**Draft - Questionnaire for National MLA’s on Rights of Direct Action Against Insurers**

**China Maritime Law Association**

Note: References to “national laws” in this Questionnaire includes any statutory law of whatever level in each nation and, for common law jurisdictions, any case law 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?**

Yes. There are two kinds of right of direct action against liability insurer by third party claimants: one without any condition precedent, and the other subject to conditions precedent.

The first kind of (special) right of direct action without any condition precedent is in relation to a certain statutory insurance (see 1.3); the second kind of (general) right of direct action applies to all commercial insurance.

The conditions precedent for the general right of direct action include that:(a) the compensation liability due by the insured to the third party has been determined, (b) the insured has not yet indemnified the claimants, and (c) the insured failed to require the liability insurer to directly pay the insurance indemnity to the third party as provided by Article 65 of the Insurance Law of P. R. China.

**If so,**

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

Yes. In practice, such direct action mainly applies to tortious liability because Chinese liability insurers mainly cover tort liability, and there is often an exclusion clause in the policy to the effect that the insurer is not liable for the insured’s contractual liability unless the insured is legally liable even without such a contract. However, contractual liability may be covered.

**If not,**

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

Yes. There is statutory right of direct action granted to

 (a) claimants who suffer loss or damage caused by pollution resulting from oil spill from ships, see *Article 97 of the Special Maritime Procedure Law of P. R. China*

 (b) claimants who suffer loss or damage caused by motor traffic accident, see *Article 76 of the Road Traffic Safety Law & Rule 25 of Interpretation of the Supreme People's Court on the Application of Law in the Case of Compensation for Loss or Damage Caused by Road Traffic Accidents of P. R. China*

(c) claimants who suffer loss or damage caused by civil aircraft ground accident. see

*Articles 166, 167, 168 of the Civil Aviation Law of P. R. China*

**2. Jurisdiction**

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

No. Chinese law has no special provision on such jurisdiction. According to the general provision of Article 21 of the Civil Procedure Lawof P. R. China, the court of place where the defendant insurer has his domicile has such jurisdiction.

**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?**

No. Chinese law has no explicit provision on it.

**3. Applicable law**

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

No.

**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?**

No. Chinese law has no explicit provision on it.

**4.Procedure**

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

In the case of statutory insurance mentioned in 1.3 above claimants who suffer loss or damage caused by oil pollution from ships, or motor vehicle traffic accident, or civil aircraft ground accident can sue the insured and the insurer in the same proceedings **before** the insured’s liability to the claimant is determined.

**4.2 Can the third party sue directly the insurer only?**

Yes. In the case of commercial insurance if the insured’s liability to the claimant is determined through a binding judgment, a court mediation ruling, or an arbitration award between them, then the claimant can sue the insurer only, and not against the insured based on the principle of *res judicata*.

**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?**

Chinese law has no explicit provisions for the liable party to join insurer as further defendant except in the case of compulsory motor accident insurance.

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

Chinese law has no explicit provisions for the insurer to join the party liable as further defendant except in the case of ship oil pollution claims according to Article 97 of the Special Maritime Procedure Law of P. R. China, whether or not the liability insurance is compulsory.

**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?**

No. Only after the insurer paid indemnity to the third party, the insurer can claim recovery against the insured in a separate proceeding.

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

Chinese law has no explicit jurisdiction rules on it.

**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?**

Yes. Based on the theory of creditor’s right of subrogation, the third party’s right of subrogation against the insurer shall be exercised within the scope of its right against the liable party. In addition, there are explicit statutory provisions in the cases of ship oil pollution liability insurance and civil aircraft ground liability insurance.

*See Article 73 of Contract Law of P.R. China; Rule 8 of Provisions of the Supreme People's Court on the Trial of Cases Concerning Disputes over Compensation for Oil Pollution Damage from Ships; Articles 167 and 168 of Civil Aviation Law of P. R. China*

**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?**

Yes. Based on the theory of creditor’s right of subrogation, the insurer can benefit of the global limitation of liability. In addition, the Maritime Law of P.R. China has special provision on it.

*See Article 206 of the Maritime Law of P. R. China*

**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?**

Yes. The third party’s right of subrogation against the insurer shall be exercised not only within the scope of his right against the liable party, but also within the scope of the insurance contract. However, the insurer can only raise the defence that the pollution damage resulted from the willful misconduct of the shipowner itself under the ship oil pollution liability insurance according to Rule 8 of Provisions of the Supreme People's Court on the Trial of Cases Concerning Disputes over Compensation for Oil Pollution Damage from Ships, and the insurer can only raise the defences that the damage happened when the aircraft ground liability insurance terminated or outside the area covered by the insurance according to Article 168 of the Civil Aviation Law of P. R. China.

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

Yes.

*See Rule 14 of Interpretation of the Supreme People's Court on Issues Concerning the Application of the Insurance Law of the People's Republic of China (IV)*

**If so,**

**5.4.1 does this also apply to judgments in default?**

Yes. The third party’s claim against the liable party shall not be set aside because of the defendant being in default.

**5.4.2 does this also apply to foreign judgments?**

Yes. But a foreign judgment shall first be recognized by Chinese court.

*See Article 281 of the Civil Procedure Law*

**6.Time limits**

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

Yes.

*See Rule 99 of Minutes of the Meeting on the Work of Civil and Commercial Trials of the All China Courts issued by the Supreme People’s Court of P.R. China in 2019*

**If so,**

**6.1.1 how can they be protected?**

The parties can’t shorten or extend the time limits by agreement. In general, the limitation of action is interrupted and recalculated in the circumstances that the claimant requests performance from the insurer, the insurer agrees in fulfilling its obligations, or the claimants take legal action against the insurer. But regarding marine insurance cases, the claimant can’t interrupt limitation of action by requesting performance from the insurer.

*See Articles 195&197 of General Rules of the Civil Law of P.R. China; Rule 2 of Provisions of the Supreme People's Court on the Application of Limitation of Action in Civil Case; Article 267 of the Maritime Law of P. R. China*

**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?**

Yes. The Court does not hear the issue of time limit on its own initiative. The Defendant may waive the defence of expiration of time limit.

*See Rule 3 of Provisions of the Supreme People's Court on the Application of Limitation of Action in Civil Cases*