

QUESTIONNAIRE

PREAMBLE TO ANSWERS

Finland is presently a party to the CLC and Fund Conventions, as well as the Supplementary Fund Convention and the Bunkers Conventions. Through EU Regulation 392/2009, and the EU's ratification, the Athens Convention 2002 will in practice be applicable as from 31.12. 2012. There is no reference yet in the Finnish Maritime Code (hereinafter MC) to the new rules on carriers' liability with respect to passengers.

Relevant legislation regarding obligation to maintain insurance or other financial security, and direct action, can be found in the MC. More detailed rules relating to insurance certificates (e.g. issuing and checking certificates) can be found in various regulations issued by the Transport Safety Agency.

It seems likely that the HNS Convention might be ratified in a not too far distant future and, if so, the CLC system will probably be copied.

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 Finnish Financial Supervisory Authority (FSA) is needed in order for companies based in Finland to provide insurance products. In this regard the following information has been obtained from the FSA:

Foreign companies licensed within the EU/EEA to operate an insurance business can conduct operations in Finland from a branch or agent (secondary establishment) or through cross-border operations after notifying the FSA.

Insurers with a registered office outside the EU/EEA may, following an authorisation from the FSA, conduct operations in Finland from a branch or agent(secondary establishment).

Companies offering financial services in Finland are required to apply for a licence issued by the FSA in order to operate a business. In a licence application, the company's capital situation is reviewed along with the business plan, owners and corporate management etc.

The details of this are laid down in the Insurance Companies Act (2008/521)

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

Answer

Since these licenses are mandatory it follows that the FSA would issue an order to cease such activities.

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

Answer

No.

2. Certification

- 2.1 Will a certificate issued by a convention state

- 2.1.1 be recognized in your state without any preconditions?

Answer

Yes

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

Answer

No, the control mechanism seems to be limited to documentary compliance on board the vessel. Finnish law (MC sections 20:9a and 9b) contains provisions on sanctions if insurance does not exist, or the vessel does not carry the required certificate.

MC section 10: 15 (oil tankers) and 10a:10 (bunkers) provide that a ship that does not carry the required certificate may be detained and have its journey interrupted.

- 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

Same as above

- 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

There is no requirement of a license in Finland for this kind of insurance – only that the insurance covers the liability of the convention.

- 2.2.2 investigate the insurance conditions before issuing a certificate?

Answer

As above.

- 2.2.3 investigate the financial standing of the insurer?

Answer

In Regulation 72/2009, section 4, (on the Bunkers Convention), as amended by Regulation 1795/2009 it is specified that a certificate by the insurer about the validity of the insurance is among the information that has to be submitted to the Transport Safety Agency before it issues the certificate.

In Regulation 852/1996 (on the CLC), as amended by Regulation 316/2009 it is stated in section 10 that the Maritime Administration shall request an opinion about the insurance company in question by the national body in charge for inspecting insurance companies, but does not have to do so “if it is obvious that the insurer is reliable and solvent” and that “if there are reasons to believe that the insurer is not capable of meeting its obligations, this can be taken into account when the sufficiency and acceptability of the insurance is assessed” (for the purpose of issuing a certificate).

- 2.2.4 investigate the license of the insurer?

Answer

No

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

Finland has only implemented the CLC and Bunkers conventions. MC 10:10-15 contain the relevant provisions for damage caused by oil tankers (there is no official English translation available, but the text of the MC in this respect is virtually identical to the Swedish MC sections 10: 12-16, which has already been provided in the reply by the Swedish MLA). As far as insurance for pollution caused by bunker oil is concerned, the provisions are laid down in MC sections 10a: 6-9, which contain more details about the certificates to be issued by the Finnish Transport Safety Agency.

The main difference between chapters 10 (CLC) and 10a (bunkers) is that the latter specifically authorises the Finnish Transport Safety Agency to issue certificate for Finnish ships and for non-convention ships. The relevant section includes details on what is to be included in the application for such a certificate (i.e.: 1) evidence that insurance covers the liability in question; and 2) evidence that its last day of validity cannot be less than three months following a written notification to that effect to the Agency) and the conditions for withdrawing it (i.e. if the conditions are no longer met). (MC Section 10a:8).

- 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

The provisions of the MC are the only rules on mandatory insurance that incorporate the rules of the 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?

Answer

Generally speaking, the question of applicable law is decided on the basis of the choice of law rules of the forum state. A distinction has to be made between contractual and non-contractual claims (for which in the EU, different instruments apply, i.e. the so-called Rome I and Rome II Regulations).

Since the CLC and bunkers conventions do not include provisions on applicable law, this question is arguably fully governed by the Rome II Regulation. Article 4.1 of the latter refers to the law of the place where the damage occurs (*lex loci damni*), whereas article 7 (on environmental damage) provides a choice between *lex loci damni* and the place where the event causing the damage has taken place (*lex loci delicti commissi*). Damage would hence normally be governed by the rules of the state in which the damage has occurred, which is also in line with the jurisdiction provisions of the conventions.

These rules do not distinguish between the nationality of the parties involved as referred to in the questions.

Questions relating to the choice of law in contractual relationships, such as between the insurer and the insured, are governed by the Rome I Regulation and by general principles, neither of which seem to exclude choice of law provisions in an insurance contract.

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 Finland pursuant to MC Chapter 21 Sections 3a and 3c.

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 Finnish territory or the Finnish EEZ or involves measures to prevent such damage.

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

Answer

No.

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?

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?

Answer

Yes.

If so,

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

Answer

No, but the court must have jurisdiction pursuant to MC Chapter 21.

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

More generally in Finland, section 67 of the Insurance Contract Act (1994/543) provides a right of direct action for a limited category of claims only. As regards oil pollution, the right of direct action is laid down in MC 10:12 and 10a:9. No particular requirements must be fulfilled by the claimant before commencing a claim against the 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?

Answer

No.

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

Answer

Sections MC 10:12 and 10a:9 (ie claims under the CLC and bunkers convention) provide that the insurer is entitled to invoke the same defences as the assured, i.e. the insurer will be relieved from liability if the shipowner 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 (MC, section 19:1).

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

The time limit can be extended, under conditions provided in section 19:1 of the MC. In a direct action case, there is no need for the insurer to have the agreement of the liable party (as far as the case against the insurer is concerned), but if it is not a direct action case, this is clearly necessary as it will be the liable party, not the insurer, who he is the defendant in the case.

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

Answer

Yes (within the meaning of 5.6.1 below).

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

We cannot think of any legal obstacle to that. Normal contractual requirements apply.

If so,

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

Answer

No.

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

Answer

The concept is not used, but is normally taken to be 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, under ordinary rules of subrogation

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

Answer

Under section 10 :12 and 10a:9 of the Maritime Code 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 limit its liability to the limit of the owner's limit, even if the owner, might have lost that right. Through his conduct or otherwise.

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

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?

Answer

No express provisions exist, although it is possible that such liability may follow from general principles under national 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.

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- Secretary General -