Mandatory Insurances in International Conventions

Presentation by Dr. Dieter Schwampe and Prof. Wang Pengnan during CMI Conference Beijing, October 2012

Mr. President, distinguished Members of the Executive Council and the Organizing Committee of the Chinese MLA, Ladies and Gentlemen,

I am honored that I have been asked to present, together with Prof. Wang Pengnan, my fellow member of the International Working Group on Marine Insurance, an overview over the replies to the Questionnaire sent out in 2010. But before I start let me express my great respect for the very well organized conference. The Chinese MLA has successfully made all efforts to make this conference the memorable event. And apart from all the interesting presentations in discussions over this week I am sure that all attendants really look forward to tomorrow's excursion to the Great Wall.

Then let me thank the members of the IWG for Marine Insurance for the great participation and painstaking involvement in the survey regarding the questionnaire. On the screen you see all members of the Working Group shown in the order of their countries: Dr. Sarah Derrington from Australia, Prof. Marc Huybrechts from Belgium, José Tomas Guzman from Chile, Prof. Pengnan Wang from China, who will share this presentation with me, Jiro Kubo from Japan, Prof. Rhidian Thomas from the United Kingdom and last but not least Joe Grasso from the United States. With us at this conference are Sarah Derrington, Jiro Kubo, Pengnan Wang and myself.

As you will be aware, the task assigned to the International Working Group by the Executive Council was

> *"to consider mandatory insurance provisions in international Conventions and give 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 international Conventions at which the working Group look at were CLC 1992, HNS, the Wreck Removal Convention, the Bunker Convention and the Athens Protocol. I am sure you are familiar with the features of those Conventions, which all provide for a particular liability, as regards insurance: The Conventions provide for mandatory insurance for such liability, but only within certain limits; there is a direct action against the insurer; the insurer only has limited defenses against such direct action. And the member states to the convention issue certificates as proof of existence of such insurance.

When you go through the Conventions you will note that they do not really contain particular rules on the mechanics of either the direct action or the certification. In order to establish what practices and procedures exist in the various countries, the Working Group has produced a comprehensive Questionnaire which was sent out to all national MLAs. After a reminder for replies by our Secretary General Nigel Frawley, finally 14 Associations handed in replies:

Argentina, Australia/New Zealand, Belgium, Canada, China, Croatia, Germany, Italy, Japan, The Netherlands, Norway, Sweden, Switzerland, United States

We are grateful that those associations took the burden of going through the questionnaire, which was rather long with no less than 55 questions. The MLA of the United States had a special position in this survey. Although the US have not ratified any of the Conventions, the US MLA gave detailed and very interesting replies, setting out the principles of direct action on basis of state law in the US. Though not directly applicable to the Conventions, for us this was very helpful because it broadened our views on what practices and procedures might be available.

The 55 questions of the Questionnaire were grouped into different categories, dealing with licensing, certification, statutory law, jurisdiction and proceedings, particulars of direct action and state liability.

What Prof. Wang and myself will try to do now, is giving you an impression of the great diversity of answers which makes it hard to find a basis for a guidelines, which ultimately is our task. Since even „yes“ and „no“ answers often had to be appended by a „but“, a uniformity in answers is rarely to be found. In result it may appear that only very few aspects might be suitable for the intended draft. The complete answers of all MLAs are available on the Website of the Working Group at http://comitemaritime.org/Marine-Insurance/0,2751,15132,00.html.

Let me start with the first range of questions regarding the **licensing**.

It can be stated that there has been *almost* uniformity that a license is required, if the Insurer is conducting insurance business in the country concerned and if an Insurer wants to insure the risk under the Conventions. This appears to be part of the respective insurance supervision regulations. Foreign licenses may mostly be approved. Many countries have stated that cover with a member club of the International Group of P&I Associations ist sufficient without any further investigation into licenses.

Apart from that, it appears that only Canada and New Zealand/Australia do not inquire the existence of a license. In China there is no license needed, but the Chinese authorities maintain a list of approved insurers which appears to come close to the need of a license.

Regarding the consequences where an insurer issues a policy without the respective license there appear to be three different concepts. Italy has stated such policies are void and do not provide any protection. Also Argentina has reported that the contract as such is void, but that the insurer nevertheless has to provide cover. Other countries like Germany and the Netherlands treat the

contract valid despite the lack of a license. Many countries have stated that an insurer doing business without a licensing may be subject administrative or even criminal sanctions, and a majority has stated that their administration would not issue a certificate under the relevant convention in case of an unlicensed insurer.

All MLAs have reported that there is no obligation of a licensed insurer to accept business, but that a licensed insurer is free to reject business.

Turning to **certification**, all countries have confirmed that a certificate issued by a convention state generally will be recognized by them.

Regarding the complex of possible investigations before issuing a certificate, almost all countries investigate the insurance conditions before issuing the certificate and most of them also investigate the financial standing of the insurer, having a few States also investigating the license of the insurer.

Taking a closer look on the answer reveals the following:

In Belgium, Canada, possibly China (where the insurance policy must be shown), Croatia., Germany and Switzerland a certificate issued by a convention state may be subject to investigation of the validity of the insurance contract and the solvency of the insurer.

A very interesting subject is what consequences it has if investigations, when carried out, reveal that there is either no valid insurance contract at all, or that the contract does not satisfy the convention requirements. Four countries - Italy, Japan, the Netherlands, and Norway – have replied that there are no consequences. This may be somewhat surprising, as it means that such countries will allow respective ships to trade in their waters despite the fact that there is no valid or sufficient insurance. All other countries have replied, some under certain conditions, that in such a situation a foreign certificate could be rejected. From a security point of view this is fully understandable, as the Conventions just aim at providing a solvent debtor for the damage caused. But those answers may be considered equally surprising, bearing in mind that the Conventions do not deal with the situation at all, so that one may well

question, whether convention states have means at all to reject a respective certificate – a point which, for example, Japan and Norway made. Against that Switzerland concludes *e contrario* from Art. VII (/) CLC 1992 (and similar provisions in other Conventions) that member states may indeed reject certificates. It appears, thus, that in this important point there is no uniform view.

Turning to certificates issued in the reporting countries themselves, in almost all countries the authority in charge investigates the insurance conditions before issuing the certificate. Exceptions are only Norway and Germany, which have reported that no such investigation takes place but that only the so-called *blue card* will be inspected. Canada does not investigate the insurance conditions, but requests an undertaking from the insurer that the cover meets the convention requirements.

As regards an investigation into the financial standing of an insurer, we find a similarly divided picture- but the dividing line is different from the one before. Some states do investigate the insurance conditions, but not the financial standing, others do not care for the content of the insurance contract but check the solvency.

If you combine this with the aforementioned recognition of foreign certificates, you may end up in situations, in which the state, which has issued the certificate, has not investigated whether the insurance policy meets the convention requirements, but that such certificates in certain states must nevertheless be accepted. Situations may arise, thus, where there are certificates allowing to trade vessels in certain countries without proper insurances backing such certificates.

We will come back to this aspect when addressing state liability for failure to adhere to the Conventions.

Finally we must admit that despite the great complexity of our Questionnaire there is one area which we did not address, but which recently has proved to be of considerable practical relevance. It is the question how the authorities react if the insurer notifies the termination of the insurance contract. The Conventions themselves provide that the cover must not end but before three

months after notification to the respective authority. But what happens after those three months? Practical experience shows that there are administrations which simply file the notice of the insurers – and show no other reaction. Vessels certified by such an administration, thus, might still call ports and produce the certificate, as the authority has not requested it back. This certainly is an area worth of looking into in more detail. Surely we will do so.

Let us now go on to questions of **Statutory Law**.

In view of the few provisions in the Conventions dealing with matters of insurance and direct actions, the Working Group raised the question whether there exist national statutory provisions which are applicable on insurance contracts under such Conventions and on the direct action, and if so what those provisions stipulate. The answer is actually unanimous: no, there are no such national statutory provisions in place. We are left, thus, with what the Conventions provide. Aspects not covered by the Conventions are not dealt with in the national statutory laws.

Next we have addressed some questions on conflict of laws rules. If you are a practicing lawyer you will know the importance of what law will be applied by a court to a dispute. In particular we asked whether the nationality of the claimant and/or the insurer has any relevance for the applicable law. Only few answers were received, and no general pattern can be taken from them. Germany and Japan have simply stated that the nationality of the parties to the dispute is irrelevant. Argentina, Italy and Norway have reported that their courts would apply the law at the domicile of the insurer, whilst China and Switzerland refer to the law in force at the place, where the wrong was done. Australia/New Zealand, Canada, Croatia and Sweden have reported that their courts would respect a choice of law clause in the insurance contract. Some European MLAs have referred to the Rome-II-Regulation, but I submit that this does not contain any particular provisions on direct action. All it contains is Art. 18, which does not state which law applies to a direct action, but only provides that a direct action is available, if it so is under the law governing the wrong. We do not need such a provision in the convention context, because the availability of a direct action is expressly provided for in the Conventions. All other MLAs have remained silent on the point. There is no uniformity at all,

thus, on the aspect on basis of what laws the courts determine questions on the direct action.

The next set of questions dealt with aspects of ***Jurisdiction and Proceedings***. Our first question was whether there exist any special rules on jurisdiction in respect of direct actions, in particular direct actions under the Conventions. The answers were almost evenly split between “yes” and “no”.

Going over to the set of questions regarding *Jurisdiction and Proceedings* we can state that in most national laws of the surveyed states direct claims against insurers are acknowledged. Only in Belgium and Argentina the national law does not contain provisions on jurisdiction of courts for direct claims against Insurers.

As regards arbitration, most of the countries have stated that their national law presumably allows the direct claim against an insurer being subject to arbitration. Only the Netherlands has answered in the negative. Japan has stated that arbitration is generally permissible, unless a direct action is brought in a Japanese court. But most countries observe that arbitration clauses in the insurance contract do not bind the third party claimants, as they are not participating in the insurance contract. Arbitration, if at all, thus only plays a role if the claimants agree on arbitration with the insurer after the incident.

Now we are getting somewhat technical, when reaching the question, whether a judgment rendered against the liable party alone binds the direct insurer. This is a very important aspect, because a binding effect could deprive the insurer of all possibilities of defending the case.

It seems that the topics of these questions are in quite a few countries possibly a somewhat unexplored area, since in the answers given you will find rather often phrases like “we think”, “we are not sure” and “it has not been decided yet”.

Nonetheless we can summarize that there were three different answers given.

In Australia/New Zealand, China and Italy the judgment against the liable party alone is binding for the insurer. And this then applies even for a judgment in default.

Not binding is the judgment against the liable party for a court in a direct action against an insurer in Belgium, Croatia, the Netherlands, Norway and Sweden.

And then there are countries like Japan and Switzerland where the judgment is binding if the insurer was brought into the proceeding or at least if he was given notice to give him opportunity to become part of the proceeding. Canada and Japan, finally, have stated that their countries allow the insurer to re-litigate in cases of fraud and collusion between the claimant and the ship owner – a feature which most likely may be available in other countries as well.

There is uniformity in respect of the question whether the liable party, the ship owner, and his insurer can be sued as joint debtors in the same proceedings: they can. There are, however, differences in respect of domicile requirements. Canada, Croatia, Italy, Norway and Switzerland have stated as the only requirement that the court must have jurisdiction. In Belgium and Germany one party must be domiciled in the country itself. In China, Japan, the Netherlands and Sweden there seem to be no further requirements.

With this we come to the penultimate area, namely ***Particulars of the Direct Action.***

There is uniformity on two aspects, namely that the procedural laws in all countries contain no particularities in respect of special requirements, which a direct claimant has to fulfill, or in respect of burden of proof The national laws do unanimously also not contain provisions on burden and measure of proof.

As regards defenses available to an insurer it does not come as a surprise that practically all MLAs referred to the defenses available under the respective Conventions. More interesting is what some associations stated further and above. Sweden, for example, referred to its national law, under which an insurer may, in a direct action against him, rely on all defenses of the insurance contract. We will discuss this further with our Swedish colleagues whether we might have misunderstood them, because this appears to be contrary to what the Conventions themselves state. The national laws of Australia/New Zealand, Canada, Croatia, the Netherlands allow only Convention defenses, which would be limitation of liability, all owner's defenses against the injured party and willful misconduct. Germany, in turn, allows contributory negligence of the injured party as a defense of the insurer.

Very different rules govern time limits for direct actions and their protection. Whilst some countries have referred to the time limits applicable for the claims against the liable party (China, Croatia, the Netherlands, Norway), there a differing time limits in other countries: 3 years in Belgium, Canada and Germany and 6 years in Australia/New Zealand

Proceedings protect the time limit in all countries, in most countries – except China, Croatia, Italy and Sweden - the time limit can be extended. The Netherlands have mentioned correctly that the Conventions are silent on the point, so that they wonder whether national law may allow it. In Norway it is unclear whether an extension is possible. German law provides for a variety of other means. Most notably, negotiations between the parties prevent a time limit from running.

Rules are split when it comes to joint liability between the liable party and its insurer. Belgium, Croatia, Germany, Italy, Norway, Sweden and Switzerland have confirmed this, Argentina, Australia/New Zealand, Canada and Japan have denied it.

In Belgium, Italy, the Netherlands and Sweden the insurer may also file cross actions against his insured in the same proceeding. In these states the court is also giving effect to a jurisdiction or arbitration clause in the insurance policy.

In most countries surveyed it is allowed that the claimant assigns his direct claim to a third party, except for Italy being uncertain and Sweden, where an assignment of claim is not permitted. The validity of the assignment requires a written form as well as notice to the debtor, whereas in Germany the assignment not necessarily needs to be made in writing. In China, the assignee has to prove the notice to the debtor (the insurer).

Of much importance were the definitions, which the various MLAs offered under their law for the term "willful misconduct". This term is of particular relevance, because an insurer may defend a direct action under the Conventions with the argument of willful misconduct on the part of the liable party. At the top end you find the statement that this requires intent. This is the case for Argentina, Belgium, China, Germany and Switzerland. Actually, Germany has published the Conventions ratified in the Federal Gazette with a German translation, which uses the word *Vorsatz*, which means intent, for *willful misconduct*. We find a broader meaning in Australia/New Zealand, Croatia, and Japan, where the term includes recklessness. Even broader is Canada, which appears to allow a serious wrongdoing, and Italy, which only requires more than gross negligence. The broadest understanding can be found in Norway: it includes gross negligence, if there is also knowledge that damage will probably result.

With this we come to the last area, namely ***State Liability***

For this we revert to what we have reported in respect of investigations made by the relevant authorities in respect of the financial standing of the insurer as well as the insurance conditions. You will recall that there can be situations in which no such investigations were made, and there are countries which nevertheless do accept respective certificates. The result may be that in an

incident there exists a certificate, but there is for practical purposes no insurance cover available.

Bearing this in mind, one may find it remarkable that only under the national laws of Belgium, Germany and presumably the Netherlands the state might be liable in case of the appropriate authority issuing a certificate under the Convention and turning out that there is no insurance contract at all or not consistent with the provisions of the Conventions or not enough financial security. This is a very big issue, but fortunately it is not peculiar to the mandatory insurances in International Conventions.

This brings our presentation to an end. The work of the Working Group will continue. During the next weeks we will discuss, if and to what extent we will propose to the Executive Council proposals for Guidelines for national governments. Obviously there will be much more uncertainty and diversity out there, bearing in mind that we could evaluate only 14 replies to the Questionnaire. Uniformity in those countries does not necessarily mean real uniformity, so that Guidelines reflecting those uniformities may serve a useful purpose. But in other areas the views appear to be so far apart that one may wonder whether Guidelines would be meaningful.

Thank you very much for your attention.