



## **DRAFT – Questionnaire for National MLA’s on Rights of Direct Action Against Insurers**

### **Responses of the Spanish Maritime Law Association**

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**28<sup>th</sup> February 2020**

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

YES. Such direct action is provided for in Article 76 of the Spanish Insurance Contract Act 50/1980 of 8<sup>th</sup> October (hereinafter “SIA”). This provision establishes:

The third party or his heirs will be entitled to address a direct action against the insurer, without prejudice to the insurer’s right to file a reimbursement claim against the insured if the loss or damage caused to the third party has arisen out of his willful misconduct.

The Supreme Court maintains that the direct action "implies a proper right - substantive and procedural - of the injured party against the insurer, with the purpose of a faster compensation." (judgments dated 5 June 2019 and 4 March 2015). It is “an autonomous and independent action that the injured third party has against the insured and is configured as a legal right whose purpose is the satisfaction of the damage caused to the injured third party” (judgements dated 5 June 2019 and 10 September 2018)

**If so,**

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

YES. both in tort and in contract, but in contract this action will raise or not depending on the wording of the policy. If the policy provides coverage for the contractual liability of the insured, the third party will be entitled to direct action.

**If not,**

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

There are different kinds of direct action against civil liability insurers. These are provided for, among others, in Consumer Law, Traffic Law, Pollution Law or Transport Law.

In particular, the Spanish Shipping Act (Law 14/2014 of 25<sup>th</sup> July, hereinafter “SSA”) specifically governs the direct action against marine insurers in Articles 463 to 467 of its section 3.

*“Section 3. On civil liability insurance*

*Article 463. Scope of the rules. The rules governing civil liability insurance shall not only be applied to those of this class, but also to the coverage of risk of certain obligations arising to compensate third parties included in maritime insurance of another class.*

*Article 464. Mandatory insurance. Mandatory civil liability insurance required pursuant to this Act shall be regulated, in the first place, by the specific provisions thereof and, failing that, by the terms set forth in this Section.*

*Article 465. Obligation of the insurer and direct action. The obligation of the insurer to compensate in such insurance exists from the moment of liability of the insured arises before the third party damaged. The latter shall be entitled to direct action against the insurer to demand that it fulfil its obligation. Any contractual clause that alters the terms of this Article shall be void.*

*Article 466. Limit of coverage. The insurer shall be liable up to the maximum limit of the sum insured for each one of the events causing liability that occur during the term of the contract.*

*Article 467. Limitations of liability to compensate. The insurer may raise the same exceptions before the party damaged as it may with respect to the insured, and especially the quantitative limits of liability that the latter may enjoy pursuant to the applicable law or the contract from which the liability arises.”<sup>1</sup>*

In addition to Section 3, there are other Articles in the SSA that impose compulsory insurance and direct action against the insurer, as for example, article 300 and 389 regarding passenger transport and pollution, respectively.

There is also a specific Regulation for liability insurance in leisure boats that provides a direct action against the liability insurer by application of the general direct action of the article 76 SIA. This is regulated by Royal Decree 607/1999 of 16<sup>th</sup> April. Article 406.2 SSA says that mandatory insurance of vessels dedicated to sport or recreation shall be governed by the terms of the SIA, without agreement to the contrary being admissible.

Furthermore, direct action against the insurers is specifically provided in the IMO conventions and ratified and in force in Spain as the International Convention on Civil Liability for Oil Pollution Damage (CLC), the 2002 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea (PAL), and the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001

Spain is also a Party to the 2006 Maritime Labour Convention (MLC). The MLC Agreement does not follow the type-clause of the direct action of the IMO conventions, having been drafted by the ILO. The MLC provides a right for seafarers to claim against the provider of the guarantee in case of abandonment (rule A2.5.2.8) and of contractual responsibility of the shipowner (rule A4.2.10). The 2014 amendments also provide for models of the payments made by the provider of the financial guarantee to the affected seafarer. It can be argued that this is an acknowledgement of a direct action, but without the clarity of the IMO Conventions.

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<sup>1</sup> Non-official English version issued by the Spanish Ministry Justice:  
[https://www.mjusticia.gob.es/cs/Satellite/Portal/1292427275074?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAct\\_14\\_2014\\_dated\\_24th\\_july\\_on\\_Maritime\\_Navigation\\_%28Ley\\_de\\_Navegacion\\_Maritima%29.PDF](https://www.mjusticia.gob.es/cs/Satellite/Portal/1292427275074?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAct_14_2014_dated_24th_july_on_Maritime_Navigation_%28Ley_de_Navegacion_Maritima%29.PDF)

## **Jurisdiction**

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

NO. Spanish national Law does not contain specific provisions on the jurisdiction for direct claims against marine liability insurers, but the Spanish Courts usually consider that the jurisdiction for the claim against the liability insurer is the same than the one applicable to the main claim against the insured.

Nevertheless, article 22 quinquies, paragraphs b) and e), of the Judicial Power Act 6/1985 of 1<sup>st</sup> July (hereinafter "JPA"), as amended, contains some provisions that can be used to attach Spanish jurisdiction for claims against civil liability insurers, as follows:

- (i) In tort, when the harmful event has occurred in Spain
- (ii) In matter of insurance:
  - a. If the insured or policy holder or the beneficiary are domiciled in Spain;
  - b. If the harmful event occurred in Spain and is covered by a liability insurance contract;  
or
  - c. In the case of civil liability insurance contracts, if the Spanish Courts are competent to hear the claim under (i) above.

In addition, Section 3 of Regulation (EU) 1215/2012 of 12<sup>th</sup> December is applicable to jurisdiction in matters relating to insurance.<sup>2</sup>

Finally, if the insurer is domiciled in Spain, direct action may be brought before the Court of its domicile.

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

When the claim refers to a non-large risk insurance contract (for example, in the case of leisure boats), the insurer cannot rely on an arbitration clause included in the policy, because under Spanish SIA (Article 24) the parties are not entitled to agree an arbitration clause for dispute resolution.

When the claim refers to large risks, the answer is not straightforward. Under Article 76 of the SIA, the insurer is entitled to oppose to the injured party all the personal defences included in the insurance policy. It is under strong discussion whether the arbitration clause may be considered a personal defence or not. Some learned authors are of the opinion that this clause constitutes a procedural defence and not a personal one.

This being said, following the authority of the Judgement of the Spanish Supreme Court of 4<sup>th</sup> July 2003<sup>3</sup> (in a matter of a maritime cargo claim by the charterer dealing with a direct action) the arbitration clause included in the insurance policy may be opposed against the injured party. Such judgement's doctrine has a rather limited scope, as it relates to a case previous to the entry into force of the SSA (under the repealed provisions of the Commercial Code, the direct action did not apply to civil liability marine insurance policies). The doctrine of the aforementioned "Seabank" case, in any event, has been subsequently followed in other cases as providing support to the lack of direct action in cargo claims against the P&I insurer under Spanish law. It has been so applied by First Instance and Appeal Courts to cargo claims of a varying legal nature, with a unsatisfactory outcome for third parties. In light of the new wording of the SSA, it is not clear whether the said doctrine remains currently applicable.

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<sup>2</sup> <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:En:PDF>

<sup>3</sup>

<http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=3212042&links=SEGURO%20MAR%20CDTIMO%20Y%20LEY%20CONTRATO%20DEL%20SEGURO&optimize=20030801&publicinterface=true>

## **2. Applicable law:**

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

In Spanish domestic law there is no special conflict of laws provision relating to the law applicable to the direct action against civil liability insurers. European Union law provides for a conflict of laws provision on this matter, which is however limited to non-contractual liability (and does not consequently apply to damages arising from a breach of contract by the insured party)

In accordance to article 18 of Rome II:

*“Article 18. Direct action against the insurer of the person liable. The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.”*

If not,

### **2.2. 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?**

N/A. See answer to 3.1.

## **3. Procedure:**

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

YES. Under Article 72 of the Spanish Civil Procedure Act (“SCPA”) the injured third party may sue the responsible party and the insurer in the same proceedings.

### **3.2. Can the third party sue directly the insurer only?**

YES. In joint and several liability, the claimant has the option to sue any or all of the possible liable parties.

Having said this, it is usual practice to claim against both the allegedly liable insured party and the insurer. The reason for this is that the Supreme Court has clearly stated that, without prejudice of the direct action’s independent nature as one of the damaged third party’s rights, the liability of the insurer structurally depends on the liability of the insured party. In this sense, the Supreme Court has pointed out that “the procedural autonomy of direct action, in the sense that it is not necessary to previously or simultaneously claim against the insured, does not deprive the insurer’s liability of its ancillary character, meaning that it will not arise if the insured’s responsibility is not established”(Supreme Court judgments of June 5, 2019, and July 3, 2003). The Supreme Court further adds that “the direct action, which allows a direct claim against the insurer, does not avoid the need to prove the insured’s responsibility”.

### **3.3. 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?**

NO. If the claimant has only sued the liable party, the respondent is not entitled to call its insurer to the proceeding as a second defendant. This is also applicable when the claimant sues the insurer but no the liable person. However, the insurer or the insured can appear voluntarily in the proceedings arguing that they have a direct and legitimate interest in the result of such proceedings (Article 13.1 of the SCPA).

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

NO. As general rule. See answer to question 3.3 above. However, in some cases, specifically provided by International Conventions in force in Spain, such as the 2002 Protocol to the Athens Convention, the Bunkers Convention or the CLC, the insurer is entitled to join the liable party to the proceedings. This exception is considered and authorized by Art. 14 of the SCPC.

**3.5. 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. Provided that the requirements for a partial or full recovery are met the insurer must start fresh proceedings for the recovery against the insured.

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

Following Article 22.3 of the JPA, save in case of exclusive jurisdiction, if the claim has been addressed against multiple defendants, Spanish Courts would have jurisdiction over all defendants if it can exercise jurisdiction over one of them.

**4. Defences:**

**4.1. Under your national law, in case the insurer is directly sued by the third party**

**4.1.1. 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. Under Article 467 of the SSA and 76 SIA the insurer is entitled to oppose against the injured third party all the defences available to the insured, specially the limitation of liability applicable according to the law or to the contract.

**4.2. 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. According Article 467 SSA (mentioned above) and to the International Conventions duly ratified by Spain, the insurance company may benefit of the global limitation of liability.

See answer to question 5.1.1.

**4.3. 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?**

Article 76 of the SIA provides in these regards:

*“The direct action is immune to all defences that may be available to the insurer as against the insured. The insurer, however, may rely on the exclusive fault of the injured third party and on all personal defences that it may hold as against the latter.”*

Under the said provision, it is widely accepted that the direct action requires of the existence and effectiveness of the insurance contract between the insured/liable party and the insurer, as well as that such contract covers the liability and the damage specifically claimed by the injured third party. , This provision is interpreted as preventing the insurer from relying and invoking against the injured third party

any defences that it might have against the insured/liable party in accordance to the insurance contract (including any exclusions based on the willful misconduct of the insured). The insurer may always oppose the personal defences that it might have against the injured third party, on the basis of its personal relations with the latter.

**4.4. 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?**

Whilst a final judgement on liability and quantum against the insured does not technically constitute *res judicata* regarding the civil liability insurer under Article 222 of the SCPA, in any subsequent proceeding against the liability insurer, the Courts will tend to apply the conclusions of the said judgement. The civil liability insurer will still be entitled to oppose the personal defences that it might have as against the injured third party (see reply to question 4.3 above).

**If so,**

**4.4.1. Does this also apply to judgements in default?**

YES.

**4.4.2. Does this also apply to foreign judgements?**

YES, always provided that such foreign judgments are recognized in Spain according to the International Treaties, EU Regulation or national laws.

**5. Time limits:**

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

The time limit for the injured third party to claim against an insurer in a direct action would be the same time limit that would apply to an action against the insured. Generally speaking, this time limit would be 5 years in case of actions in contract (following Article 1964 of the Spanish Civil Code) and one year in case of actions in tort (following Article 1968.2 of the Civil Code).

It should be noted that the time limit for a claim by the insured against the insurer is two years (Article 23 of the SIA and 438 of the SSA).

**If so,**

**5.1.1. How can they be protected?**

The protection of the time limit is regulated by Article 1973 of the Civil Code and can be achieved by either filing a lawsuit or by means of a letter of demand sent to the defendant or by any act of recognition of liability of the defendant.

**5.1.2. 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. It is possible to address a claim even if the time bar has elapsed, but the claim will be dismissed if the defendant argues and proves that the action is time-barred. Having said this, under article 1974 of the Civil Code, the interruption of the time bar against one of the joint and several liable parties benefits the claimant, so that, if the time limit has been protected against the insurer, the action will not be considered time-barred even if the action has not been specifically protected against the liable party.