



## Questionnaire for National MLA's on Rights of Direct Action Against Insurers

Background: Joe Grasso, the Chair of the Marine Insurance Standing Committee, to circulate the attached Questionnaire which has been prepared by the Committee as part of their current project to study rights of direct action against insurers. One of the goals of this project is to examine and compare the different national philosophies that might be identified with regard to rights of direct action, with the view that the Standing Committee's work product may be useful in the drafting of future maritime liability conventions. The Questionnaire is addressed to National Maritime Law Associations and responses are requested by 28th February 2020 to [jgrasso@wiggins.com](mailto:jgrasso@wiggins.com) with copy to [admin-antwerp@comitemaritime.org](mailto:admin-antwerp@comitemaritime.org).

Note: References to national laws" in this Questionnaire includes any statutory law of whatever level in each nation and, for common law jurisdictions, any caselaw precedent establishing a right of direct action.

### 1. Direct action against liability insurer by third party claimants

1.1 Does your national law provide for a right of direct action against liability insurers by third party claimants?

A/ Yes. According to article 1133 of the Colombian Commercial Code as amended by article 87 of Law 45/1990 there is a direct action allocated on the victim of a wrongful act committed by the insured against his liability insurer.

If so,

1.2 Does such right of direct action apply to any claim, either in tort or in contract?

A/ The existence of an insurance contract is a condition precedent for the right of direct action.

Moreover, the liability insurance may cover liabilities arising from breaching a contract or liabilities arising from a wrongful act against third parties. However, from the insurance contract perspective, the direct claim submitted by the victim against the insurer is based on tort.

If not,

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1.3 Is there a right of direct action granted to specific categories of claimants?

A/ The Colombian Supreme Court of Justice has held that the meaning of the term "victim" to be entitled to initiate direct action against the insurer comprises the direct and indirect victims and their inheritors.

## 2. Jurisdiction

2.1 Does your national law contain provisions on the jurisdiction of courts for direct claims against Insurers?

A/ There is no special provision governing jurisdiction of courts for direct claims against insurers. Accordingly, relying on the general rules of jurisdiction and particularly to paragraph 5 and 6 of article 28 of the Colombian General Procedural Code the following courts may have jurisdiction for direct claims against insurers: (i) the civil courts where the insurance company or its branch or agency are domiciled, or (ii) the civil courts where the casualty occurred.

2.2 Does your national law allow that the direct claims against an insurer are subject to an arbitration clause stipulated into the contract of insurance?

A/ No. Considering that the victim is not a party to the insurance contract, should an arbitration clause be incorporated into such contract, it is not enforceable against the victim.

## 3. Applicable law

3.1 Does your national law contain special conflict of laws provisions on the applicable law governing the right of direct action against Insurers?

A/ There is not a specific conflict-of-laws provision in Colombia governing the right of direct action against insurers. However, please note that article 9 of Law 33/92 sets out a conflict-of-laws provision in marine insurance contracts stating that such contracts should be governed by the law where the insurance company or its branches or agencies are domiciled.

Therefore, in marine insurance cases the right of direct action should be governed by the law where the insurance company or its branches or agencies are domiciled.

If not,

3.2 Is the proper law governing such direct action established on the basis of the general conflict of laws rules applicable to the insurance contract stipulated with the liability insurers, or to the claim in tort or in contract brought by the third party claimant, or on the basis of other general rules?

A/ Please see answer to question 3.1.

#### 4. Procedure

4.1 Under your national law, can the claimant sue the person liable and the insurer in the same proceedings?

A/ Yes, it is possible.

4.2 Can the third party sue directly the insurer only?

A/ Yes, it is possible. In fact, this the reasoning behind the direct action against the insurer.

4.3 Can the liable party, as a respondent, ask that the insurer is joined as a further defendant and ask that the decision be issued directly against the insurer?

A/ Pursuant to article 64 of the Colombian General Procedural Code, the alleged liable party may request to the Court that the insurer joins the proceeding as impleader (llamado en garantía) rather than as a co-defendant. If the impleader is admitted by the Court, the Court may grant a decision against the insurer allocating on him the payment of the damage sustained by the victim. It is worth noting that in doing so, in the ruling shall be a statement of the Court holding the liability of the liable party and a further statement allocating on the insurer the payment of such liability up to the limits set out in the insurance policy.

4.4 Can the insurer, as a respondent, ask that the party liable is joined as a further defendant?

A/ Here it is important to set a difference between join proceedings as a co-defendant or as an impleader.

Under the first scenario, it is worth noting that the Colombian Supreme Court of Justice has held that it is not necessary that the person liable joins the proceeding, however, some Colombian scholars are of the opinion that it is necessary that the party liable joins the proceeding to allow him submit his statement of defense. Under this position, between insurer and the liable party a necessary passive joinder of defendants (litisconsorcio necesario por pasiva) should exist.

Under the second scenario, it is not possible that the insurer ask to the Court that the liable party joins the proceeding as an impleader, considering that is the insurer the person that pursuant to a contractual relationship (insurance contract) should bear the alleged liability when a binding judicial decision stating such liability is granted. Accordingly, the liable party can ask that the insurer joins the proceeding as an impleader, but the insurer is not entitled to ask that the liable party joins the proceeding as an impleader.

4.5 In case the liable party and the insurer are joined as respondents in the same proceedings, can the insurer file in the same proceedings an action seeking recovery from the insured under the terms of the contract of insurance for the indemnity to be paid by the insurers to the third party?

A/ No. A separate proceeding should be initiated in that respect based on the contractual terms fixed in the insurance contract. Such recovery may occur if the damages awarded by the Court exceeded the limit fixed in the insurance contract. Hence, the insurer may initiate proceedings against the assured asking recovery of the sums paid to the victim in excess of the limits fixed in the insurance contract.

4.6 What are the rules for jurisdiction for joining the third party and/or filing action between the respondents in the above cases?

A/ See answer to question 4.5.

## 5. Defences

5.1 Under your national law, in case the insurer is directly sued by the third party

5.1.1 Can the insurer raise any defence which would be available to the liable party as regards the merits and quantum, whether or not the latter is joined in the proceedings as a defendant?

A/ Pursuant to article 1044 of the Colombian Commercial Code, the insurer is entitled to raise against the victim (beneficiary) the same defences that would have been available against the liable party (assured). Moreover, it is worth noting that this is not a mandatory provision and the parties of the insurance contract may agree otherwise, namely, granting to the insurer the same defences that the liable party would had raise against the victim.

5.2 Can the insurer benefit of the global limitation of liability — if any — available to the liable party, whether or not the latter is joined in the proceedings as a defendant?

A/ Yes. In any case, the liability of the insurer against the victim is limited by the sums fixed in the insurance contract.

5.3 Can the insurer raise defences based on the terms of the insurance contract stipulated with the liable party against the action filed by the third party?

A/ Yes. Based on article 1044 of the Colombia Commercial Code, the Colombian Supreme Court of Justice has held that the insurer is entitled to raise the defences based on the terms of the insurance contract stipulated with the liable party against the third party (victim) who addressed a direct action against the insurer.

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

A/ Considering that it is optional for the victim to initiate separate proceedings against the insurer and the liable party, the decision (ruling) issued against the liable party in a previous proceeding it is not binding for the Court that acknowledges further proceedings against the insurer. However, such judgement can be brought as evidence to the new proceeding initiated against the insurer.

If so,

5.4.1 does this also apply to judgements in default?

A/ Please provide further clarifications. What does "judgements in default" means?

5.4.2 does this also apply to foreign judgements?

A/ As explained before, the separate judgement – either issued in Colombia or in a foreign jurisdiction – can be brought as evidence to the new proceeding initiated against the insurer. Moreover, in case of a foreign judgement this should be brought duly apostilled/legalized and officially translated into Spanish. Please note that such judgement, would be assessed by the Court as a documentary evidence, namely, this is not a scenario for the recognition and enforcement of such judgment in Colombian jurisdiction.

## 6. Time limits

6.1. Under your national law, are there any time limits for a direct action against an insurer?

A/ Yes. Pursuant to article 1081 and 1131 of the Colombian Commercial Code, and the interpretation of such provisions made by the Colombian Supreme Court of Justice, the victim has a 5-year term (statute of limitations) to initiate proceedings against the insurer. Such term begins since the day of the casualty.

If so,

6.1.1 how can they be protected?

A/ Please provide further clarifications to this question. If this question is rightfully understood, it is important to remark that according to article 1081 of the Colombian Commercial Code the time limits for a direct action are mandatory, and the parties are not entitled to agree otherwise.

6.2 Is it possible for the third party to sue directly the insurer even if the time limit of the action against the liable party has not been protected?

A/ Yes. The time limit set out to directly sue the insurer (5 years) is independent of the time limit of the action against the liable party.