

COMITE MARITIME INTERNATIONAL
THE IMPLEMENTATION IN NATIONAL LAW OF
MANDATORY INSURANCE PROVISIONS IN INTERNATIONAL CONVENTIONS
QUESTIONNAIRE TO MEMBER ASSOCIATIONS

The CMI Executive Council has requested the International Working Group (IWG) on Marine Insurance to consider mandatory insurance provisions in international conventions and given recommendations on whether Guidelines for national governments should be drafted to assist in the formulation and proper implementation of national law giving effect and providing a legal framework for them.

The Questionnaire has been developed to collect information on existing national legislation as a basis for proposals for Guidelines.

We would be grateful if you would provide your responses by October 10, 2010 so they may be collated and analysed in time for reporting and discussions at the Assembling in Buenos Aires on Wednesday, October 27, 2010.

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I. This questionnaire addresses mandatory insurance provisions of the following international conventions:

1.1 **CLC Convention of 1992** (International Convention on Civil Liability for Oil Pollution Damage 1992):

Art. VII para. 1: "The owner of a ship... carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund...".

1.2 **HNS** (International Convention of 3 May 1996 on Liability and compensation in connection with Carriage of Hazardous and Noxious Substances by Sea (London),

Art. 12 para. 1: "Insurance or other financial security, such as the guarantee of a bank or similar financial Institution".

1.3 **Bunkers Convention** (International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage),

Art. 7 para. 1: "The registered owner of a ship having a gross tonnage greater than 1000 registered in a State Party shall be required to maintain

insurance or other financial security, such as the guarantee of a bank or similar financial institution”.

I.4 Nairobi Wreck Removal Convention of 18 May 2008,

Art. 12 para. 1: “The registered owner of a ship of 300 gross tonnage and above and flying the flag of a State Party shall be required to maintain insurance or other financial security, such as a guarantee of a bank or similar institution”

I.5 Athens Protocol of 2002 to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974,

Art. 4bis para. 1: “Any carrier who actually performs the whole or a part of the carriage shall maintain insurance or other financial security, such as the guarantee of a bank or similar financial institution”.

II. The foregoing referenced Conventions contain the following provisions concerning requirements for coverage

II.1 CLC Convention of 1992:

Art. VII para. 8 “Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner’s liability for pollution damage. In such a case the defendant may, even if the owner is not entitled to limit his liability according to article V paragraph 2, avail himself of the limits of liability prescribed in Article V, paragraph 1. He may further avail himself of the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may avail himself of the defence that the pollution damage resulted from the wilful misconduct of the owner himself, but the defendant shall not avail himself of any other defence which he might have been entitled to invoke in proceedings brought by the owner against him. The defendant shall in any event have the right to require the owner to be joined in the proceedings.”

II.2 HNS:

Art. 12 para. 8 “Any claim for compensation for damage may be brought directly against the insurer or other person providing financial security for the owner’s liability for damage. In such case the defendant may, even if the owner is not entitled to limitation of liability, benefit from the limit of liability prescribed in accordance with paragraph 1. The

defendant may further invoke the defences (other than the bankruptcy or winding up of the owner) which the owner would have been entitled to invoke. Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the owner, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the owner against the defendant. The defendant shall in any event have the right to require the owner to be joined in the proceedings.”

II.3 Bunkers Convention:

Art. 7 para. 10: “Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the registered owner’s liability for pollution damage. In such a case, the defendant may invoke the defences (other than bankruptcy or winding up of the ship owner) which the ship owner would have been entitled to invoke, including limitation pursuant to article 6. Furthermore, even if the ship owner is not entitled to limitation of liability according to article 6, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the pollution damage resulted from the wilful misconduct of the ship owner, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the ship owner against the defendant. The defendant shall in any event have the right to require the ship owner to be joined in the proceedings.”

II.4 Wreck Removal Convention:

Art. 12 para. 10. “Any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner’s liability. In such a case the defendant may invoke the defences (other than the bankruptcy or winding up of the registered owner) that the registered owner would have been entitled to invoke, including limitation of liability under any applicable national or international regime. Furthermore, even if the registered owner is not entitled to limit liability, the defendant may limit liability to an amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the maritime casualty was caused by the wilful misconduct of the registered owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the registered owner against the defendant. The defendant shall in any event have the right to require the registered owner to be joined in the proceedings.”

II.5 Athens Protocol of 2002:

Art. 4bis para. 10 “Any claim for compensation covered by insurance or other financial security pursuant to this Article may be brought directly against the insurer or other person providing financial security. In such a case, the amount set out in paragraph 1 supplies as the limit of liability of the insurer or other persons providing financial security, even if the carrier is not entitled to limitation of liability. The defendant may further invoke the defences (other than the bankruptcy or winding up) which the carrier referred to in paragraph 1 would have been entitled to invoke in accordance with this Convention. Furthermore, the defendant may invoke the defence that the damage resulted from the wilful misconduct of the assured, but the defendant shall not invoke any other defence, which the defendant might have been entitled to invoke in proceedings brought by the assured against the defendant. The defendant shall in any event have the right to require the carrier and the performing carrier to be joined in the proceedings.”

III. The foregoing referenced conventions deal with certification of the compulsory insurance in the following provisions:

III.1 CLC Convention of 1992 (International Convention on Civil Liability for Oil Pollution Damage 1992)

Art. 7 para. 2 A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a Contracting State has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a Contracting State such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a Contracting State it may be issued or certified by the appropriate authority of any Contracting State. The certificate shall be in the form of the annexed model and shall contain the following particulars:

- (a) name of ship and port of registration;
- (b) name and principal place of business of owner;
- (c) type of security;
- (d) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;
- (e) period of validity of certificate which shall not be longer than the period of validity of the insurance or other security.

Art. 7 para. 3 The certificate shall be in the official language or languages of the issuing State. If the language used is neither English nor French, the text shall include a translation into one of these languages.

III.2 HNS

- Art. 12 para 2 A compulsory insurance certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such compulsory insurance certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This compulsory insurance certificate shall be in the form of the model set out in Annex I and shall contain the following particulars:
- (a) name of the ship, distinctive number or letters and port of registry;
 - (b) name and principal place of business of the owner;
 - (c) IMO ship identification number;
 - (d) type and duration of security;
 - (e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and
 - (f) period of validity of certificate, which shall not be longer than the period of validity of the insurance or other security.
- Art. 12 para. 3 The compulsory insurance certificate shall be in the official language or languages of the issuing State. If the language used is neither English, nor French nor Spanish, the text shall include a translation into one of these languages.

III.3 Bunkers Convention:

- Art.7 para 2: A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This certificate shall be in the form of the model set out in the annex to this Convention and shall contain the following particulars:
- (a) name of ship, distinctive number or letters and port of registry;
 - (b) name and principal place of business of the registered owner;
 - (c) IMO ship identification number;
 - (d) type and duration of security;

(e) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;

(f) period of validity of the certificate which shall not be longer than the period of validity of the insurance or other security.

Art. 7 para. 3 (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(b) A State Party shall notify the Secretary-General of:

(i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognised by it;

(ii) the withdrawal of such authority; and

(iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

(c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

Art. 7 para 4 The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language of the State may be omitted.

III.4 Wreck Removal Convention:

Art. 12 para 2 A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship of 300 gross tonnage and above by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This compulsory insurance certificate shall be in the form of the model set out in the annex to this Convention, and shall contain the following particulars:

- (a) name of the ship, distinctive number or letters and port of registry;
- (b) gross tonnage of the ship;
- (c) name and principal place of business of the registered owner;
- (d) IMO ship identification number;
- (e) type and duration of security;
- (f) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established;
- (g) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

Art. 12 para. 3 (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

- (b) A State Party shall notify the Secretary-General of:
 - (i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognized by it;
 - (ii) the withdrawal of such authority; and
 - (iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

- (c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

Art. 12 para. 4 The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language(s) of the State may be omitted.

III.5 Athens Protocol of 2002:

Art. 4bis para 2 A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship after the appropriate authority of a State Party has determined that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party,

such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This certificate shall be in the form of the model set out in the annex to this Convention and shall contain the following particulars:

- (a) name of ship, distinctive number or letters and port of registry;
- (b) name and principal place of business of the carrier who actually performs the whole or a part of the carriage;
- (c) IMO ship identification number;
- (d) type and duration of security;
- (e) name and principal place of business of insurer or other person providing financial security and, where appropriate, place of business where the insurance or other financial security is established; and
- (f) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other financial security.

Art. 4bis para 3 (a) A State Party may authorize an institution or an Organization recognised by it to issue the certificate. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued, and shall undertake to ensure the necessary arrangements to satisfy this obligation.

(b) A State Party shall notify the Secretary-General of:

- (i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognised by it;
- (ii) the withdrawal of such authority; and
- (iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date from which notification to that effect was given to the Secretary-General.

(c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not complied with. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

Art. 4bis para 4 The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages, and, where the State so decides, the official language of the State may be omitted.

ANSWERS BY BELGIUM **QUESTIONNAIRE**

1. Licensing

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

The answer is affirmative although the criterion is not so clear : “doing insurance business in Belgium”, i.e. marketing, conclusion and performance of the insurance contract (see art. 2§ 1 Insurance Supervision Act of 9 July 1975) or when “risk is situated in Belgium”, i.e. the place of residence of the insured or the place of registration of the vessel (see art. 2§6,8° a) and c) Insurance Supervision Act) 1975 as amended by Royal decree 22-02-1991 Published Mon.Belge 11-04-1991(amended sections : 2; 3; 4; 7; 16; 19; 20; 21; 22; 23; 24; 25; 26; 28; 28BIS-28OCTIES)

If so,

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

Answer: The license must be issued by :

- either Belgium (art. 3§1 Insurance Supervision Act)
- or another EU member state (art. 64 and following Insurance Supervision Act) on the basis of the single license principle in the internal European insurance market
- or a WTO member state only for certain classes of liberalized (transport) insurance, i.a. marine third party liability cover (art. 2§4 and§5 Insurance Supervision Act and art. 30ter Insurance Supervision Decree of 22 February 1991)
- or an OECD member state only for certain classes of liberalized (transport) insurance, i.a. marine third party liability cover (art. 2§4 and§5 Insurance Supervision Act and art. 30quater Insurance Supervision Decree)

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

Answers: Consequence of cover by non-licensed insurer :

- Insurance contract is void, but must be performed vis-à-vis insured of good faith (art. 3 §3 Insurance Supervision Act)
- Criminal sanctions (art. 83 Insurance Supervision Act)
- Administrative fines (art. 82 Insurance Supervision Act)
- Court injunction on the basis of the Market Practices (Procedures) Act dated 6 April 2010

1.3 Is there an obligation to provide cover ?

Answer: In principle : no, but on the basis of the anti-discrimination legislation an insurer who refuses to provide cover ill advised on a discriminatory basis will have to justify his refusal on objective grounds or else he has a case to answer.

2. **Certification**

2.1 Will a certificate issued by a convention state

2.1.1 be recognized in your state without any preconditions?

Answer: the supervision of financial services in Belgium has recently been entrusted to a double structure, on the one side the National bank of Belgium and on the other side the Financial Services and Markets Authority abbreviated as FSMA (see Royal Decree of March 3,2011) .Belgian law provides that certain formal requirements must be fulfilled for a certificate will be recognized.

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

Answer: the certification will be examined by the FSMA : the control mechanisms are limited to document compliance ; the supervision of the financial services industry of which the insurance industry is a part, lies now with the National bank of Belgium. Belgium will request consultation with the issuing or certifying state in case of doubt.

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: if a consultation with the issuing or certifying state leads to the conclusion that the insurer named in the insurance certificate is not financially capable of meeting the obligations imposed by the conventions, a certificate issued by a convention state will be rejected if there is evidence that there is no valid insurance at all.

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

Answer: Belgium will only accept certificates issued under the supervision of the FSMA cover or accepted by it in compliance with the Belgian insurance supervision act (see our answer under number 1,1)

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

Answer: yes

2.2.2 investigate the insurance conditions before issuing a certificate?

Answer: yes insurance conditions can be the object of such an investigation.

2.2.3 investigate the financial standing of the insurer?

Answer: yes, investigation by FSMA

2.2.4 investigate the license of the insurer?

Answer: yes

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?

Answer: The P.I.L.(Private International law statute or the “conflict of laws” statute) provisions designating the applicable national law on mandatory insurance are found in : formerly art. 28quinquies-octies Insurance Supervision Act of 1975 as amended (transposing the 2nd generation EU insurance directives) and the Belgian PIL-code of 16 July 2004. To the extent that some articles of the statute would be incompatible, the latter are now superseded by the Rome I Regulation with universal application effect

A recent statute has radically changed the situation i.e statute of January 20, 2012 by which the European directive 2009/20/EEC relating to the insurance of the vessel owners against maritime claims, has been implemented in Belgium.

This law takes into account the following international treaties: CLC 1992, the HNS convention 1996, the Bunker Oil Convention of 2001, the Nairobi Convention of 2007 and the Removal of Wrecks, the European Regulation 392 / 2009 relating to the liability for the carriers of passengers by sea.

In section 5 of the statute the Belgian vessel owners or foreign vessels entering into Belgian waters have to carry insurance cover to the maximum limits of liability provided by 1996 LLMC treaty. The insurance certificate must be available on board the vessel.

The certificated has to mention

- 1) the name of the vessel, her I. M. O. registration number, her home port
- 2) the name of the vessel owner and his principal place of business
- 3) the type and the period of cover provided
- 4) name and identity address and principal place of business of the insurance provider, and address of the office where the insurance contract has been concluded.

If the certificated is not made up in English or French or Spanish, a translation in one of these languages has to be included. The statute provides that the vessel owner

has the burden of proof to establish the cover or the insurance conditions are adequate. The duly qualified agents of the Transport authority are entitled to ask for submission of all additional relevant information.

If so, could you

3.1.1 summarize the main characteristics of those provisions?

See summary above

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

Answer: see summary above

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?

Answer: see our answer is provided under number 3.1

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?

Answer: The P.I.L.(Private International law statute or the “conflict of laws” statute) provisions designating the applicable national law on mandatory insurance are found in : formerly art. 28quinquies-octies Insurance Supervision Act of 1975 as amended (transposing the 2nd generation EU insurance directives) and the Belgian PIL-code of 16 July 2004. To the extent that some articles of the statute would be incompatible, the latter are now superseded by the Rome I Regulation with universal application effect

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

Answer: The P.I.L.(Private International law statute or the “conflict of laws” statute) provisions designating the applicable national law on mandatory insurance are found in : formerly art. 28quinquies-octies Insurance Supervision Act of 1975 as amended (transposing the 2nd generation EU insurance directives) and the Belgian PIL-code of

16 July 2004. To the extent that some articles of the statute would be incompatible, the latter are now superseded by the Rome I Regulation with universal application effect

3.3.3 if the claimants and the insurer are foreign companies?

Answer: same as above

4. Jurisdiction/Proceedings

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

Answer: In a pure Belgian Marine Insurance Law setting, claimants do not have a direct action right against third party liability insurers. The Belgian Act of 25 June 1992 on land based Insurance, (which provides the possibility of direct action against a liability insurers) , does not apply to marine insurance. But international treaties such as the CLC 1969 and the CLC 1992 have been implemented by law into the Belgian legal system and these treaties provide for the possibility of direct action against the liability insurers and as a consequence on account of these enabling statutes implementing these international treaties, direct actions are a possible in this limited framework. Statute of August 10, 1998. – (Wet houdende instemming met het Protocol van 1992 tot wijziging van het Internationaal Verdrag inzake de burgerlijke aansprakelijkheid voor schade door verontreiniging door olie, 1969, en de Bijlage, gedaan te Londen op 27 november 1992.)

Answer:

If so, does your national law

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

Answer: yes

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

Answer: yes

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

Answer: The stipulation of an arbitration clause in a third party liability insurance contract is not forbidden. If the contract contains such a clause in favor of the victim, the latter could invoke the arbitration clause. But given the contractual nature of arbitration, is it questionable whether the arbitration exception could be invoked against the victim who is not a party to the insurance contract.

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,

Answer: In principle, a Court decision has only binding authority between the litigating parties in the Court case.

For this reason, a tortfeasor may force his insurer to intervene in the pending Court proceedings for the sole goal of rendering the decision legally binding on his insurer ("impleader") in case there is no direct action right available against the third party liability insurer. But one has also to take into account the following: According to the fair trial principle expressed by art. 6 of the European Human Rights Treaty, a party in Court can never be denied the right to challenge the claim by its own arguments. One has also to take into account the existence of a special procedural remedy; the "Tierce Opposition" by which any party can challenge a decision if that decision has caused prejudice to his rights. (Sections 1122 through 1131 of the Belgian Code on Civil Procedure)

4.3.1 does this also apply to judgements in default?

Answer: yes, certainly

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

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?

yes

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

yes

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

Answer: yes, these claims can be combined in one legal action before one and the same Court.

If so,

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

Answer: there must be a jurisdictional ground of a territorial nature (residence of the defendants or a place where the right of action arose) against at least one of the defendants; if one of the defendants has his domicile within the jurisdiction of the Court, an action can be brought against that defendant before the Court and other defendants can be joined in that action.

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: if an insurer wants to join the party liable ,he will have to bring suit against i.e. serve writ on that person; such an action is called “ an action for forced intervention/impleader”. The liable party can also join by its own initiative and its own free will.

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: there are no specific rules on jurisdiction for direct claims against insurers as such.

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: a claim against the party liable and or a claim against the liability insurer are dealt with in exactly the same way.

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

Answer: all the defences which could have been advanced by the liable party in the first place.

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: yes, it is admitted that the insurer can take over the defence of the liable party because it is the insurer who is ultimately going to pay the bill but the insurer does not enjoy a formal power of attorney on behalf of the party liable.

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

Answer: The time bar for marine insurance cases is still governed by the general Insurance statute of 1874 : art. 32 of this statute sets the time bar at 3 years. The Insurance Contract Act of 25 July 1992 for Land based insurance and all its potentially relevant provisions (art. 36, art. 79, art. 88 etc.) does not apply to Marine Insurance !

If so,

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

Answer: a former writ of summons served before the expiration of the original time limit and by which Court proceedings are instituted, will interrupt the time limit from running. A demand letter will not but the letter emanating from the party against whom the time limit is running, agreeing to an extension, is valid.

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: yes the time limit can be extended by an agreement but the extension agreement has to be made after the cause of action arose. The agreement is only binding on the parties who are parties to the agreement.

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

Answer: Joint liability of the third party liability insurer is a consequence of the direct action right against the insurer.

If so,

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

Answer: the consequences of joint liability are such the claimant can implement a favourable decision against any of the jointly held parties according to his wish. He may try to enforce a favourable decision against the deep pocket defendant.

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

Answer: yes he can. He must not necessarily take out a writ of summons but he can cross claim by filing submissions in the pending proceedings.

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

Answer: in Marine insurance cases yes, the Court will give effect to an arbitration clauses that were agreed upon by the parties. With reference to land-based insurance cases, the statute on contract for land-based insurance of 1992 does not accept the validity of arbitration clauses unless they have been agreed upon after the cause of action arose. However this statute on the land-based insurance contracts of 1992 is not applicable to Marine insurance cases.

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

Answer: there is nothing in the law which would forbid a claimant to assign his rights or its claim to a third party.

If so,

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

Answer: the law imposes certain formalities to be fulfilled in order to effectively assign rights to a third person. The essential requirement is that the debtor is being clearly informed about the assignment so that he knows in whose hands he has to pay. That is implemented by informing the debtor by registered mail.(Section 1690 of the Belgian civil code)

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

Answer: intentional wrongdoing qualifies as wilful misconduct. After an erratic deviation in its ruling of Cass. 5/12/00, the Belgian Supreme Court returned to conformism by its ruling of Cass. 24/4/09 that the concept of intentional loss does not merely imply the knowledge that the act will harm, but requires the intent to harm, even if the actual harm does not correspond with the intended harm. Intentional wrongdoing is not to be placed on the same footing as gross negligence or even “serious” negligence.

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 the insurer may have a right of recourse against his insured if the latter has breached sudden certain policy conditions and contractual obligations.

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

Answer: the insurer enjoys the same rights of limitation of liability as the liable person would have.

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: if the insurance contract is not in compliance with the international conventions the duly qualified agents of the transport authority may either refuse access of these vessels to Belgian territorial waters or may detain vessels till such time that the insurance policies comply with the treaties. Insurance conditions that

are contrary to the binding rules of international conventions applicable in Belgium will not be enforceable in Belgium.

If so,

5.11.1 are such provisions invalid?

Answer: yes they are invalid

5.11.2 is the whole contract invalid?

Answer: not necessarily, Belgium adheres to the theory of “the partial nullity” meaning the theory of severability. If the contract can survive even if some invalid clauses have to be deleted,, the Court will save the contract.

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?

Answer: Such insurance contract containing clauses contrary to what is required in the international treaties will not be accepted by the certifying authority in Belgium. The consequence of that is that a vessel carrying such an improper/invalid contract cannot operate in Belgium, will not be entitled to leave Belgium, and it is a foreign vessel such a vessel will not be given access to our ports. If such a vessel is already in port she might be detained till the situation is remedied or set right. Administrative sanctions and criminal penalties could be imposed.

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?

The general rules on tort liability will be applicable. Since more than half a century the Belgian state is no longer held immune for errors committed in managing public affairs. The Belgian state and in the same vein, any governmental authority can be sued for wrongdoings and errors.

6.2 that the insurance contract is not consistent with the provisions of the Conventions?

Answer: same as above

6.3 that the insurer is not financially stable and cannot satisfy all direct claims?

6.4 Answer: same as above

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 -