for the purposes of any enactment or rule of law to be an action founded in Tort.

It is provided that in the absence of a compliant certificate of insurance it is the Owner and Master of the Ship that are guilty of an offence

There is no provision in National Law for any liability on the part of the Marine Survey Office in respect of the issuance of convention certificates. They do require evidence of insurance but in the absence of any evidence to the contrary they would be accepted as prima facie evidence of compliance. They wouldn't for example question the bona fides of the insurance certificate.

Again in practice they are underwritten by the reputable P&I Clubs.

Useful Links.

BUNKERS CONVENTION - SEA POLLUTION (MISCELLANEOUS PROVISIONS) ACT 2006 section 9 -
<http://www.irishstatutebook.ie/2006/en/act/pub/0029/sec0009.html#sec9>

As regards HAZMET - Sea Pollution (Hazardous Substances) (Compensation) Act 2005

Section 15.
<http://www.irishstatutebook.ie/2005/en/act/pub/0009/sec0015.html#sec15>

LIABILITY CONVENTION AND FUND CONVENTIONS OIL POLLUTION OF THE SEA (CIVIL LIABILITY AND COMPENSATION) ACT, 1988 Section 16.
<http://www.irishstatutebook.ie/1988/en/act/pub/0011/sec0016.html#sec16>

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