

QUESTIONNAIRE

1. Licensing

Does an insurer wanting to insure the risks under the Convention referred to above need a license? **Yes, Turkish law provides that insurers must be licensed (but the rule concerns only insurers being active in Turkey)**

If so,

- 1.1 must it be a national license, or do your respective authorities accept licenses issued by foreign bodies? **For liability insurances in respect of vessels, there is possibility to contract abroad (the rule takes into account the fact that the P&I cover is not offered by local insurers within Turkey). But there is no specific requirement that the foreign insurer be licensed.**
- 1.2 What are the consequences if an insurer issues a policy without the respective license? **An insurance contract made with a Turkish person not being licensed is not enforceable. However this rule does not apply to contracts made with foreign insurance companies (otherwise Turkish law would harm Turkish citizens at least in cases where it is allowed to take out insurance abroad).**
- 1.3 Is there an obligation of a licensed insurer to conclude insurance contracts? **For compulsory insurances, the insurer is obliged to contract.**

2. Certification

- 2.1 Will a certificate issued by a convention state
 - 2.1.1 be recognized in your state without any preconditions? **In principle yes.**
 - 2.1.2 be subject to investigation whether insurance satisfying the convention requirements actually exist? **If need is felt, yes.**
 - 2.1.3 be rejected if there is evidence that there is no valid insurance at all or that the insurance is not satisfying the convention requirements? **It depends on the appreciation of the relevant authorities. This would happen in extraordinary circumstances.**
- 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? **It will not require a Turkish license if the insurance cover is granted by a foreign insurer (which is the normal case)**

- 2.2.2 investigate the insurance conditions before issuing a certificate? **Yes.**
- 2.2.3 investigate the financial standing of the insurer? **It may do so.**
- 2.2.4 investigate the license of the insurer? **It may do so.**

3. Statutory Law

- 3.1 Does your national law contain any provisions specifically designed to transform the abovementioned provisions in international conventions into your national law? **No. International conventions to which Turkey is a party have force of law and the Judge is required to apply international rules ex officio.**

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?

- 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? **Yes Turkish law has special provisions on mandatory insurances. But in case of international conventions those provisions will apply only as complementary rules where the international convention did not regulate.**

If so, could you

- 3.2.1 summarize the main characteristics of those provisions? **The domestic rules provide for direct action, impossibility to invoke against the victim of the defences available under the insurance contract or provisions governing the insurance contract, restriction in invoking the termination of the contract against the victim (right to invoke cannot be used before one month from the announcement of the termination to the relevant public authority), prohibition to deduct the outstanding premium from the indemnity to be paid.**
- 3.2.2 provide the IWG with an English translation of those provisions?

II - Compulsory Liability Insurance

1. Obligation of Contracting

Article 1483-(1) Subject to the provisions of other legislation, insurers shall not refrain from granting cover for compulsory insurances in the insurance classes, in which they are active.

2. Obligation of Performance as against the Victim

Article 1484-(1) In case the insurer is totally or partially discharged of its obligation of performance towards the insured, its obligation of performance as

against the victim shall remain effective up to the sum insured under the compulsory insurance.

(2) The termination of the insurance relationship shall become effective as against the victim after one month following the notification by the insurer to the competent authorities that the contract has expired or is about to expire.

(3) The liability of the insurer shall cease to the extent that the loss is compensated by Social Security Institutions.

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? *In respect of claims in tort, the rule Lex Loci Delicti applies. If the law applicable to the tort or if the law applicable to the insurance contract allows, the liability insurer can be sued directly. Turkish law grants direct action in all liability insurances (compulsory or not). So in cases where Turkish law applies to the claim brought by the victim, the liability insurer of the person who is liable for the tort would be sued directly before Turkish courts.*

In respect of claims in contract (arising out of carriage of persons for instance) Turkish International Private Law does not contain any similar rule in respect of direct action against the liability insurer. It is not clear whether an application per analogy is possible.

3.3.2 if the claimants are foreign persons and companies, but if the insurer is a national company? *As direct action is recognized in Turkish law, foreign claimants can sue directly the Turkish insurer in Turkey.*

3.3.3 if the claimants and the insurer are foreign companies? *If the tort is more closely connected to another state, the law of that state shall apply (and if according to the law of that another state no direct action against the liability insurer were provided, the liability insurer would not be sued directly.*

4. Jurisdiction/Proceedings

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

If so, does your national law

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

4.1.2 allow foreign and national claimants to directly sue foreign insurers in your national courts? **Yes (provided that there is a competent Turkish court according to rules about territorial competence).** There is no special rule in respect of territorial competence for claims against foreign liability insurers. According to the general rule, the court of the

insurer's centre of business is competent (but that court is not within Turkey). However when a claim is brought against several defendants, the competent court for one of them is also competent for the others. Although debated, in my opinion it is possible to sue the liability insurer before the court where the insured (the person liable) is sued.

Turkish law although containing a clear rule about direct action, did not provide special rules for designating "where" (before which court) this direct action should be brought. (No specific rule neither to the competence of the court where the loss engendering liability occurred nor as to the competence of that court for claims against the liability insurer).

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

Turkish law does not regulate specifically this issue.

In my opinion the arbitration clause at least in the mandatory insurance contracts cannot be invoked against the third party victim unless the third party agrees to be bound by it. In mandatory liability insurances the rule is that the defences arising out of the insurance contract or the legal provisions regulating the insurance contract having the consequence that the insurer is relieved partly or wholly from liability are not opposable to the third party victim. The situation here is similar (arbitration can be detrimental to the victim as compared to civil courts).

- 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? **Yes.** This would constitute "irrefutable evidence" that the liable party has incurred liability. According to Turkish Civil Proceedings Act article 204, court decisions are regarded as conclusive evidence until their falsification is proven.

If so,

- 4.3.1 does this also apply to judgements in default? **In principle, yes.**

- 4.3.2 can the insurer invoke that the court having decided on the claim against the party liable has not had jurisdiction? **In principle, no.**

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

- 4.3.4 can the party liable invoke that the party liable has not defended itself properly? **In principle no.**

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

If so,

- 4.5.1 are there any requirements as to the domicile of the party liable or the insurer? **No.** It suffices that the court be territorially competent in respect of one of the defendants.
- 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? **No.** Turkish law does not regulate this issue. In cases where the international conventions apply directly, Turkish Judge will have to play the role of the legislator and decide alone how to fill the gap, when the liability insurer uses its right to require that the insured to be joined in the proceedings under the international convention.

(Note that the convention does not say that the insured will join upon the insurer's request the proceedings as a "defendant". What the insurer needs is only assistance from the insured and any method that can achieve the purpose would be enough).

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?

No (except that the insurer has the right to request directly from the victim documents and information about the case).

- 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? **No.**

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

We have to differentiate between mandatory (liability) insurances and voluntary (liability) insurances.

In voluntary insurances, where the law grants also the direct action, the insurer can invoke defences arising out of the insurance contract.

However in mandatory liability insurances, the fact that the insurer is relieved from liability vis-à-vis the insured cannot constitute a defence against the victim. Furthermore, the insurer is allowed to invoke the termination of the insurance contract only after one month from the notification made to the competent authority.

But the mandatory liability insurer that is relieved from liability vis-à-vis the insured can invoke that it is exempted from liability vis-à-vis the victim, to the extent that the victim has received compensation from the Social Security Institution.

The liability insurer cannot deduct any outstanding premium from the indemnity amount.

(We reiterate that the international convention is applied directly as if it were domestic law –it has the force of law. The local provisions are applied as complementary rules provided that they don't contradict the convention)

- 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?

Article 1476(1) Turkish Code of Commerce states that the insurer shall declare to the insured whether, it will take the necessary legal steps and decisions on behalf of the insured but for its own account and under its own responsibility and assist in the defence of the insured with regards to the claims of the victim.

It is not clear whether this rule establishes a statutory power of representation of the insurer to act in the proceedings on behalf of the insured.

- 5.5 Are there any time limits in your national law for a direct action against an insurer? Yes. Ten years maximum from the event (that gave rise to the liability). Otherwise the same prescription as for the claim of the victim against the liable insured applies also to the direct action against the insurer (although the law says erroneously that the victim has to take direct legal action against the insurer within the prescription period applicable to "insurance contract"). The principle is that the victim should not have against the insurer more rights than against the liable insured.

If so,

- 5.5.1 what protects such a time limit (e.g court proceedings; demand letters)? Court proceedings, application for enforcement (not based on a court judgment), written recognition of the debt, partial payment.

- 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?

The prescription periods cannot be modified in Turkish law by agreement except where the law explicitly allows it.

Any extension agreed by the insurer (or the liable insured) would extend also the claim against the liable insured (or the insurer) if

extension were possible, assuming that the insurer and the insured are jointly liable towards the victim –which is debated.

5.6 Under your national law, are the party liable and the insurer jointly liable? *It is debated. But in our opinion they are 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? *No. The insurer has to file a separate recourse action against the insured.*

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? *Yes.*

If so,

5.7.1 are there any requirements for the validity of the assignment?
Written form

5.8 What qualifies under your national law as a *wilful misconduct*?
It lies somewhere between the “dolus eventualis” and “conscious fault”. It is heavier than “culpa lata” (grobe Fahrlässigkeit). “Wilful misconduct” is conceived as an act done “recklessly and with conscious that a loss will 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? *Turkish legislator did not provide explicitly that the insurer would be entitled to have recourse against the insured after indemnifying the victim (save for some compulsory liability insurances: motor vehicle liability insurance, road carrier liability insurance). But we believe that the insurer would be allowed to get back from the insured what it had to pay to the victim where it did not incur liability against the insured)*

5.10 How is limitation of liability affected under your national law in cases of direct actions? *Turkish maritime law provides explicitly for the effects of the limitation of liability defence during proceedings. The judge will take that defence into account even if a limitation fund is not established (Code of Commerce Article 1335 which refers to Article 10 of the*

LLMC). In a direct action against the insurer the same rule should apply by analogy.

- 5.11 Does your national law contain consequences, if the insurance contract contains provisions which are not consistent with the Conventions referred to above? **No**.

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?

Yes, the liability of the Turkish State arising out of the competent Turkish Authority which issued a certificate a for non existing or inconsistent insurance contract, would be subject to the rules and principles of Turkish administrative law (any act or action of the State being subject to judicial control).

However, the State would most probably not be regarded as having guaranteed the financial capabilities of the foreign insurer if at the moment of issuing the certificate there was no reason to be suspicious about this.