

CMI International Working Group

Marine Insurance – Questionnaire

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

Insurance Law dd. 04/04/2014

* Art. 150 -> The insurance gives the injured party its own right against the insurer. The compensation owed by the insurer is due to the insured party, to the exclusion of the other creditors of the insured. If there is more than one injured party and the total amount of compensation payable exceeds the sum insured, the rights of the injured party against the insurer are reduced proportionally to the amount of this sum. Nevertheless, the insurer who, unknown to the existence of claims of other injured parties, in good faith has paid to an injured party a greater amount than the part due to it, towards those others only liable to the amount of the remaining part of the insured sum.

Mortgage Law dd. 16/12/1851

* Art. 20, 9° -> For insurance contracts to which the law dd. 25/06/1992 on the land insurance contract does not apply, claims arising from an accident for the benefit of a 3rd party injured by that accident or his beneficiaries, are privileged to receive compensation from the civil liability insurer based on the insurance contract. No payment to the insured will be liberating, as long as the privileged creditors have not been compensated.

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

Yes

1.3 Not applicable

2. Jurisdiction

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

No

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?

Yes

Art. 92: The clause whereby the parties to an insurance contract undertake in advance to submit disputes that would arise from the contract to arbitrators is not deemed to be prescribed.

Art. 20,9°-> case-law(Cassation 28/09/2000): arbitration clause cannot be made opposable to third parties because this clause is not relevant in respect of insurance.

3. Applicable law

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

Yes

Private International Law dd. 16/07/2004

Art. 106 -> The law applicable to the obligation under articles 98 to 105 determines whether the person suffering damage has a direct claim against the insurer of the liable person. If the law applicable under the 1st paragraph does not know that claim, it can nevertheless be brought if it is granted by the law applicable to the insurance contract in question.

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 3rd party claimant, or on the basis of other general rules?

4. Procedure

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

Yes

4.2 Can the 3rd party sue directly the insurer only?

Insurance Law dd. 04/04/2014: art. 150: yes

Mortgage Law dd. 16/12/1851: art. 20,9°: not successfully

The insurer will only be convicted once the liability of the insured has been established, therefore first the liability of whomever caused the damage must be established otherwise you cannot sue. Solution is to sue both at the same time. If the liability is established, it is possible. The claimant does not exercise his own right drawing from the insurance contract, he therefore cannot sue the insurer as long as he has not obtained a title against the party who caused the damage

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

Yes, interim claims

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

Insurance Law dd. 04/04/2014: art. 150: yes

If the insurer is being sued, his defense can be that the claimant does not have a title

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 3rd party?

Insurance Law dd. 04/04/2014: art. 152: yes

The insurer may, insofar as it could have refused or reduced the benefits under the law of the insurance agreement, reserve a right of recourse against the policyholder and, if there is reason to do so, against the insured person who is not the policyholder, to the extent of personal share in the liability of the insured. Under penalty of forfeiting his right of recourse, the insurer is obligated to inform the policyholder or, where appropriate, the insured person who is not the policyholder of his intention to institute recourse as soon as he is aware of the facts on which that decision is well-founded.

4.6 What are the rules for jurisdiction for joining the 3rd party and/or filing action between the respondents in the above cases?

no specific rules

Judicial law => same court

5. Defences

5.1 Under your national law, in case the insurer is directly sued by the 3rd party

5.1.1 Can the insurer raise any defense 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

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

Yes

In case the insurer acts as insurer of the liable party and the latter has not invoked any limitation against the claimant, the insurer will have to honor the claim without taking into account the limitation.

The insurer can however raise an action against the insured in case the latter has acted deliberately or in case of fraudulent attitude by the insured. Under the actual marine insurance law even the mere fault and/or negligence of the insured suffice. Under the contract of insurance parties are at liberty to waive this legal grounds (art. 205 & 206 actual M.I.L 1879) since both articles are considered not obligatory law.

Anyway the insurer will always be entitled to limit his intervention to the maximum amount as mentioned in the policy. The advantage for third parties under a direct action against insurers, has a counterpart, i.e. that the third party has no major means against the insurer but those provided for under the policy towards the insured.

The policy limitation will always apply but for one exception. Under the – be it exceptional – case of a general average claim coinciding with a particular average claim, insurers could be bound to cover in excess of the actual limit of the policy. As said, this is rather exceptional, since the contribution of insurers in the G.A.- adjustment is considered but on the rest value of the cargo, i.e. the saved value and not the sound value.

5.3 Can the insurer raise defenses based on the terms of the insurance contract stipulated with the liable party against the action filed by the 3rd party?

Insurance Law dd. 04/04/2014: art. 151

You cannot object to exemptions from after the damage

Mortgage Law dd. 16/12/1851: art. 20,9°: Yes

Everything can be invoked: 2 exceptions (case law)

- You cannot object to exemptions that are not related to coverage
- You cannot object to exemptions from after the damage

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?

Insurance Law dd. 04/04/2014: art. 153

A judgement can only be invoked against the insurer if he had been party to the case or have been called into it..

Mortgage Law dd. 16/12/1851: art. 20,9°: in analogy to

5.4.1 does this apply to judgements in default?

Not applicable

5.4.2 does this also apply to foreign judgements?

Not applicable because 5.4 is already not binding

6. Time limits

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

Insurance Law dd. 04/04/2014: art. 88

The limitation period for every legal claim arising from an insurance contract is 3 years

Mortgage Law dd. 16/12/1851: art. 20,9°: 10 years

6.1.1 How can they be protected?

Insurance Law dd. 04/04/2014: art. 89: Suspension and interruption of the limitation period

6.2 Is it possible for the 3rd party to sue directly the insurer even if the time limit of the action against the liable party has not been protected?

Insurance Law dd. 04/04/2014: art. 89

Interruption or suspension of the limitation period of the claim of the injured party against an insured party results in interruption or suspension of the limitation period of his legal claim against the insurer. Interrupting or suspending the limitation of the claim of the injured party against the insurer will result in interruption or suspension of the limitation of his legal claim against the insured.



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Mortgage Law dd. 16/12/1851: art. 20,9°: non than you lost it