

ASSOCIATION FRANÇAISE DU DROIT MARITIME



Paris, 25 July 2013

RESPONSE BY THE FRENCH MARITIME LAW ASSOCIATION TO THE CMI QUESTIONNAIRE ON THE IMPLEMENTATION IN NATIONAL LAW OF MANDATORY INSURANCE PROVISIONS IN INTERNATIONAL CONVENTIONS

1. Licensing

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

The insurer whose registered office is in France needs an administrative approval to operate in France as provided for by article L 321-1 of the Code of Insurances.

The approval is issued by the Prudential Control Authority.

Foreign EEC or non EEC companies are similarly subject to an Administrative approval provided that they are validly established in France.

But non EEC companies also need to have their general agent approved by the Prudential Control Authority.

If so,

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

The Administrative Approval must be obtained from the Prudential Control Authority and no other bodies.

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

The insurance contract subscribed by a company which has not been approved by the Prudential Control Authority would be held null and void by our courts, and the insurer may be subject to sanctions and held criminally liable.

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

No.

2. Certification

2.1 Will a certificate issued by a convention State

2.1.1 be recognized in your State without any preconditions ?

Yes, it will.

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

Yes, it may be the case.

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 ?

Yes.

Different person within the French Administration are empowered by article L 218-5 of the Code of Environment to find out and establish irregularities or fraud and prevent the vessel from sailing, in the framework of Port State Controls.

A ship holding a non-conformed certificate may be detained by the Port State Control for safety reasons but also expelled from France pursuant to article L 5123-5 of the Code of Transport.

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 licensing in another state ?

Certificates issued for foreign vessels by licensed insurers in another state are accepted.

2.2.2 investigate the insurance conditions before issuing a certificate ?

The authority exercises a formal control only.

2.2.3 investigate the financial standing of the insurer ?

It may be the case.

2.2.4 investigate the license of the insurer ?

It may be the case.

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?

Yes.

Provisions of the Code of Transport implement in French Law the provisions of the CLC convention of 1992, the Bunkers convention, and the Athens Protocol of 2002, in particular articles L 5122-25 and L 5123-4 of the Code of Transport which refers, for oil pollution damage to articles L 218-1 and Et Seq of the Code of Environment and articles L 5123-2 and L 5123-3 of the Code of Transport.

If so, could you

3.1.1 summarize the main characteristics of those provisions ?

The above articles recall that the registered owners of ships must maintain insurance or other financial guarantee as required by the above conventions and for the Athens Protocol by the EC Regulation n°392/2009 dated 23 April 2009.

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

The above summary is sufficient for the purpose of this questionnaire.

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 then contain general provisions on mandatory insurance, which also apply to the mentioned provisions in the international conventions ?

Not applicable.

If so, could you

3.2.1 summarize the main characteristics of those provisions ?

Not applicable.

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

Not applicable.

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?

The law of the insurance contract should normally be applied but this question is not fixed in jurisprudence.

In case the contract does not provide for any law the second paragraph of article 7.2 of Regulation (CE) n°593/2008 dated 17 June 2008 should be applied i.e the law of the place where the insurer has its principal place of business unless it results from the facts that the contract has closer connections with another country in which case the law of this country applies.

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

It makes no difference.

3.3.3 if the claimants and the insurer are foreign companies?

It makes no difference providing a French court has jurisdiction.

4. Jurisdiction / Proceedings

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

Yes. French law allows direct actions against the insurer of the liable party.

The legal basis of this action is given by article L 124-3 of the code of land insurance. For the Cour de Cassation, the victim has a “*right of its own*” on the indemnity of insurance.

The code of maritime insurance had not contained a similar provision for a very long time. But the code now contains a specific provision at article L 173-23 whose terms are almost identical to those of article L 124-3 of the code of land insurance

4.1.1 If so, does your national law allow foreign claimants to directly sue foreign insurers in your national Courts?

Yes.

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

Yes, if they have jurisdiction.

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

The short answer is no because the victim, which is not a party to the insurance contract, has not seen nor accepted the arbitration clause.

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

Yes. The judgment holding the assured liable constitute, for the insurer, the realisation of the insured risk, save in case fraud is established.

But under French domestic law, the insurers may oppose to the direct claimant the exceptions of the insurance contract as it could against the assured.

If so,

4.3.1 does this also apply to judgments in default?

Yes.

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

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?

No.

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

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?

Either the person liable or the insurer must be domiciled within the jurisdiction of the court.

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?

This is a matter of proceedings.
The rules of proceedings must be applied.

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.

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. Claims against the party liable and/or against the liability insurer are dealt with in the same way.

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

Pursuant the article L 112-6 of the code of insurances the liability insurer has the right to oppose to the direct claimant the same defences as those it would oppose to the assured under the insurance policy, including the time bar.

This article may conflict with the more restricted defence available under the convention which should prevail.

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?

Yes, the insurer can take over the defence of the liable party but if it does, it renounces, pursuant to article L 113-17 of code of insurances, to all the exceptions it could have opposed under the contract of which it was aware of at that time.

The insurer has no statutory power of attorney to act for the liable party.

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

Yes. The insurer can be directly sued by the direct claimant as long as its claim against the liable party is not time barred.

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

Court proceedings only in shipping cases.

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 extension as well?

Extensions of the time bar are possible for the actions under the contract in maritime insurance only (they are forbidden by article L 114-3 in land insurances).

Extensions are not possible for the action of the direct claimant which is not contractual.

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

Yes they may be held jointly liable.

5.6.1 **If so, what legal consequences does your national law provide for such joint liability?**

They may be condemned jointly and severally.

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

Yes.

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

Yes.

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

Yes.

5.7.1 **If so, are there any requirements for the validity of assignment?**

Yes. It must be served upon the insurer.

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

The wording of article V-2 of the CLC and which can be found in other conventions (“*The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result,*”) is qualified by our courts as “*faute inexcusable*” which is usually translated by wilful misconduct.

A fault inexcusable is not a “*faute intentionnelle*” and does not require intent. It implies recklessness and knowledge that damage with 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?**

Yes.

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

Pursuant to article L 173-24 of the code of insurances : « *when a limitation fund has been constituted the claimants whose claims are subject to limitation in accordance*

with articles 58 to 60 of the law n°67-5 of 3rd January 1967 on the status of ships, have no action against the insurer. »

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.

5.11.1 If so, are such provisions invalid?

Not applicable.

5.11.2 is the whole contract invalid?

Not applicable.

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?

Not applicable.

6. State Liability

Does your national law provide for liability of the state where the 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?

There is no specific provisions in our law allowing to answer this question but :

(i) the French State liability may always be engaged for its fault in the issuance of a certificate.

(ii) pursuant to article L 5123-3 of the code of transport, if and when the organism which are entitled to issue certificates by delegation of the Administration does not execute the contracts that have been delegated to it in normal conditions or in case of negligence, may be sanctioned by the payment of a fine and the withdrawal of the delegation.