# Direct action against liability insurer by third party

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

In general the Norwegian Insurance Contracts Acts (the "**ICA**") chapter 7 provides for a right of direct action against the liability insurers by third party claimants.

The main rule is that a third party's right of direct action is mandatory law. However, in certain situations, such as in marine insurance, the parties to the insurance contract are allowed to contract out this third party right. Nevertheless, this does not apply if the insured is insolvent. In those situations, the third party's right of direct action is mandatory even in marine insurance contracts. See more in 1.3 below.

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

The third party right of direct action against the liability insurer pursuant to the ICA, applies generally to any claim against the insured. Consequently, both claims in tort and in contract are covered, provided the claim is covered by the insurance.

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

The ICA provides for a general right for any third party of direct action against the liability insurers. As mentioned, this right is normally mandatory law. However, according to the ICA section 1-3, for claimants in the following situations, the right of direct action can be contracted out:

* when the insurance relates to undertakings which at the time of conclusion of the contract or subsequent renewals meet at least two of the following criteria:
* the number of employees exceeds 250
* the sales earnings are a minimum of MNOK 100 according to the most recent annual accounts
* assets according to the most recent balance sheet are a minimum of MNOK 50
* when the business takes place mostly abroad
* when the insurance contract relates to a ship under duty to register, cf. section 11 of the Maritime Act, or to installations as stated in section 33, subsection 1, and sections 39 and 507 of the Maritime Act
* when the insurance relates to aircraft, or
* when the insurance relates to goods in international transit, including transportation to and from the Norwegian Continental Shelf.

In the above mentioned situations, the right of direct action is only mandatory when the insured is insolvent, see response to 1.1 above.

# Jurisdiction

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

The ICA section 7-6, fifth subsection, states that Norwegian courts normally have jurisdiction for direct action claims based on the ICA. However, the provision establishes a general exception stating that the provision does not apply if Norway's obligations pursuant to international law entail a different solution.

A relevant example is article 8, 9 and 10 in the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Lugano Convention**") which according to article 11 apply to direct actions.

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

As a general rule, section 7-6 in the ICA is mandatory law when the right of direct action is mandatory. Consequently, if the right of direct action is mandatory, the parties may not decide that the direct claim is subject to an arbitration, provided that Norway's international obligations does not imply otherwise.

If the third party right of direct action is not mandatory, but is nevertheless provided for in the insurance contract, the parties to the contract should be free to decide that the direct action may be subject to an arbitration.

# Applicable law

## Does your national law contain special conflicts of laws provisions on the applicable law governing the right of direct action against the insurers?

Norwegian law does not contain specific provisions regarding the applicable law governing the right of direct action against the insurers. The Supreme Court has recently decided, in HR-2018-869-A, that the ICA section 7-6 (5) is not a choice of law rule for the direct action, and furthermore that the choice of law must be assessed based on other more general principles (see more in 3.2 below).

## 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?

Under Norwegian law, the third party's direct action is regarded as being independent from the insurance contract. Consequently, the question of choice of law for the direct action is not dependent on the choice of law for the insurance contract.

The main rule in Norwegian law is that the choice of law is decided based on an assessment of which state the case has the closest connection to (the Irma Mignon-formulae), provided that a firmer rule is not applicable. Whether or not a firmer rule is applicable to a direct action is, however, uncertain. Dr. juris Giuditta Cordero-Moss has repeatedly in legal literature argued that a direct action must be regarded as a claim in tort, and consequently that the choice of law normally must be decided based on the principle of lex loci delicti. However, in HR-2018-869-A (Stolt Commitment I) the Supreme Court seems to keep the question open. In June 2019 a Norwegian court of appeal decided (in Stolt Commitment II) that the direct action against the insurer is not a claim in tort and decided the choice of law based on the Irma Mignon-formulae. The case has been appealed to the Supreme Court, but the proceedings have not yet been scheduled.

Nevertheless, it should be noted that the Norwegian legislator earlier has indicated that the ICA section 7-8 is an internationally mandatory rule, which is an argument that could influence the assessment of the choice of law of a direct action before Norwegian courts.

# Procedure

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

Under Norwegian law the claimant may normally combine the lawsuit against the person liable and the insurer in the same proceedings.

## Can the third party sue directly the insurer only?

Provided that the third party's right for direct action applies, he or she may choose to only proceed against the insurer. However, the insurer may demand that the third party also sue the liable party in the same proceedings, cf the ICA section 7-6 third subsection.

## 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?

Whether or not the third party shall issue a claim directly against the insurer, is up to the third party to decide. However, the liable party may normally decide to include his or her insurance claim against the insurer in the same lawsuit.

## 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?

The Norwegian Civil Procedure Act (the "**CPA**") section 15-1 to 15-3 authorizes the parties to combine proceedings, both in the form of additional claims between the two parties, and claims against other parties. However, a basic requirement is that the parties either accept the merger of the claims or that the claims are closely linked to each other. Furthermore, the claims must be subject to mainly the same procedural rules.

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

The rules for jurisdiction will depend on each claim. However, as mentioned in 4.4 above, a basic requirement for joint proceedings is that the claims are subject to mainly the same procedural rules. This includes the requirement of Norwegian courts being competent courts for all claims included.

# Defences

## Under your national law, in case the insurer is directly sued by a third party:

### 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?

Pursuant to the ICA section 7-6 fourth subsection, the insurer may generally invoke any defense which would have been available to the liable party in a lawsuit against the third party.

Nevertheless, in the decision in HR-2017-958, the Supreme Court decided that the insurer could not invoke the rules which had led to a reduction of the compensation in the proceedings between the affected and the liable party. The relevant rules had led to a reduction based on the consideration that payment of the total claim would place an unreasonable burden on the liable party (in the case between the third party and the liable party the court had not been informed of the liable party's insurance).

## 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?

As mentioned, the insurer may invoke any defense which would have been available to the liable party, including any limitations of liability. This is also confirmed in the Maritime Act section 171, which regulates who may invoke the limitations of liability set out in the Maritime Act.

## 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?

The ICA section 7-6 fourth subsection also allows the insurer to invoke all defenses which would have been available to the insurer in a lawsuit against the insured, with the exception of the defenses that relates to the insured's actions subsequent to the insurance event.

## 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?

According to the CAP section 19-15 first subsection, a court decision is only binding for the parties. Hence, the main rule is that a separate judgement against the liable party is not binding for the court in the direct action. However, section 19-15 makes an exception for anyone who would have been bound by an equivalent agreement regarding the subject-matter of the case. Consequently, the terms of the insurance contract between the liable party and the insurer, may be decisive.

**If so ..**

### Does this also apply to judgements in default?

In theory, the CAP section 19-15 does not exclude judgements in default. However, in reality it is highly unlikely that the insurance contract makes such defaults made by the insured binding for the insurer.

### Does this also apply to foreign judgements?

If a foreign judgement shall be recognized by Norwegian courts, for instance pursuant to the Lugano Convention, it will be binding for the insurer to the same extent as a Norwegian judgment, cf. the CAP section 19-16 (se 5.4 above).

# Time limits

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

The main rule regarding limitation of direct actions under Norwegian law, is the ICA section 8-6. According to section 8-6, second subsection, the limitation period of a direct action is regulated by the same rules as the claim against the liable party.

The Supreme Court have, however, recently decided (in HR-2020-257-A) that, provided the ICA is not generally mandatory law (as explained in 1.3 above), the ICA section 8-6 is not mandatory although the third party's right of direct action is mandatory due to the liable party's insolvency. Consequently, if the parties to the insurance contract generally have contracted out the ICA, the limitation of the third party's claim against the insurer will not be regulated by the ICA section 8-6. If nothing is stated in the insurance contract, the claim will then become time-barred pursuant to the general rules on limitation in the Limitation Act.

The Supreme Court did in the mentioned ruling not decide whether the limitation of the direct action is regulated by the Limitation Act section 3 or section 9. According to section 3 no 1, the limitation period commences the date on which the creditor first had the right to demand performance. An additional year is granted pursuant to section 10 no 1 if the creditor has not asserted the claim because he or she lacked the necessary knowledge of the claim or of the debtor of the claim. If so, the limitation period commences the date on which the creditor obtained (or should have obtained) such knowledge. Section 9, which applies to claims for damages, however not to claims which arise from a contract, states that the claim shall be subject to a limitation period of three years from the date on which the injured party obtained, or should have obtained, necessary knowledge of the damage and the person responsible.

## if so..

### How can they be protected?

To interrupt the limitation period, Norwegian law in general requires the creditor to proceed against the debtor of the claim. Furthermore, the limitation period may also be interrupted by the debtor's acknowledgment of the claim.

However, if the limitation period is regulated by the ICA section 8-6, the third subsection sets forth a special rule. According to this provision, if the claim has been notified to the insurer, the limitation period will not expire until six months after the insurer has provided the third party with a written notice stating that the insurer will invoke limitation of the claim.

Another way to protect a claim from limitation is to have the debtor agreeing to a prolonging of the limitation period pursuant to the Limitation Act section 28. In practice, this is the usual manner by which the time-bar is interrupted for direct claims.

### 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?

As the insurer may invoke any defense which would have been available to the liable party, the third party will lose the claim against the insurer if the time limit of the action against the liable party has not been protected. However, if neither the claim against the insured nor the claim against the liable party were time-barred when the proceedings against the insurer were initiated, the claim against the insurer will not become time-barred if the third party's claim against the liable party later becomes time-barred.