**Questionnaire**

PREAMBLE TO ANSWERS

Sweden is presently only party to the CLC Convention. Relevant legislation regarding obligation to maintain insurance or other financial security, and direct action, can be found in the Swedish Maritime Code. Legislation relating to insurance certificates (e.g. issuing and checking certificates) can be found in various Acts and Ordnances.

It seems likely that the HNS Convention might be ratified in a not too far distant future, with necessary amendments of applicable national legislation to follow. The system in place for compulsory insurance and insurance certificates in relation to the CLC Convention is reportedly working well and it seems likely that this system will be copied if and when the HNS Convention is implemented into Swedish national legislation (*cf.* SOU 2006:92 pp. 144-153).

1. **Licensing**

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

Answer

Yes.

If so,

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

 Answer

A permit from the Swedish Financial Supervisory Authority (FSA. Sw: Finansinspektionen, FI) is needed in order for companies based in Sweden to provide insurance products. In this regard the following information has been obtained from the FSA:

Q U O T E

**Foreign insurance operations in Sweden**

*Companies with a registered office within the EEA*

Foreign companies licenced within the EEA to operate an insurance business can conduct operations in Sweden from a branch or agent (secondary establishment) or through cross-border operations after notifying Finansinspektionen.

*Companies with a registered office outside the EEA*

Insurers with a registered office outside the EEA may, after authorisation from Finansinspektionen, conduct operations in Sweden from a branch or agent(secondary establishment). They also have the opportunity, after authorisation from FI, to market insurances for risks located in Sweden. However, this applies on the condition that it occurs through mediation of an insurer licenced in Sweden and both the insurers belong to the same group or have cooperation agreements with each other.

*Apply for authorisation*

Companies offering financial services in Sweden are required to apply for a licence issued by FI in order to operate a business. In a licence application, we review the company's capital situation, business plan, owners and corporate management, among other things. The company's operating activities may require additional licences from FI.

U N Q U O T E

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

 Answer

Based on information from the FSA there would be an order to cease such activities.

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

Answer

No.

1. **Certification**

2.1 Will a certificate issued by a convention state

2.1.1 be recognized in your state without any preconditions?

Answer

Yes, but Swedish law provides that certain formal requirements must be fulfilled (Section 8 of Ordnance 1996:12).

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

 Answer

Not to our knowledge. The control mechanism seems to be limited to documentary compliance onboard the vessel.

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?

 Answer

Logically Yes. Swedish law contains provisions as to sanctions if insurance does not exist.

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?

 Answer

License is required as discussed under 1.1.

2.2.2 investigate the insurance conditions before issuing a certificate?

 Answer

Yes, to the extent that an application to the FSA for a certificate shall be accompanied by a certificate from the relevant insurance company confirming that insurance is in place which covers the liability imposed by the Convention (Section 5 of Ordnance (1996:12)).

2.2.3 investigate the financial standing of the insurer?

 Answer

Not to our knowledge.

2.2.4 investigate the license of the insurer?

 Answer

Probably Yes. As mentioned under 2.2.3, in addition to issuing certificates the FSA is the authority responsible for granting licenses (permits) for insurances companies and such information should thus be readily available to the FSA.

**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?

If so, could you

3.1.1 summarize the main characteristics of those provisions?

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

Answer

As mentioned, Sweden has only implemented the CLC Convention. To this end, The Maritime Code contains the following provisions:

  *Insurance duty for Swedish vessels*

Chapter 10 Section 12: The owner of a Swedish vessel carrying more than 2,000 tons oil as bulk cargo shall take and maintain an insurance or provide other satisfactory security to cover his liability according to the provisions of this chapter or corresponding legislation in any other Convention State up to the amounts stated in section 5 first paragraph. The Swedish State is not, however, subject to such obligation.

An insurance or security according to the first paragraph shall be approved by the Government or the authority which the Government nominates.

If the owner has fulfilled his duty according to the first paragraph, the authority which the government nominates shall issue a certificate indicating this. For a vessel owned by the Swedish State, the authority which the Government nominates shall issue a certificate indicating that the vessel is owned by the Swedish state and that its liability is covered up to the liability amount mentioned in section 5 first paragraph.

The Government shall determine the form of the certificate mentioned in the third paragraph. The certificate shall be carried on board the vessel.

  *Insurance duty for foreign vessels*

Chapter 10 Section 13: For a foreign vessel which enters or leaves a Swedish port or a mooring place on Swedish maritime territory and which on the occasion is carrying more than 2,000 tons of oil as bulk cargo there shall be an insurance or other satisfactory security which covers the owner's liability according to this chapter or the corresponding legislation in any other Convention State up to the liability amount mentioned in section 5 first paragraph. This does not apply to a vessel owned by a foreign State.

The vessel shall carry on board a certificate indicating the existence of such insurance or other satisfactory security as is mentioned in the first paragraph. For a vessel not registered in a Convention State the certificate may be issued by the authority nominated by the Government. If the vessel is owned by a foreign State it shall carry on board a certificate indicating that the vessel is owned by that State and that its liability is covered up to the liability amount applicable according to section 5 first paragraph.

Further provisions on certificates mentioned in the second paragraph shall be issued by the Government or by the authority which the Government nominates.

*Claims against the insurer*

Chapter 10 Section 14: An insurance mentioned in sections 12 or 13 shall entitle any claimant to compensation directly from the insurer.

The insurer shall however be free from liability if the vessel owner is free from liability or caused the damage with intent. The insurer's liability shall in no case exceed the liability amount stated in section 5 first paragraph.

Except as follows from the second paragraph, the insurer may not invoke defences against any one other than the owner which he might have invoked against the owner.

Chapter 10 Section 15: Subject to special reservation by the insurer, the insurance shall inure for the owner's benefit in respect of his liability according to the provisions of this chapter or corresponding legislation in any other Convention State. Act (1995:1081).

*Other security*

Chapter 10 Section 16: What is provided in sections 14 and 15 on insurance shall be applicable also in respect of such other security as is provided in sections 12 or 13.

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?

Answer

No.

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 you 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?

Answer

Arguably, the law agreed for in the contract should apply on the assumption that a direct action is an action pursued pursuant to the terms of the insurance contract (Chapter 9 Section 7 of the Insurance Contract Act).

**4. Jurisdiction/Proceedings**

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

 Answer

Yes. Claims against an insurer for oil pollution damage should be filed with a Maritime Court in Sweden pursuant to Chapter 10 Section 18, Chapter 21 Sections 5 and 6 of the Maritime Code

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?

 Answer

 Yes, provided the oil pollution damage occurred within Swedish territory or the Swedish EEZ.

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

Answer

 Yes, although it seem to be disputed by some authors.

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?

Answer

 It does not bind the courts trying the direct action but it has evidentiary value in that action.

If so,

4.3.1 does this also apply to judgements in default?

 Answer

 Yes.

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

 Answer

 Yes.

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

 Answer

Yes.

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

Answer

Yes.

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

 Answer

 Presumably Yes, pursuant to Chapter 14 Section 2 of the Code of Judicial Procedure.

If so,

4.5.1 are there any requirements as to the domicile of the party liable or the insurer?

 Answer

 No.

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?

 Answer

 No.

**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?

 Answer

 Yes.

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?

 Answer

 No.

5.3 What defences does your national law allow an insurer against a direct claim?

Answer

Chapter 9 Section 7 of the Swedish Insurance Contract Act (FAL) provides that an “injured party may direct a claim for indemnification to the insurance company pursuant to the insurance contract”. Hence, the liability insurer can rely on all terms of the insurance contract and put forward the same defences against an injured party as against an assured.

Chapter 10 Section 14 of the Maritime Code (ie CLC claims) provides that the insurer is entitled to invoke the same defences as the assured, i.e. the insurer will be relieved from liability if the vessel owner is not liable or if the damage was caused with intent by the vessel owner. However, the insurer may not invoke any other defences.

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?

 Answer

 No.

5.5 Are there any time limits in your national law for a direct action against an insurer?

Answer

 Yes.

If so,

5.5.1 what protects such a time limit (e.g court proceedings; demand letters)?

Answer

 Court proceedings.

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?

Answer

Regarding a direct action according to FAL, yes. However, not regarding a direct action under the Maritime Code (ie CLC claims)

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

Answer

 Yes.

If so,

5.6.1 what legal consequences does your national law provide for such joint liability?

 Answer

 Either of them can be pursued for the full claim.

5.6.2 can the insurer file a cross action against his insured in the same proceedings?

Answer

 Yes.

5.6.3 do your courts in such a situation give effect to a jurisdiction or arbitration clause in the insurance policy?

Answer

 Yes.

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

Answer

 No.

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*?

 Answer

According to the relevant preparatory work to the Maritime Code (Prop. 1982/83:159 s. 110), the concept of “wilful misconduct” is seemingly equivalent to “recklessly and with knowledge that such loss would probably result”.

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?

Answer

 Yes, to some extent.

5.10 How is limitation of liability affected under your national law in cases of direct actions?

 Answer

It is not affected. Chapter 10 Section 14 of the Maritime Code provides that the insurer’s liability shall in no case exceed the liability amount stated in Section 5 first paragraph. That is to say, the liability insurer is entitled to the same limitation of liability as the vessel owner.

5.11 Does your national law contain consequences, if the insurance contract contains provisions which are not consistent with the Conventions referred to above?

Answer

 Not that we know of.

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?

Answer

No express provisions exist although it is possible that such liability may follow from general principles under Swedish law on State liability.

If you have any questions regarding this Questionnaire, please feel free to contact the Chairman of the IWG on Marine Insurance, Dr. Dieter Schwampe at d.schwampe@da-pa.com. Replies to this Questionnaire should be sent to the CMI Secretariat in Antwerp.

Your cooperation is very much appreciated.

 Niglel H. Frawley

 - Secretary General -