IBA Insurance Committee Substantive Project 2012

Direct Third-Party Access To Liability Insurance

The materials compiled herein are collected from various sources as shown, and do not represent the views of the International Bar Association.

International Bar Association

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About the International Bar Association Insurance Committee

Insurance is present in every facet of commercial, industrial and private life. Lawyers practicing in many different fields encounter insurance and its problems and can greatly benefit from the knowledge which membership of this committee provides.

The Insurance Committee aims to provide its nearly 600 members, and the IBA Legal Practice Division as a whole, with information about developments in insurance and reinsurance law and markets throughout the world as well as with specialist knowledge to assist in the efficient solution of practical insurance problems. New insurance products are also brought to the attention of members.

In addition to this publication, the Committee produces a newsletter for its members which provides updates and commentary on developments and issues in the field.

The Committee also presents sessions at the IBA Annual Conference every year. In 2012, the Conference will be held in Dublin. Please see http://www.ibanet.org for more information on this and other upcoming events.

If you would like to join the Insurance Committee, or if you would like further information on the Committee's activities, please visit http://www.ibanet.org.

We also invite you to contact the IBA membership department on

Tel: +44 (0)20 7842 0090, Fax: +44 (0)20 7842 0091

or by email at member@int-bar.org.

Note from the IBA Insurance Committee

We received an excellent response to our recent substantive projects. In 2010, with contributions from our members in 27 jurisdictions, the committee conducted a survey regarding the procedures and effects of insurance portfolio transfers around the world. In 2011, again with contributions from our members in 27 jurisdictions, the committee conducted a survey regarding privilege in insurance disputes.

Building on this past success, this year we have conducted a survey regarding direct third-party access to liability insurance. Members from 23 jurisdictions have provided detailed discussion and insights into this issue.

With insurance and reinsurance being a global enterprise, resulting in cross border disputes, often involving both common law and civil law jurisdictions, we hope that this comparative analysis will be valuable to lawyers and other (re)insurance professionals alike.

We would like to thank those who generously contributed their time and expertise to successfully complete this project.

Copies of this report will be made available to our members at the annual meeting in Dublin. You may also access this report on the IBA's website.

Best regards,

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EDITORIAL

A party suffering loss or damage, and seeking to recover its loss from the liable party, may find itself in a difficult position. Not only will it have to establish the liability of the offender, but it can only hope there will be sufficient funds to compensate for the loss. The latter will be far less worrisome if the liable party has taken out liability insurance. The injured party may receive the payments that the liable party will be able to claim under the insurance agreement. However, even in this event, another problem may arise for the injured third party if the liability insurance is accessible only through the liable insured party. The third party may still be left with nothing, for example, if the liable party is declared bankrupt or refuses to cooperate.

A number of jurisdictions have sought to resolve this problem by creating a right for a third party to obtain direct access to liability insurance. Although the principle of third party access may sound simple, the way in which access is granted, and the conditions under which a third party may exercise this right, can vary greatly from country to country. It is our hope that these surveys will provide useful information about the choices that have been made in various jurisdictions about third-party access to liability insurance.

A Note Of Appreciation

I would like to thank my colleagues at Houthoff Buruma, **Martine Kos** and **Marijke Lohman**, who devoted significant time and effort to this project over the course of several months. This report would not have been possible without their substantial and persistent assistance. Furthermore I would like to thank our editor Greg Korbee for reviewing the contributions and Stephanie van Spijker for her editorial work.

Hans Londonck Sluijk

HOUTHOFF BURUMA

September 25, 2012

DISCLAIMER

ARGENTINA

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

b. Only for specific types of parties (e.g. individuals/companies)?

c. Only for specific types of loss or damage?

d. Only for specific types of insurance?

e. Other?

According to Section 118, second paragraph, of the Argentine Insurance Act (Law Nº 17,418), a third party is allowed to request the intervention of the insurer in a lawsuit against the insured. In practice, an application to implead the insurer (*citación en garantía*, i.e. to have the insurer joined as a third party) is generally made by the insured, which will normally appear as the defendant. The insured is also expressly allowed to apply for impleading (Section 118, third paragraph, Argentine Insurance Act). However, the insurer is bound by the ruling as a principal party of the claim, to the extent of the insured amount.

In practice, before the claim of the third party against the insured reaches the Court, a third party may direct its claim only against the insurer, and negotiate the insurance claim directly. It is furthermore noted that in many Argentine provinces, and in the City of Buenos Aires, mandatory mediation proceedings are a prior condition to the initiation of a lawsuit. In these previous mediation proceedings, a third party or the insured may summon the insurer to intervene. It is not unusual for the insurer to attend the mediation hearings directly, and even without the participation of the insured to enter into a settlement agreement with the third party. If the mediation proceedings fail and no agreement is reached, the third party may initiate judicial proceedings against the insured as described above.

The effects of impleading the insurer are in practice very similar to the effects of a direct claim.

Authors differ in their opinions regarding the nature of the impleading, but many consider it a type of direct action in which the insured is a necessary party (i.e. a third party cannot claim solely against the insurer).

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

A claim against the insurer by the insured is not required for a third party to be able to claim under the liability insurance policy. However, a third party can only claim

against the insurer pursuant to the procedure established in Section 118 of the Argentine Insurance Act (impleading) described in the answer to Question 1). The insured must give notice of the loss or damage to the insurer within three days of its occurrence or after receiving a claim from a third party if the damage or loss was unknown to the insured (Section 115, Argentine Insurance Act). It should be noted that this three-day period may be extended by the insured and the insurer in the policy.

Pursuant to Section 47 of the Insurance Act, failure to comply with this obligation causes the insured to lose its right to indemnification, except if the failure is due to *force majeure* or the impossibility to comply.

Moreover, pursuant to Section 36 of the Argentine Insurance Act, the parties to the insurance contract may agree that failure or delay in providing notification of the loss or damage by the insured entitles the insurer to decline coverage. This is a standard clause in civil liability insurance policies. However, courts usually apply very restrictive criteria regarding the loss of the insured's right on the grounds of failure to comply with obligations and/or duties under the policy, and have consistently declared that such lack of compliance only results in the loss of the insured's rights under the policy if it has affected the extension of the insurer's obligation (Section 36, paragraph b, of the Argentine Insurance Act).

However, failure or delay in giving notice of the loss cannot be invoked by the insurer against a third party as it is deemed a "defence arising after the occurrence of the loss or damage" (Section 118, third paragraph, Argentine Insurance Act). These defences may only be invoked against the insured.

3. Can a third party initiate court proceedings against a liability insurer?

Please see the answer to Question 1.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

Please see the answer to Question 1.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

The participation of the insured is required. (Please see the answer to Question 1).

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

A liability insurer is allowed to defend itself against a third party by denying coverage. The insurer may exercise any defence available in connection with the lack of coverage.
Nonetheless, according to Section 118, third paragraph, of the Argentine Insurance Act, the insurer cannot raise any defence arising after the loss or damage has occurred (e.g. the lack of notice to the insurer by the insured)

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Coverage can be established in proceedings between a third party and the liability insurer, but these proceedings must always involve the insured. (See the answer to Question 1).

b. If no, does the liability insurer have remedies or recourse against the insured?

5. Are there any further conditions for allowing a third party to have direct access?

Please see the answers to Questions 1 and 2

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

Bankruptcy of the insured does not impact the possibility of a third party claiming directly under an insurance policy. In such a case, the claim against the insured must be directed to the designated liquidator (Section 110, Argentine Bankruptcy Act), and the insurer can be summoned through impleading. (Please see answer to Question 1).

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

The third party's right to the insured amount and its accessories is secured, and has priority over the insured and the insured's creditors, even in the case of bankruptcy, pursuant to Section 118, first paragraph, of the Argentine Insurance Act.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

Please see answers to Questions 6 and 6(a).

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Prejudgement attachment or seizure of assets is allowed in Argentina. In principle, a third party could request such measures against the insurer to the court intervening in the lawsuit, as it is allowed to do so by the national and provincial procedural codes. However, it should be noted that it is quite unusual to obtain such measures against the insurers. It is noted that prejudgement attachment or seizure of assets may also be requested against the insured

To obtain an injunction, the third party will be requested to provide evidence supporting (i) the authenticity of its right against the insured and (ii) the presence of "danger in delay" (*periculum in mora*), as necessary conditions to the granting of the protective measures. For the sake of completeness, it is noted that there are exceptions to this principle, but such exceptions are irrelevant in the context of this questionnaire.

As insurance companies are regulated entities and have minimum capital legal requirements, it is unlikely that a Court will consider that there is a "danger in delay" as the insurer will be considered to be solvent. Moreover, the third party's right to the insured amount and its accessories is secured, and has priority over the insured and the insured's creditors (Section 118, Argentine Insurance Act).

Thus, as mentioned above, this type of measure is, generally speaking, unlikely to be granted by the Court and the issue should be considered on a case by case basis. Only if the insurer's reputation or solvency is reasonably doubted in any particular case may the third party obtain protective measures against the insurer.

In cases in which a third party obtains a favourable first instance ruling (Section 213, third paragraph, of the National Civil and Commercial Procedural Code) protective measures will typically be granted. It should be noted that the National Civil and Commercial Procedural Code is not applicable in the provinces of Argentina (unless litigation is carried out in a Federal Court) and thus in the different jurisdictions the solution may vary.

a. Is attachment or seizure of an insurance payment allowed in full?

If the attachment or seizure is granted by the Court, it may be fixed to cover the total insured amount plus interest and legal costs. It could however also be granted for a lesser amount, depending on the importance of the loss or damage suffered by the third party or on the evidence available about the amount of the damages or losses.

b. Are the defence costs of the insured excluded from attachment and seizure?

A third party has no direct interest in the insured's defence costs and therefore cannot request the attachment or seizure of defence costs on such grounds

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Whether to order protective measures is decided by the courts without the intervention of the affected party. The insurer may deny coverage and request the Court to lift the protective measures, but the possibility of success of such a request depends on the circumstances of each particular case.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

Pursuant to Sections 1161, 1162 and 1199 of the Argentine Civil Code, settlements and agreements are not enforceable against third parties, unless such third party ratifies the settlement or agreement.
Consequently, any agreement or settlement between the insurer and the insured is, without the intervention of the third party, not enforceable against the third party.
The insured may agree to indemnify/hold the insurer harmless against any claim by third parties in connection with the loss or damage. However, such agreement would not affect the third party's right to claim against the insured and the insurer.

a. Would a settlement between the insurer and the insured be binding on the third party?

As explained in the answer to Question 8 above, a settlement between the insurer and the insured would not be binding on a third party.

b. If so, under what conditions?

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No.

10. Is there anything else you would like to add that could be of interest to this project?

No.

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AUSTRALIA

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Ordinarily, an insurance contract is a private arrangement between the insured and the insurer and a third party has no rights to access the proceeds of that insurance. However, the law in Australia allows a third party that has suffered loss or damage to claim directly under a liability insurance policy in specified circumstances.

Charge over liability insurance: A third party may have a right to claim directly against an insurer in certain jurisdictions within Australia.[1] For example, in New South Wales, s. 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) operates to create a charge over insurance moneys in circumstances where a third party has a claim against an insured which is covered under a liability insurance policy. The charge is then enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured.

Insured not able to be found: Section 51 of the Insurance Contracts Act 1984 (Cth) (**ICA**) allows third parties to proceed directly against the insurer where (a) the insured under a contract of liability insurance is liable in damages to a person; (b) the insured has died or cannot, after reasonable inquiry, be found; and (c) the contract provides insurance cover in respect of the liability. In such circumstances, the third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages.

The phrase "cannot... be found" in s. 51(1)(b) of the ICA has been liberally interpreted by the courts to also refer to the deregistration of a company.[2]

Although the ICA extends cover to certain persons who are not the "insured" (see discussion below regarding "non-party beneficiaries"), s. 51 does not entitle a third party to make a claim directly against an insurer in respect of a claim the third party has against a non-party beneficiary. This is because a non-party beneficiary is not the contracting "insured".[3]

Bankruptcy and insolvency: The Bankruptcy Act 1966 (Cth) and the Corporations Act 2001 (Cth) have provisions which allow a third party direct access to insurance in the event of bankruptcy or insolvency respectively.

Statutory insurance schemes: Specific schemes exist in various jurisdictions within Australia for compulsory third party liability insurance for personal injuries resulting

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1 New South Wales, Northern Territory and the Australian Capital Territory.

2 *Norsworthy v SGIC* [1999] SASC 496 at [62] (unreported, Supreme Court of SA, Olsson J, 30 November 1999).

3 *Ripper v Gatenby* (2002) 12 ANZ Ins Cas 61-532 per Blow J at [6]; *Aspioti v Leigh* and *Kortenhorst v Dass* [2003] NSWSC 1224.

from motor vehicle accidents. These schemes may allow a third party to claim directly under the relevant insurance policy. For example, an injured person may have a direct claim against an insurer if the driver who caused the injury has died or cannot be found.[4]

Nature and extent of third party access

The various rights are not limited by the different types of loss or damage or types of insurance, except to the extent referred to above. The third party can recover fully, but only to the extent that the insurance is actually available.

a. Fully?

Yes

b. Only for specific types of parties (e.g. individuals/companies)?

There is no limit to the type of third party claimant.

c. Only for specific types of loss or damage?

There is no restriction on the types of loss or damage that a third party may seek to recover directly from an insurer. Of course, the ability of the third party to make a recovery is subject to the terms and conditions of the policy which may limit cover for certain types of loss or damage.

d. Only for specific types of insurance?

The rights given to third parties to claim directly against insurance are generally applicable only to liability insurance policies.

e. Other?

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

The circumstances in which a third party may make a claim directly against an insurer will be governed by the specific rules applying to those circumstances. In most cases a claim by the insured against the insurer would not be required. The claimant is "put into the shoes" of the insured as against the insurer.[5]

3. Can a third party initiate court proceedings against a liability insurer?

A third party may initiate court proceedings against a liability insurer in certain circumstances.

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[4] *Motor Accidents Act 1988* (NSW), s. 54(1); *Motor Accident Insurance Act 1994* (Qld), s. 52(2); *Motor Vehicles Act 1959* (SA), s. 113(1); *Motor Vehicle (Third Party Insurance) Act 1943* (WA), s. 7(2); *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas), s16(1).

[5] *Green (Arimco Mining Pty Ltd) v CGU Insurance Ltd (No 2) (2008)* 15 ANZ Insurance Cases ¶61-774; [2008] NSWSC 825.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

The legislation allowing for direct access to an insurer generally requires the third party to apply to court for leave to proceed against the insurer. For example, s. 6(4) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) states that no action against an insurer to enforce the charge created under s. 6(1) may be commenced in any court except with the leave of that court.

In Tzaidas v Child (2004) 208 ALR 651 Giles JA said:

> [17] The purpose of the leave requirement has been described in various ways; for present purposes, it is sufficient that it was intended to protect insurers from unwarranted direct actions by claimants upon their insureds. The prohibition is a gloss upon the leave requirement …
>
> [18] For the prohibition to apply the court must be satisfied of two things: first, entitlement to disclaim liability, and second, taking necessary proceedings. Satisfaction as to taking necessary proceedings can not be passed over. The application for leave pursuant to s 6(4) can not amount to taking necessary proceedings, since the necessary proceedings must be something outside the application. CGU submitted that proceedings were necessary only if the insurer's entitlement to disclaim liability was not obvious. I do not think that is right. The proceedings are those 'necessary *to establish*' the insurer's entitlement to disclaim liability (emphasis added). "Establish" means what it says. The Court does not decide, additionally to its satisfaction that the insurer is entitled to disclaim liability, whether or not the entitlement is obvious, and even if it did that would not establish the entitlement to disclaim liability. So long as the insurer's entitlement to disclaim liability is in issue, other proceedings are necessary to establish it.

The decision as to whether or not leave should be granted to proceed directly against the insurer is discretionary. There are two predominant considerations: first, whether the plaintiff has shown an arguable case against the insurer; and, second, whether there are sufficient reasons for the plaintiff to bring the action against the insurer.[6]

These are not the only considerations. The High Court has explained s. 6(4) by saying:[7]

> This provision is not directing the court that leave be denied only in a case where it is satisfied both of entitlement to disclaim liability and that

[6] *Green (Arimco Mining Pty Ltd) v CGU Insurance Ltd (No 2) (2008)* 15 ANZ Insurance Cases ¶61-774; [2008] NSWSC 825 at [14].

[7] *Bailey v New South Wales Medical Defence Union Ltd* (1995) 184 CLR 399 at 448, McHugh and Gummow JJ.

necessary steps have been taken to establish entitlement to do so. Leave may be refused in other cases but must be refused in these cases.

In practice, once a claim is made against the insured, courts will be inclined to join the insurer to avoid a multiplicity of proceedings.[8] However, it is important to consider whether or not the relevant court's rules will permit the joinder of the insurer as an additional defendant after proceedings have started. For example, in some proceedings in Western Australia[9] and New South Wales[10], it has been determined that an insurer would have been joined to the proceedings but for the procedural rules of the relevant courts, which did not permit such joinder.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

If the insured's liability is established (for example, if it is admitted by way of settlement), it is unlikely to be necessary to have the insured participate in subsequent proceedings between the third party and the insurer. Whether the insured does participate will turn on the facts and circumstances of the case.

If proceedings are permitted to be commenced against the insurer, there is generally no requirement for the insured to be involved in the proceedings. Section 6(5) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) does not require the insured to be a defendant.[11]

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

b. If no, does the liability insurer have remedies or recourse against the insured?

At the outset, in claims for direct access against an insurer under the Law Reform (Miscellaneous Provisions) Act 1946 (NSW). the court will not grant leave to proceed with the action against the insurer if it is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim, have been taken.[12]

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8 *Tatterson v Wirtanen* (unreported, Vic Sup Ct, Gillard J, 30 September 1998).

9 *Lois Nominees Pt Ltd v Hill* [2011] WASC 53.

10 *CGU Insurance Ltd v Bazem Pty Ltd* [2011] NSWCA 81.

11 See for example *Bailey v NSW Medical Defence Union Ltd* [1995] HCA 28; (1995) 184 CLR 399.

12 *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s6(4).

Assuming that leave is granted, the legislation provides that the insurer shall not be liable for any greater sum than that fixed by the contract of insurance between the insurer and the insured.[13]

The proceedings by the third party against the insurer are assimilated to those against the insured.[14] Therefore, the insurer may defend the third party's proceedings by relying on the same defences that the insurer would have against its own insured.

5. Are there any further conditions for allowing a third party to have direct access?

At common law, it may be possible to join an insurer to legal proceedings if there is an issue between an insured and insurer as to liability to indemnify, and the insurer's decision to decline indemnity is for factual and legal reasons that are similar to the issues between the plaintiff and the defendant.[15] This principle is not absolute and in some cases courts have disallowed joinder.[16]

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

The bankruptcy or insolvency of an insured can impact the possibility of a third party claiming directly under an insurance policy, but this is usually as a consequence of the drafting of the relevant policy wording and not as a matter of substantive or procedural law.

Liability insurance policies often exclude claims in circumstances where the insured is bankrupt or insolvent or otherwise contain provisions which allow the insurer to adjust its liability or the terms and conditions of cover in the event of the insured becoming bankrupt or insolvent.

The rights of a third party claiming under an insurance policy are always subject to the insurer having a liability, either directly to the third party or to the insured, in accordance with the terms of the policy. Often (but not always) policies will be drafted so as to limit the liability of an insurer in the event of the insured becoming bankrupt or insolvent. Where that is the case, a third party may be prevented from claiming directly, or at all, under an insurance policy.

Section 562 of the Corporations Act 2001 (Cth) permits a third party to gain access to insurance moneys paid to an insured that becomes insolvent or to the relevant

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[13] *Law Reform (Miscellaneous Provisions) Act 1946* (NSW), s6(7).

[14] *Kinzett v McCourt* [1999] NWCA 7.

[15] *JN Taylor Holdings Ltd (in liq) v Bond* (1993) 59 SASR 432.

[16] *Beneficial Finance Co Ltd v Price Waterhouse* (1996) 68 SASR 19; C*E Heath Casualty and General Insurance Ltd v Pyramid Building Society (in liq)* [1997] 2 VR 256; *Interchase Corporation (in liq) v FAI General Insurance Co Ltd* [2000] 2 Qd R 301; [1998] QCA 180.

liquidator provided the insurance moneys were paid in respect of the liability owed by the insured to the third party.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

There are specific rules relating to third party claims in the case of bankruptcy. In the event that the insured corporation is deemed insolvent, the third party is able to directly claim against the insurer.

Section 117 of the Bankruptcy Act 1966 (Cth) protects the interests of a third party in the event that a bankrupt is or was insured against liabilities to the third party and a liability against which the bankrupt was so insured has been incurred (whether before or after he or she became a bankrupt). The right of the bankrupt to indemnity under the policy vests in the trustee of the estate of the bankrupt and any amount received by the trustee from the insurer under the policy is to be paid to the third party.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

The rights of a third party that cannot claim directly under an insurance policy are protected to some extent if the insured goes bankrupt.

In the event of an insured going bankrupt, a third party that might obtain the benefit of an insurance policy pursuant to s 117 of the Bankruptcy Act 1966 (Cth) for the reasons set out above.

However, in circumstances where the operation of the policy has been materially altered by an act or omission of the insured or by the bankruptcy or insolvency of the insured, the rights of the third party may not be fully protected. It is possible for an official trustee in bankruptcy to assign to a third party the bankrupt insured's right to claim indemnity under a contract of insurance. Therefore, if the insurer refuses to grant cover under a liability policy, a third party to whom the right to claim has been assigned can proceed directly against the insurer (see QBE Insurance Ltd v Nguyen [2008] SASC 138).

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Australian law allows the prejudgment attachment of assets through an interlocutory injunction known as "Mareva order" (or a "freezing order" under the Federal Court Rules of the Federal Court of Australia and Uniform Civil Procedure Rules of the

Supreme Court). It is an order which prevents a defendant from removing assets located in or outside Australia, or from dissipating those assets.
The purpose of a Mareva order is to prevent the defendant from dealing with its assets in such a way as to deprive the plaintiff of the benefit of the final judgment which the plaintiff seeks against the defendant.
We are not aware of cases in Australia in which a plaintiff has sought to attach a policy claim by an insured defendant. Arguably, until such time as the insurer has agreed to grant indemnity, there would not be an asset which could be subject to attachment. However, if an insurer has agreed to pay an insurance claim and insurance proceeds are due to the insured defendant, there may be an asset capable of attachment. If so, in theory it is possible that a third party may be able to attach those insurance proceeds if the requirements for a Mareva order are otherwise met. However, the insurer is likely to be an innocent non-party to the litigation and the courts will not readily make orders which interfere with the use of that non-party's property.
The rights of a third party to access insurance proceeds directly are more effectively protected by legislation such as the Law Reform (Miscellaneous Provisions) Act 1946 (NSW).

a. Is attachment or seizure of an insurance payment allowed in full?

Although the position may vary between Australian jurisdictions, generally, if legislation provides for a charge over insurance, it will apply to all of the insurance moneys, regardless of whether they have or have not been paid and regardless of whether the liability to the third party has been determined.

b. Are the defence costs of the insured excluded from attachment and seizure?

There is no legislation expressly excluding defence costs from attachment or seizure.

A recent decision in the New Zealand High Court[17] concerning a New Zealand legislative provision which is drafted in similar terms to s. 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) reveals the risk that defence costs of the insured will be subject to the charge and therefore not available to the insured. This has become an area of concern in relation to all liability policies but in particular directors and officers liability insurance. The matter is currently the subject of an appeal.

[17] *Steigrad v BFSL* 2007 Limited [2011] NZHC 1037

Reactions to this case have ranged, with insureds considering whether policy wordings can be drafted in a way that clearly isolates defence costs or looking to be covered separately under a stand alone defence costs policy.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

The insurer can raise as a defence to proceedings brought under s. 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) any defence which the insurer may have against the insured pursuant to the policy. If there is any dispute as to coverage under the policy, the insurer would deny that there is any charge over the insurance moneys. In order to establish successfully a charge over the policy, it must be established that the insurer is liable to indemnify the insured.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

There is no legal requirement that an insurer or insured must consider the interests of a third party when requesting payment under an insurance policy. However, both parties will be guided by their obligations under the relevant insurance policy. The position would be different if the insurer is on notice of the third party's claim.

a. Would a settlement between the insurer and the insured be binding on the third party?

b. If so, under what conditions?

A third party claiming directly against an insurer pursuant to s. 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) would be affected by a settlement made between an insurer and an insured, but only if the insurer did not have actual notice of the charge in favour of the third party at the time of the settlement. The settlement would be binding on the third party but would only have the effect of reducing the potential liability of the insurer to the third party by the amount of the settlement.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

The provisions referred to above are the most relevant provisions with respect to direct access by a third party.

10. Is there anything else you would like to add that could be of interest to this project?

No.

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BELGIUM

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Yes.

a. Fully?

Article 86 of the Non-Marine Insurance Contracts Act of 25 June 1992 (**Act**) allows a third party to claim indemnification of the third party's loss or damage from the liability insurer directly.

b. Only for specific types of parties (e.g. individuals/companies)?

A direct third-party claim is not limited to physical persons. It may also include companies that have suffered loss or damage.

c. Only for specific types of loss or damage?

No. All types of loss or damage can be claimed from the liability insurer (physical damage, property damage or financial loss) if and to the extent that this is obviously covered by the policy.

d. Only for specific types of insurance?

Such direct third-party access is granted to all types of non-marine or non-transport liability insurance (e.g. professional liability insurance, contractual liability insurance and non-contractual liability insurance).

e. Other?

Transport or marine insurance remains regulated by the former Insurance Contract Act of 11 June 1874 , which does not provide for direct claims by a third party against a liability insurer. For these types of insurance, Belgian law does not provide for third-party claims.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

There are no specific conditions that an injured third party is required fulfil to initiate court proceedings against a liability insurer. The only issue is that, before

initiating such proceedings, the third party must be aware of the identity of the liability insurer. Article 23 of the Act requires an insured to disclose to an injured party the identity of the insured's liability insurer and the policy conditions. Disclosure of this information can be obtained in summary proceedings.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

Strictly speaking, participation of the insured is not required. In practice, however, an injured party will mostly sue both the insured and the insured's liability insurer.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

In a compulsory insurance contract, a statutory or contractual defence, procedural objection or forfeiture cannot be raised against a third party regardless of whether the defence, objection or forfeiture was caused before or after occurrence of the loss. However, the annulment, cancellation, expiry or suspension of a contract before the occurrence of the loss may be raised against a third party (article 87(1) of the Act).

In non-compulsory insurance contracts, an insurer may raise a statutory or contractual defence, procedural objection or forfeiture against a third party only if it was caused before occurrence of the loss (article 87(2) of the Act).

b. If no, does the liability insurer have remedies or recourse against the insured?

An insurer has the right to reimbursement from the insured of the indemnification paid to a third party by the insured if the insurer could have refused payment of, or reduced the amount of, the indemnification. To make use of this right, the insurer must notify the insured of this intention as soon as the insurer is aware of the facts justifying the insurer's decision (article 88 of the Act).

5. Are there any further conditions for allowing a third party to have direct access?

No. However, a third party has a five-year limitation period to file the claim with the liability insurer starting on the date of the loss-causing fact, which in practice is usually the date of the loss (article 34(2) of the Act).

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

An insured's bankruptcy has no impact on the possibility of a third party claiming directly under an insurance policy.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

As a general rule (except for marine insurance and transport insurance), an insurer indemnifies a third party directly. Direct access is granted to the insurer specifically to avoid a situation of an insured becoming insolvent and unable to indemnify an injured party. On claiming direct indemnification from the insurer, the third party prevents payment of the indemnification to the insured. This avoids competition with insured's other creditors.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

Regarding marine insurance and transport insurance, the injured third parties have priority in the proceedings relating to the indemnification which must be paid to them by the bankruptcy trustee. This is because those policies have no third-party claim.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Under Belgian law, prejudgment attachment or the seizure of assets is allowed if certain strict conditions are met. First, the claim of the creditor (third party) against the debtor (insured) must be certain (i.e. uncontested). Second, the amount of the claim must be determined in advance or at least determinable. Finally, payment of the claim must be due. In addition, another condition is that there must be a risk that the insured will not be able to pay the third party the amount payable (e.g. a threat of insured's bankruptcy). In Belgium, attachment proceedings by third parties are rather uncommon because in most cases the injured third party will be able to make a direct claim against the liability insurer.

a. Is attachment or seizure of an insurance payment allowed in full?

Yes.

b. Are the defence costs of the insured excluded from attachment and seizure?

No, but in principle this is not an issue because of the direct claim made against the liability insurers.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Yes. The insurer must issue a statement within 15 days following service by the bailiff of the document indicating the third party's seizure or attachment of the amount payable to the insured. If the insurer denies coverage, the insurer will declare that no amount is payable to the insured. The third party may challenge this statement before the Seizure Court.

8. *Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?*

Although there is no statutory obligation on an insurer to take the rights of third parties into account, the insurer may face liability for breach of good faith towards a third party that has a direct claim against him and of whose existence and possible claim the insurer was aware.

a. Would a settlement between the insurer and the insured be binding on the third party?

A settlement between an insurer and an insured is not binding on a third party, because of the principle of privity of contract (article 1165 of the Belgian Civil Code).

b. If so, under what conditions?

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

The Third Party Motor Liability Insurance Act provides for a third party to have a direct claim against a motor liability insurer. The 2004 Clinical Trials Act also provides for a clinical trial participant to have a direct claim against the liability insurer of the organiser. Furthermore, article 106 of the Belgian International Private Law Act provides specific rules on the applicable law for a direct claim against a liability insurer. Such a direct claim will always be allowed if it is allowed by the law applicable to the insurance contract.

10. Is there anything else you would like to add that could be of interest to this project?

Our experience is that most international insurance practitioners are rather surprised by the rather expansive direct claims system in Belgium. In addition, practitioners should also realise that under Belgian law liability insurers are under a statutory obligation to defend their insured in the case of the insured's liability (article 79 of the Act). In litigation, both the insured and the insured's liability insurer are often defended by the same legal counsel. The Belgian Bar has specific conflict of interest rules for legal counsel in this situation.

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DENMARK

Introduction to the Danish law on third-party rights in direct claims against a liability insurer.

Under Danish law, the position of a third party (a person who is not a party to the contract) to benefit from the contract is poor. The general rule is that no one may enforce all or part of a contract to which he or she is not a party.

However, section 95 of the Danish Insurance Contracts Act (Consolidated Act no. 999 of 5 October 2006) provides for a third party to be able to claim directly under a liability insurance. It lays down the rule that if the liability of the insured to pay compensation to the third party has been ascertained and the amount of the compensation determined, the third party is entitled to all the rights and remedies belonging to the insured against the insurer (in so far as the third party has not been satisfied).

The third party is also entitled to the rights and remedies of the insured against the insurer if the third party's claim for compensation falls within the bankruptcy, composition with creditors or debt rescheduling of the insured. In so far as the third party's claim is not covered by the insured in such circumstances, the full claim for compensation may be raised against the insurer directly.

The following sections concern the position of third parties' direct access to liability insurance under section 95 of the Danish Insurance Contracts Act.

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?
Yes.

b. Only for specific types of parties (e.g. individuals/companies)?
No.

c. Only for specific types of loss or damage?
No.

d. Only for specific types of insurance?
Section 95 of the Danish Insurance Contracts Act applies in general to liability insurance.

e. Other?

If a third party is allowed to claim directly under a liability insurance policy in accordance with section 95 of the Danish Insurance Contracts Act, the insurer must notify the insured without undue delay that it has received a claim for compensation.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

If the third party is allowed to claim directly against the liability insurer, the insured may not prevent this. But as the third party takes the position of the insured, the third party will not have a valid claim if the insured does not have a valid claim.

3. Can a third party initiate court proceedings against a liability insurer?

Yes.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

Once the third party is allowed to claim directly, the third party may exercise all rights of a claimant, including the right to initiate proceedings.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

Participation of the insured is not required for a third party to be able to initiate court proceedings against the insurer.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes.

b. If no, does the liability insurer have remedies or recourse against the insured?

N/A

5. Are there any further conditions for allowing a third party to have direct access?

No. However, as the third party is entitled to all the rights and remedies belonging to the insured against the insurer, the validity of a third party claim under Danish law

depends on the legal relationship (e.g. the insurance policy) between the insured and the insurer. We refer to the principles laid down in section 27 of the Danish Debt Instruments Act (Consolidated Act no. 669 of 23 September 1986).

Hence, the rights of the third party against the insurer are subject to the same terms and conditions as the rights of the insured. The third party's claim is as a main rule subject to all defences that were available to the insurer against the insured.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

Yes, please see the introduction above.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

Yes, please see the introduction above.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

N/A

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Interim remedies, such as prejudgment attachment and seizure of assets in order to enforce judgments, are allowed under Danish law. The rules are mainly contained in chapters 47 and 56 of the Danish Administration of Justice Act (Consolidated Act no. 1066 of 17 November 2011). The main rule in Danish law is that it is possible to seize or attach the insurance sum payable by an insurer to an insured once a claim under the policy has been established and the claim is exigible. Prejudgment attachment of assets can be effected as interim security for money claims if (1) execution for the claim cannot be levied (i.e. the creditor does not fulfil the requirements under Danish law to have his claim executed) and (2) it must be assumed that the possibility of obtaining coverage for the claim (reimbursement) at a later stage would otherwise be substantially impaired.

However, seizure or prejudgment attachment of the insured's claim against the insurer will in practice not be relevant if the third party is (according to section 95 of the Insurance Contracts Act) allowed to claim directly, as the insurance sum will be paid by the insurer to the third party directly.

If the third party is not allowed to claim directly against the insurer (because the liability of the insured to pay compensation to the claimant has not been ascertained or the amount of the compensation has not been determined), the insured's claim against the insurer is not exigible.

Danish law does not allow seizure or prejudgment attachments of future claims or claims that are not exigible. Danish law does not provide for the seizure or attachment by a third party of an insured's claim against a liability insurer before the liability of the insured to pay compensation to the claimant has been ascertained and the amount of the compensation has not been determined.

In order to protect its interest, the third party may give notice of the claim to the insurer. According to section 96 of the Insurance Agreement Act, the insurer — once notified of an insurance event — may not negotiate a reduction or forfeiture of the third party's rights with the insured (in accordance with section 95 of the Danish Insurance Contracts Act).

a. ***Is attachment or seizure of an insurance payment allowed in full?***
   There are no specific restrictions; attachment and seizure of an insured amounts is allowed to the same extent as other assets.

b. ***Are the defence costs of the insured excluded from attachment and seizure?***
   According to section 511(3) of the Danish Administration of Justice Act, a party to a mutually obligatory contract may object to the seizure or attachment of contractual payments if that party's interests are prejudiced. In so far as prejudgment attachment or seizure of payments of defence costs would prejudice the insured's defence and thus the insurer's liability under the policy, the insurer may object to the seizure and pay defence costs directly to the insured or the defence counsel.

c. ***Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?***
   Please see the answer to question 5 above.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance, but the third party has not yet requested payment?

Yes. Under Danish law, the insurer is required to take the interest of a third party into account if the insurer has notice of occurrence of an insurance event.

Further, the insurer may not pay out the insurance sum in full on a "first come, first served" basis, as section 95 of the Insurance Agreement Act lays down the rule that where several claimants are entitled to the compensation payable in respect of an insurance event, and where their aggregate claims against the insurance company exceed the liability of the insurance company, the insurer is obliged to satisfy the claimants proportionately, unless otherwise agreed in the policy.

To reduce the risk of paying more than the insured amount the insurer may in such situations protect insurer's position by paying the insured amount into escrow.

a. Would a settlement between the insurer and the insured be binding on the third party?

No. Where the insurer has notice of the occurrence of an insurance event, it may not, by negotiation with the insured, cause a reduction or forfeiture of a third party's rights, pursuant to section 95 of the Danish Insurance Contracts Act. We refer also to section 96 of the Danish Insurance Contracts Act.

b. If so, under what conditions?

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

Under Danish law, insurance brokers, insurance agents and auditors are required to take out professional liability insurance that allows a third party to file directly against the insured a claim for compensation for the loss or damage suffered as a result of negligence by the auditor, insurance broker or insurance agent.

Further, under Danish law it is compulsory to take out motor vehicle liability insurance that allows the injured third party to claim directly against the insurer of the motor vehicle.

Thus, in the case of professional liability insurance and motor vehicle liability insurance, a third party may file a direct claim against the insurer without meeting the conditions laid down in section 95 of the Insurance Agreement Act. In addition, unlike the situation in a direct claim made under section 95 of the Insurance Agreement Act, the third party's rights in professional liability or motor vehicle liability insurance are not subject to all the defences available to the insurer against the insured. If the insurer is obliged to compensate a third party, the insurer may have a recourse claim against the insured based on, for example, misrepresentation.

10. Is there anything else you would like to add that could be of interest to this project?

The statutory limitation period of a claim under Danish law is generally three years from the due date of the claim, i.e. the date the damage occurs. This applies for both the third party's claim against the insured and the insured's claim against the insurer.

In respect of third party access to liability insurance according to section 95 of the Danish Insurance Agreement Act, we note that if the third party becomes entitled to the rights and remedies of the insured against the insurer before the third party's claim against the insured is time barred, the third party's claim against the insurer is time barred one year after the third party's subrogation at the earliest.

If a claim has been notified by the insured to the insurer before the claim against the insurer is time barred, the claim is time barred one year after the insurer's denial of the claim at the earliest.

Further, we note that the Danish Insurance Agreement Act provides for liability insurance on a loss-occurrence basis. However, the market practice in Denmark is generally to agree that liability cover will be taken out on a claims-made basis.

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BECH-BRUUN

GERMANY

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

In general, German law does not entitle a third party to make a direct claim under a liability insurance policy.

b. Only for specific types of parties (e.g. individuals/companies)?

Under German law there are no specific types of parties that are privileged in the sense that they could, as a third party, claim directly under a liability insurance policy.

c. Only for specific types of loss or damage?

Specific types of loss or damage would also not entitle a third party to claim directly under a liability insurance policy.

d. Only for specific types of insurance?

Under the Compulsory Insurance Act, dated 5 April 1965, (read in conjunction with section 150, para. 1, No. 1 German Insurance Contract Act), a third party may claim directly against the liability insurer if the claim derives from an event covered by a motor liability insurance policy. Germany has thus complied with its obligations under the European Convention on Compulsory Motor Liability Insurance, dated 20 April 1959, which has been signed by practically all European states.

e. Other?

Prior to the introduction of the new Insurance Contract Act, dated 23 November 2007, it had been vigorously discussed whether and to what extent the *action directe* should be extended to include all liability insurance classes compulsory in Germany. The majority of academic authors had been very much in favour of such extension. However, at the very last minute, the bill was modified to restrict the extension of the *action directe* to only two situations:

- if an insolvency administration proceedings are commenced with respect to the assets of the insured, or if an application for the commencement of insolvency proceedings against the same has been declined for lack of assets, or if a preliminary insolvency administrator has been appointed over the assets of the insured; and
- if the place of residence of the insured is unknown.

Under German law, many businesses and professions are required to take out compulsory professional liability insurance cover. This applies not only to medical professionals, but also to architects, lawyers, accountants, CPAs and others. All in all, there are more than 100 statutes and/or regulations in Germany requiring certain companies and business and professional people to obtain liability insurance cover prior to being allowed to engage in the contemplated business or profession.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

This is not the case in Germany. However, where an injured third party is entitled to make a direct claim, the third party has a legal duty to inform the insurer about the insured event within two weeks after having become aware of the event (section 119, para. VAG). Failure to comply with this disclosure duty does not automatically deprive the third party of the right to make a claim. However, if such failure increases the amount of the claim or makes it more burdensome for the insurer to investigate it, the third party could be exposed to a proportionate reduction of the indemnification. Apart from the compulsory insurance context, there may also be exceptional circumstances that would allow a third party to make a claim against an insurer without the policyholder first having to file a claim with the insurer.

3. Can a third party initiate court proceedings against a liability insurer?

A third party entitled to make a direct claim against the insurer under German law may direct the claim either at the insurer or the policyholder, or both. Apart from the *action directe*, the third party may acquire the right to make a direct claim against the insurer if one of the conditions specified under (a) below is fulfilled.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

Not for a third party entitled to make a direct claim against the insurer under German law. Apart from an *action directe*, the third party may acquire the right to make a direct claim against the insurer if one of the following conditions is fulfilled:

(i) the insured has assigned the insured's claim against the insurer to the third party or the third party has acquired the latter's claim as a result of civil proceedings (see below);

(ii) the insurer has given the third party the impression that it wants to settle the matter with the third party rather than with the insured, for instance, by discussing and negotiating the claim exclusively with the third party; or

(iii) the insured is pursuing the claim against the insurer in such a manner that the insured is about to jeopardise the claim, for instance, by disrupting the negotiations to such an extent that the claim could become barred by the pertinent statute of limitation.

In the second and third cases mentioned above, however, the third party may not be entitled to institute an action against the insurer for payment. Instead, the third party may have to restrict pursuit of the claim to instituting a declaratory action, unless the third party has first acquired an award against the policyholder and has obtained an order of attachment in the third party's favour with respect to the policyholder's claim against the insurer.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

In all cases where the third party has a right to file a direct claim against the insurer, the participation of the insured party will not be required under German law.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Under German law, a liability insurer has a right to defend itself against any third party claim by denying coverage if the third party has a right to make a direct claim against the insurer from the outset or the third party subsequently acquires such a right. As a rule, however, German insurance law adheres to the separation principle, which means that the final duty of the insurer to indemnify the third party has to be established in two separate procedures: first, by the third party pursuing its claim against the insured and, second, by the insured then enforcing a claim against the insurer to be held harmless. In practice, if the parties adhere to the rule of reason, all liability and coverage issues will be discussed and resolved in triangular negotiations and the insurer will pay the agreed amount of indemnification to the third party. However, from time to time, one and the same event will trigger complex liability and coverage issues that will require more than one litigation to be resolved.

b. If no, does the liability insurer have remedies or recourse against the insured?

5. Are there any further conditions for allowing a third party to have direct access?

In addition to fulfilling all (or at least one) of the above-mentioned conditions, the third party will have to comply with all other requirements in order to be permitted to file a suit against the insurer under the German Code of Civil Procedure. It should be noted that the insured's claim against the insurer as a result of the insured being liable for loss vis-à-vis a third party is not structured as a claim for payment but as a hold-harmless claim. This claim would automatically become a claim for payment once the insured has fully and finally indemnified the third party or once the third party has a direct claim or has acquired the insured's hold-harmless claim against the insurer.

6. *Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?*

As already briefly described above, a third party is automatically entitled to claim directly against the insurer if the insured becomes bankrupt, i.e. either insolvency proceedings involving the insured's assets have been commenced or the application for the commencement of such proceedings is rejected for lack of assets.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

No.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

In addition to entitling the third party to make a direct claim in these circumstances, the law protects the interests of the third party pursuant to sections 77 and 77a of the German Insurance Supervision Act, which obliges the insurer to earmark the assets covering claims under liability policies for the sole benefit of the injured third parties, with the insurer having a duty to separate such assets from other assets. The insolvency administrator is not permitted to prevent the third party from pursuing the liability claim, and the third party's claim should be covered by assets earmarked for settling claims under liability insurance policies (see also under 8 below).

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction?

German law avails the creditor of a prejudgment attachment and/or seizure of assets pursuant to section 916 et seq. of the German Code of Civil Procedure. Section 917

could be understood to provide a creditor in nearly all instances with such protection, because quite general terms are used to refer to a creditor enjoying such a right if the creditor may rightfully anticipate that the enforcement of an award (after a long lawsuit) could be foiled or even just rendered more difficult. The provision then gives one example of where such a situation has arisen, and that is where a later award would have to be enforced in a foreign jurisdiction that does not have reciprocity with Germany. However, this clarification is no longer very helpful because a host of conventions and treaties have meanwhile established that there is reciprocity between Germany and most other nations, including obviously the entire European Union. However, notwithstanding the fact that the German legal community is aware of the fact that the courts in other jurisdictions—relying on similar wording in parallel legal provisions—grant the creditor a rather broadly formulated right of prejudgment attachment or seizure, German courts have restricted this remedy to a few very exceptional cases. To obtain such a remedy, it is not sufficient to prove that the potential debtor might not be able to honour an award; rather, the creditor has the burden of establishing that the debtor has started to, or is about to, conceal or disperse its assets with the aim of thwarting the enforcement of a future award against the debtor. This burden of proof can hardly ever, as shown in actual practice, be shouldered successfully.

If so, is a third party allowed to attach or seize an insured's claim against the insurer?

If a creditor obtains an attachment order in prejudgment proceedings, the creditor could also hypothetically seize the insurance payment on that basis. Such seizure would be redundant, however: the third party is sufficiently protected under section 108 of the Insurance Contract Act in as much as the insured is prohibited from making any and all dispositions concerning the insurance cover that could have a detrimental effect on the third party's claim for indemnification. Hence, an insurer who pays out the indemnification for a claim to an insured without ascertaining that the payment will actually reach the third party would have to pay the third party a second time (whilst obviously then having a claim against the insured for a refund). The third party having a liability claim against a wrongdoer could therefore abstain from taking any protective measures once the third party has been informed that the claim was covered by the pertinent liability insurance.

a. Is attachment or seizure of an insurance payment allowed in full?

See the answer to the second question under 7 above.

b. Are the defence costs of the insured excluded from attachment and seizure?

Pursuant to section 101 of the Insurance Contract Act, the liability insurance includes the indemnification of the insured for defence costs. For attachment and seizure on behalf of these costs, the same principles outlined under 7 above would apply.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

As indicated in the descriptions above, this issue does not arise under German law. If there is a justified claim under the policy, the third party will be protected; if not, there will be no need for any prejudgment remedy.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

Under German law, it is first and foremost the insurer that is responsible for ensuring that the third party actually obtains the indemnification, as an insurer is not released from its duty to pay the claim if it pays the claim to the insured and the insured does not remit the sum to the third party (see section 108 of the Insurance Contract Act). You will therefore not be able to find any insurer willing to settle a liability claim without first having taken the third party on board.

a. Would a settlement between the insurer and the insured be binding on the third party?

German law does not permit the insured to make any dispositions concerning the claim to the detriment of the third party. A settlement agreement between the insurer and the insured as to the claim would be considered to be a disposition affecting the claim and would thus have no legal effect on the claim of the third party. The third party may pursue its claim as if such settlement had never occurred. It should be mentioned, however, that the insured could hamper the third party's claim through certain acts or omissions, for instance, by providing no or misleading information about the event. Such conduct, which could normally entitle the insurer to reject a claim, might, however, be of no consequence to the third party. This is because, according to the courts, section 108 of the Insurance Contract Act incorporates the intention of the lawmakers to protect a third party from such misconduct. The courts have decided that the insurer is not released from its indirect obligation to a third party if it pays the claim to the insured as a result of the insured having incorrectly confirmed that the insured had previously settled the claim of the third party. The courts have taken the position that the scope of the aforementioned legal provision is broad enough to protect the third party from

such manoeuvres even if it is obvious that the insured's conduct has been fraudulent.

The law affords an even higher level of protection to the third party if the insured was compelled to take out the liability cover. In this case, practically all of the insured's failures in connection with the occurrence and the claim cannot be held against the third party (see section 117 of the Insurance Contract Act). This shield, however, provides cover only in relation to the legally required minimum liability insurance cover.

b. If so, under what conditions?

See the answer under a.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

German law does not protect the third party's claim under just the aforementioned provisions and other provisions of the Insurance Contract Act. In the case of compulsory liability insurance, there are statutes and other regulations entitling a third party to obtain information on the identity of the insurer providing the coverage. The third party requires such information in order to be able to comply with the third party's duties to notify and provide information to the insurer. The third party may thus enter into direct contact with the insurer in order to achieve an out-of-court settlement. The information on the identity of the insurer has to be supplied to the third party by the administrative body or authorised agency required to collect such information from the policyholder before issuing the licence to engage in the respective business or profession. Once the insurer has issued the policy and informed the administrative body or authorised agency of the issuance, it will remain liable to the third party through to the end of one month after having notified the competent authority or agency that the policy has been terminated or has expired.

10. Is there anything else you would like to add that could be of interest to this project?

As stated above, whenever a third party has a direct claim against the insurer, the third party can choose to sue either the insured or the insurer, or both. As a result of this multiple choice, lawmakers have extended the binding effect of any judgment rejecting the third party's claim against that defendant also to the other potential defendant. This is one of the rare extensions of the principle of *res judicata* to a party that has not been participating in the litigation.

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HUNGARY

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Section 559 of Act IV of 1959 on the Hungarian Civil Code sets out the general legal provisions applicable to liability insurance under Hungarian law. Section 559(2) of the Hungarian Civil Code excludes the possibility of a third party bringing a claim directly against a liability insurer.

In some circumstances, however, a liability insurer may make a payment to a third party, but only if the insured did not satisfy any part of the third party's claim. If the insured has already indemnified the third party, liability insurers may compensate the insured to the extent the insured satisfied the third party claim.

Act LXII of 2009 on Mandatory Motor Third Party Liability Insurance (the "**MTPL Act**") and Government Decree No. 190/2004 (VI.8.) on the mandatory MTPL insurance of vehicle operators (the "**MTPL Decree**") set out an exception to the general rule stated above. Third parties are allowed to make their MPTL insurance related claims directly to the liability insurer.

a. Fully?
No. Hungarian law only allows direct claims in MTPL insurance matters. Where Hungarian law allows direct claims, the third party must be fully indemnified, i.e. the insurer and/or the insured are obliged to compensate a third party's full financial loss (i.e. damage, lost profits and costs).

b. Only for specific types of parties (e.g. individuals/companies)?
The Hungarian Civil Code, the MTPL Act and the MTPL Decree do not distinguish between individuals or companies in relation to liability insurance.

c. Only for specific types of loss or damage?
No, third parties must be fully compensated.

d. Only for specific types of insurance?
Hungarian law only allows direct claims in MTPL insurance matters.

e. Other?
N/A

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

Generally this is not applicable.

In the case of MTPL insurance, a third party is entitled to submit a claim to the insurer directly.

3. Can a third party initiate court proceedings against a liability insurer?

Generally speaking, as set out in our answer to question 1 above, a third party is not entitled to claim directly from an insurer. Therefore, it is not possible for a third party to initiate court proceedings for damages against an insurer.
In the case of MTPL insurance, the initiation of court proceedings against an insurer is possible if the third party intends to claim from the insurer directly and the insurer refuses to satisfy the third party's claims.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

See above.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

If a third party initiates court proceedings on the basis of MTPL insurance, the participation of the insured is not required. In other cases, initiation of court proceedings against an insurer is not available for third parties and third parties may only initiate court proceedings against the insured. The insurer may, however, participate in the lawsuit in favour of the insured as an intervening party at the insurer's sole discretion.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

As set out above, a third party may claim directly from an insurer only under MTPL insurance. If the third party intends to claim directly from an MTPL insurer, this insurer may defend itself by denying coverage. In other cases, i.e. where no direct claims against insurers are possible and thus, insurers are only entitled to participate in a lawsuit in favour of the insured as an intervening party as set out in our answer to question 3 above, the insurer may not refer to the lack of coverage in the lawsuit, as the subject matter of the lawsuit between the insured and the third party is only to establish the insured's liability and not the obligations of the insurer.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes, in the case of MTPL insurance, as set out above.

b. If no, does the liability insurer have remedies or recourse against the insured?

According to section 559(3) of the Hungarian Civil Code, as a general rule, third parties may not claim directly from insurers. If a claim is based on the insured's gross negligence or wilful misconduct, the insurer may have a recourse claim against the insured, save where the insured proves that the damaging conduct was not unlawful.

According to section 34 of the MTPL Act, an MTPL insurer may have a recourse claim:

a) against any person who drove the motor vehicle without the permission of the registered operator of the motor vehicle or lawful user;
b) in the case of several insured parties, against the insured parties jointly and severally if they wilfully and unlawfully caused the loss or injury collectively;
c) against the driver, if the driver drove the motor vehicle while under the influence of alcohol or any substance that has the capacity to impair one's ability to drive, or against any insured party that permitted such person to drive the motor vehicle in question, unless they are able to prove that they did not know that the driver was under the influence of alcohol or of any other intoxicating agent at the time of the accident;
d) against the driver, if the driver did not have a driver's licence, or against any insured party that permitted such person to drive the motor vehicle in question, unless they are able to prove that they had good reason to believe that the person driving the motor vehicle did have a driver's licence;
e) against the registered operator of the motor vehicle, if the accident is attributable to the seriously neglected mechanical condition of the motor vehicle;
f) from the driver, if the loss or injury was caused by the failure to provide help, or if driving recklessly in the case of professional drivers;
g) against the registered operator of the motor vehicle or the driver in the event of non-compliance with the obligation of disclosure or notification of changes, or the obligation of reporting accidents and any loss or injury at the time the contract is concluded or when the accident occurred, to the extent of the impact this conduct had on the insurance company's payment obligation.

5. Are there any further conditions for allowing a third party to have direct access?

We are not aware of any further conditions.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

For the sake of clarity, we have set out below the meaning and purpose of certain insolvency related legal instruments under Hungarian law.
Insolvency means the status where the company is unable to satisfy the due claims of creditors.
Bankruptcy means a procedure where the debtor company and/or the creditors intend to restore the solvency of the company by granting a payment moratorium and seeking an arrangement with the creditors.
Liquidation means a procedure whose purpose is to terminate the company without a legal successor and to satisfy the company's creditors. In the case of a solvent liquidation (or winding-up) process, the company is not insolvent and its assets fully cover all creditors' claims. Insolvent liquidation is where the assets of the company do not cover all creditors' claims. Solvent and insolvent liquidation procedures are regulated by different laws.

As a general rule, the bankruptcy of an insured does not impact on the possibility of a third party claiming directly under an insurance policy, since third parties are not entitled to claim directly from the insurer.
If a claim is based on MTPL insurance, third parties may claim compensation for losses and damages directly from the insurer irrespective of the financial status of, and/or a possible ongoing bankruptcy/liquidation procedure against, the insured.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?
We are not aware of any specific provisions. Direct damage claims by third parties may be established against an insurer on the basis of MTPL insurance irrespective of the financial status of, and/or a possible ongoing bankruptcy/liquidation procedure against, the insured.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?
N/A

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Hungarian law recognises concepts similar to prejudgment attachment during a lawsuit and seizure during judicial enforcement procedures. For the sake of clarity, we have set out below the meaning of such concepts under Hungarian law.

Preliminary injunction means an order of the court in respect of one or more claims set out in the action of the plaintiff before the judgment is adopted, if this is necessary to prevent the occurrence of imminent damages or to maintain the existing conditions or to protect equitable and significant lawful interests of the plaintiff.

Precautionary measures means measures ordered in the course of a judicial enforcement procedure to protect the creditor's interests if it is likely that without such measures, the satisfaction of creditor's claims would be jeopardised. Such measures can be the blocking of bank accounts or the seizure of properties.

Seizure means an act whereby the competent authority acquires possession over a specific property e.g. in the course of a judicial enforcement process as a first step to sell such property during the enforcement process or as part of precautionary measures.
In the course of a lawsuit between the third party and the insured, it is not possible for the third party to request the court to oblige the insured to satisfy the third party's claim from the insured's liability insurance, and therefore, may not file such claim for a preliminary injunction.
In the course of a judicial enforcement procedure, enforcement actions are performed by the bailiff under the supervision of the court and third parties may not seize or otherwise possess the insured's claim against the insurer.

a. Is attachment or seizure of an insurance payment allowed in full?
N/A

b. Are the defence costs of the insured excluded from attachment and seizure?
N/A

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?
N/A

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

On the basis of applicable laws and the practice of insurers, the liability insurer will only indemnify third parties who gave notice of their claims to the insured (or to the insurer directly in the case of MTPL insurance). The insured should give notice of the damage to the insurer after causing the damage, but the insurer will only pay compensation to a third party once the claim has been made by such third party. In addition, the insured may not request payment on the basis of liability insurance, since, according to the applicable provisions of the Hungarian Civil Code, the insurer only pays damages directly to the third party unless the insured has already indemnified the third party.

a. Would a settlement between the insurer and the insured be binding on the third party?

No.

b. If so, under what conditions?

N/A

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

There are a number of professions (e.g. lawyers) and there are certain situations (e.g. operating a motor vehicle) where mandatory liability insurance applies. However, with the exception of MTPL insurance, there is no possibility for direct access by third parties.

10. Is there anything else you would like to add that could be of interest to this project?

No.

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INDIA

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Yes, but only for the specific types of insurance indicated below.

a. Fully?

b. Only for specific types of parties (e.g. individuals/companies)?

c. Only for specific types of loss or damage?

d. Only for specific types of insurance?

e. Other?

In India the concept of third party liability insurance is applicable in the context of Motor Vehicles Act, 1988 (**"Motor Vehicles Act"**). Pursuant to the Motor Vehicles Act, the claimant can recover compensation directly from the insurer and in doing so can claim fully. Such compensation applies for all types of parties suffering physical loss /damage to themselves as well as to the vehicle.

There is also the Public Liability Insurance Act, 1991 (**"Public Liability Insurance Act"**), which relates to mandatory insurance by persons handling any "hazardous substance". Here any person (other than a workman[19]) who suffers harm to person or property (but not loss of profit) can claim under the insurance. However, the claim has to be made to the Collector (Administrative Head) of the district where the incident occurs or the person handling the ''*hazardous substance*" is situated. Typically a claim allowed under another policy will not be permitted if the effect is to recover more than the actual loss from all policies put together. Such a claim is applicable only in the case of physical damage to persons. The third party would not be allowed to recover more than the actual loss and any further recourse available to the third party would now be available to the insurance company which has paid compensation to such third party.

Workmen are excluded from the purview of the Public Liability Insurance Act, 1991 because they are governed by the Workmen's Compensation Act, 1923 (**"Workmen's Compensation Act"**). This act governs the compensation to be provided to workmen for any losses suffered by them during the course of their work.

[19] A statutory term referring to a type of employee that can generally and informally be described as a "blue collar worker".

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

Not required in the circumstances referred to in our response to 1) above.

3. Can a third party initiate court proceedings against a liability insurer?

Again such proceedings can be initiated in the circumstances referred to in our response to 1) above

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

There are no specific substantive conditions for a third party to comply with for initiating court proceedings against an insurer.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

The participation of the insured would not be required in order to determine the liability and damages.

It should be noted that in almost all cases, the insurer will move to make the insured a party. This will be with a view to protect its ability to seek recourse / contribution where the insured is at fault and/or exclusions under the policy apply.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

b. If no, does the liability insurer have remedies or recourse against the insured?

In the context of third party motor vehicles insurance, and workmen compensation cases, although there are several grounds available to the insurer to deny coverage/liability against the third party the courts have usually directed the insurer to pay the third party, in spite of prima facie evidence that the policy has lapsed. This is because third party insurance is for the benefit of the beneficiary (or third party) and not the insured.

In *Bajaj Allianz General Insurance Co. Ltd. V Birmati & Ors*[20]. and in *Oriental Insurance Co. Ltd. V Rakesh Kumar & Ors.*[21], the court held that in order to allow

[20] 2012(1)TAC806

[21] MAC.APP. 329/2010

defences to the insurer the rule of main purpose and fundamental breach has to be proved, i.e., the defences relied on by the insurer should have fundamentally contributed to the cause of the accident. If the insurer wishes to defend itself, the insured is required to be joined as a necessary party to the suit.. The limited defence possibilities available to the insurer in no way imply that the insurer is left without any remedy. Although the courts hold in favour of the third party, they have always given the insurer "the liberty to recover the said amount from the insured" in a separate suit. (Please refer to our response to question 7).
In other words, the insurer can avail itself of defences to recover the amount from the insured, but in all likelihood would not be able to avoid the full payment (by itself) of the same to the third party.

5. Are there any further conditions for allowing a third party to have direct access?

No other substantive conditions.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?
While there are no specific rules under the Motor Vehicles Act and the Public Liability Insurance Act, the bankruptcy of an insured does not impact the claim of a third party claiming directly under an insurance policy.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?
The claimant will have to move the bankruptcy court to obtain permission to enforce the insurance on behalf of the insolvent insured.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Yes. Pre-judgment attachment/seizure of assets is allowed in several Indian statutes, such as the Arbitration and Conciliation Act, 1996 and the Civil Procedure Code, 1908. In the context of third party insurance, while it has not been specifically provided for in statute, the case law indicates that as a matter of practice, attachment/seizure of assets of the insured does take place.

a. Is attachment or seizure of an insurance payment allowed in full?

Yes, it is allowed in full.

b. Are the defence costs of the insured excluded from attachment and seizure?

Yes, the defence costs form part of the entire amount due and are not excluded from attachment and seizure.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Yes, except in the context of the Motor Vehicles Act, the Public Liability Insurance Act and the Workmen's Compensation Act.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

In general, the insurer is not required to take the interests of a third party into account when an insured requests payment under the insurance, with the exception of claims made by third parties.

a. Would a settlement between the insurer and the insured be binding on the third party?

In respect of claims under the Workmen's Compensation Act, the Motor Vehicles Act and the Public Liability Insurance Act, no.

b. If so, under what conditions?

In respect of claims under insurances other than Workmen's Compensation Act, the Motor Vehicles Act and the Public Liability Insurance Act, a third party is bound by a settlement unconditionally unless the third party has an independent cause of action or is able to claim other than through the insured.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No.

10. Is there anything else you would like to add that could be of interest to this project?

There has been some judicial activism in this field as regards motor accidents. In *National Insurance Co. Ltd. V Parvathneni & Anr*.[22] It was held that if the insurance company has no liability to pay at all, then it cannot be compelled by order of the

[22] 2009 CC 10993/2009

Court in exercise of its jurisdiction under Article 142 of the Constitution of India[23] to pay the compensation amount and later on recover it from the owner of the vehicle. In the court's opinion, Article 142 of the Constitution of India does not cover such type of cases.

When a person has no liability to pay at all it cannot be compelled to pay. It may take years for the insurance company to recover the amount from the owner of the vehicle, and it is also possible that for some reason the recovery may not be possible at all.

Hence, the Supreme Court bench hearing the matter directed that the papers of this case be placed before the Hon'ble Chief Justice of India for constituting a larger bench to decide these questions. But so far, no order or decision has been passed by the larger bench hearing this issue.

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[23] Article 142 of The Constitution Of India

(1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe.

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

INDONESIA

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

b. Only for specific types of parties (e.g. individuals/companies)?

c. Only for specific types of loss or damage?

d. Only for specific types of insurance?

e. Other? Only if it is agreed in the Policy.

No, Indonesian law does not allow a third party to claim directly under a liability insurance policy. This is not the case only if the insurance is a "Third Party Insurance" (*Asuransi untuk Kepentingan Pihak Ketiga).* Pursuant to Article 1340 of the Indonesian Commercial Code, a third party cannot benefit from an agreement if such benefit is not expressly conferred by the agreement, which includes an insurance policy entered into as a private agreement between the insurer and the insured.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No, direct access by a third party to claim under a liability insurance policy is not possible under any condition.

3. Can a third party initiate court proceedings against a liability insurer?

No, a third party cannot initiate court proceedings against a liability insurer. Pursuant to the Indonesian Commercial Code, any person committing a tort that causes loss and damage to another person is liable to indemnify such loss and damage. Therefore, in an act of tort, there is a legal relationship only between the tortfeasor and the injured party. If the tortfeasor has insurance coverage for liabilities arising from the tort, the insurer under the insurance policy is then obliged to indemnify the loss/damages of the insured/tortfeasor that was caused by the insured/tortfeasor. The insurer is only related to the tortfeasor under the insurance policy. In light of the above, it is not possible for a third party to initiate court proceedings against a liability insurer, since there is no legal relationship between them.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

N/A

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

N/A

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes, in accordance with Article 1340 of the Indonesian Commercial Code.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

No, coverage for a third party can only be established under Third Party Insurance (*Asuransi untuk Kepentingan Pihak Ketiga).*

b. If no, does the liability insurer have remedies or recourse against the insured?

N/A

5. Are there any further conditions for allowing a third party to have direct access?

N/A

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

A third party having a valid claim under an insurance policy will need to submit the claims under the insurance policy to the appointed bankruptcy receiver.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

No.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

Yes. Provided that such third party is a holder of fiduciary rights over insurance proceeds (under a policy).

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Yes, prejudgment attachment or seizure of assets is allowed in Indonesia's jurisdiction. However, a third party is not allowed to attached or seize an insured's claim against an insurer, except if the relevant insurance policy is a Third Party Insurance.

a. Is attachment or seizure of an insurance payment allowed in full?
This is at the judge's decision, which may vary in practice.

b. Are the defence costs of the insured excluded from attachment and seizure?
This is at the judge's decision, which may vary in practice.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?
Yes, the insurer allowed to defend itself against the attachment or seizure by denying coverage.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

No, they are not required to take the interest of a third party into account, except under Third Party Insurance (*Asuransi untuk Kepentingan Pihak Ketiga).*

a. Would a settlement between the insurer and the insured be binding on the third party?
No.

b. If so, under what conditions?
Please see answer number 8.a above.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No.

10. Is there anything else you would like to add that could be of interest to this project?

No.

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IRELAND

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

b. Only for specific types of parties (e.g. individuals/companies)?

c. Only for specific types of loss or damage?

d. Only for specific types of insurance?

e. Other?

Irish law does not allow a third party to claim directly under a liability insurance policy except in very limited circumstances. Under Irish law, in accordance with the common law principle of privity of contract, a contract cannot generally be enforced in favour of or against a person who is not a party to the contract. There is no Irish equivalent of the UK Contracts (Rights of Third Parties) Act 1999.

There are however certain exceptions to the privity rule which permit a third party to claim directly under an insurance policy. However, these exceptions are limited and do not apply to every type of insurance contract or every third party beneficiary of an insurance contract.

- Section 62 of the Civil Liability Act 1961

The most significant exception is section 62 of the Civil Liability Act 1961. Section 62 provides that where an insured who has a policy of liability insurance becomes bankrupt or dies (if an individual) or is wound up (if a company) or dissolved (if a partnership or other incorporated association), monies payable to the insured under the policy shall be applicable only to discharging in full all valid claims against the insured in respect of which those monies are payable, and no part of those monies shall be assets of the insured or applicable to the payment of debts. The monies are essentially ring-fenced to pay valid insurance claims.

While section 62 does not expressly confer a direct right of action on an injured party against a defendant's insurers, in the case of Dunne v. PJ White Construction Company (1989), Chief Justice Finlay, as he then was, expressed the view in the Supreme Court that it was an inevitable consequence of section 62 that a right of action in favour of the injured third party is created, with the qualification that this is a matter to be fully argued before it is finally determined. The claimant has the benefit of the presumption that the defendant's insurance policy was good. The onus of proving the existence of a right to rescind or

repudiate the policy lies with the insurers. For the protection afforded by section 62 to come into play, monies must have been payable to the insured under the policy of insurance. It is arguable therefore that the liability of the insured must first be established before the injured third party can have any claim in respect of the money, either against the insured, the liquidator or the insurers; however, this remains to be determined by the courts.

This is an issue that is most likely to arise in the area of professional indemnity insurance and in particular with regard to those professions that are known to be required to carry professional indemnity insurance. Where an insurer avoids or repudiates a policy of professional indemnity insurance (or any policy of liability insurance), and particularly where there is a risk of a large number or high value claims against the insured, consideration should be given to the possibility of a claim under section 62 and steps taken to minimise the insurer's exposure.

– Section 76(1) of the Road Traffic Act 1961

Under section 76(1) of the Road Traffic Act 1961, a claimant in a road traffic accident can apply to court for leave to claim against the insurance company of the owner of the vehicle in lieu of claiming against the owner if the owner is not in the State, cannot be found or there is otherwise a just and equitable reason for granting the application. The onus is on the third party claimant to establish the existence of an indemnity as a matter of contract between the insured and the insurer. Section 76(1) can only be invoked in respect of claims against liability for which compulsory insurance is statutorily mandated.

– Section 7 of the Married Women's Status Act 1957

Section 7 provides that a policy of life assurance or endowment expressed to be for the benefit of, or by its express terms purports to confer a benefit upon, the spouse or child of the insured, is enforceable by that spouse or child by way of a statutory trust.

– The law of trusts

Under the law of trusts, a beneficiary can in certain circumstances enforce the rights of the trust against an insurer. The beneficiary has the burden of proving that the trust exists. The beneficiary must also be able to show that the beneficiary is entitled to the benefit of the policy by proving "more than a reasonable expectation" that the beneficiary is to benefit (*Re Irish Board Mills Limited (in receivership) (1980)).*

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No. However, as set out above, the circumstances in which a third party can claim under a liability insurance policy are very limited.

3. Can a third party initiate court proceedings against a liability insurer?

As a matter of procedure, a third party can either join the liability insurer as a defendant to an existing action against the insured, or commence fresh proceedings against the insurer.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

Special conditions apply to applications under section 76(1) of the Road Traffic Act 1961 and are set out in Order 91 of the Rules of the Superior Courts 1986. Any application for an order against a vehicle insurer under this section must be brought by motion on notice in the action in which the claimant has recovered judgment, or if there is no such action, entitled in the matter of the Road Traffic Act 1961 and in the matter of the intended proceeding. Where the claimant has recovered judgment, the application must be brought within six months of the date of judgment (although this can be extended by the Court).

The identity of the insurer must be known by the claimant before court proceedings can be initiated; the Irish courts have recently refused in proceedings against an insured to order discovery of documents relating to the identify of the defendant's insurer for the purposes of bringing a claim under section 62 of the Civil Liability Act 1961.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

The participation of the insured is not required.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes, however, where the third party claim is brought pursuant to section 62 of the Civil Liability Act 1961, there is a presumption that the policy was good and the onus is on the insurer to establish that it was entitled to deny coverage.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

While this question has not yet been fully considered by the Irish courts, it would appear in principle that coverage could be established in the proceedings between the third party and the liability insurer. In practice this would be difficult as the third party will not have the necessary evidence and knowledge. This has led insurers who feel exposed to such claims to bring declaratory proceedings against the insured to confirm their entitlement to decline cover.

b. If no, does the liability insurer have remedies or recourse against the insured?

Not applicable.

5. Are there any further conditions for allowing a third party to have direct access?

In the context of section 62 of the Civil Liability Act 1961, it remains to be confirmed by the courts whether a judgment against the insured is required to be obtained prior to proceedings being brought against the insurer.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

Yes. Section 62 of the Civil Liability Act 1961 applies in the case of a bankrupt insured.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

Section 62 of the Civil Liability Act 1961 applies to third-party claims in the case of bankruptcy.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

The only protection in this context is section 62 of the Civil Liability Act 1961.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

a. Is attachment or seizure of an insurance payment allowed in full?

b. Are the defence costs of the insured excluded from attachment and seizure?

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

The US concept of prejudgment attachment is not in general a feature of Irish law. However, under section 1002 of the Taxes Consolidation Act 1997, the Irish Revenue Commissioners are empowered to attach monies due from third parties to individual or corporate taxpayers in discharge of that taxpayer's taxes, together with interest and penalties without the need to first obtain a judgment for the debt. The power of attachment under section 1002 applies to virtually any debt payable to the taxpayer. A relevant person for the purposes of attachment under this section is one who the Revenue Commissioners has reason to believe owes the taxpayer a debt. Revenue Guidelines for Attachment specifically refer to insurance companies as relevant persons. The Irish courts have not considered this section in the context of insurance payments, however, section 62 of the Civil Liability Act 1961 would operate to prevent the Revenue Commissioners from attaching monies in the circumstances applicable to section 62.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

There is no requirement under Irish law to take the interests of a third party into account.

a. Would a settlement between the insurer and the insured be binding on the third party?

From a privity of contract perspective, save in the limited circumstances permitted by law set out above, a settlement between the insurer and the insured would not be enforceable by a third party, or against a third party, unless the third party is a party to the agreement.

However, if the third party seeks to proceed against the insurer in the circumstances permitted by section 62 of the Civil Liability Act 1961, it is likely that the third party would be bound by any prior settlement agreed between the insurer and the insured, in the same way as the third party would be bound by a valid declinature or avoidance by the insurer. It is common practice in this jurisdiction for insurers to bring declaratory actions against an insured to avoid the difficulties which section 62 brings to insurers. The court order is enforceable against a third party.

b. If so, under what conditions?

Not applicable.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No.

10. Is there anything else you would like to add that could be of interest to this project?

In the current economic climate, many plaintiffs find themselves in a situation where, if successful in litigation, the outcome will be a paper judgment against an insolvent defendant. .Consequently, third party rights, in particular in the context of section 62 of the Civil Liability Act, which provides a possible means of recovery if an insolvent defendant was insured, are highly relevant and have become increasingly topical. The Law Reform Commission (LRC) has recently published a consultation paper on Insurance Contracts and it is likely that this area of law will be subject to reform in the coming years. The LRC considered the law in relation to third party rights in the context of insurance contracts and has made a number of recommendations in this area, however, it remains to be seen whether these recommendations will be implemented by the legislature.

In particular, the LRC recommended the following:

- section 62 of the Civil Liability Act 1961 should be extended to allow a third party to proceed against the insurer where an insured cannot be found;
- a third party beneficiary under a contract of insurance should be defined in legislation as a person who is not a party to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of insurance cover provided by the contract extends;
- third party beneficiaries should not be able to invoke good faith obligations which should be owed only to contracting parties;
- a third party should be able to directly enforce the provisions in a contract when the term expressly confers a benefit on the third party or the contract expressly states that they may; and
- a third party should have a right to rely on a term of contract which excludes or limits the liability of a third party, provided that was the intention of the parties.

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ISRAEL

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

b. Only for specific types of parties (e.g. individuals/companies)?

c. Only for specific types of loss or damage?

d. Only for specific types of insurance?

e. Other?

Section 68 of the Israeli Insurance Contracts Law - 1981 (**Insurance Contracts Law**) allows a third party to bring a direct action against the liability insurer of the tortfeasor and to claim full compensation. The law does not limit this right to specific types of parties, loss or insurance.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

The third party's right to file a direct claim against the liability insurer is not conditioned on the existence of an insurance claim made by the insured. However, according to the Insurance Contracts Law, if the liability insurer intends to pay insurance benefits to the third party, it must notify the insured 30 days in advance of its intention in order to enable the insured to object to the payment.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

Israeli law enables a third party to initiate court proceedings against a liability insurer. The law does not impose specific conditions on the initiation of such proceedings. However Israel legal scholars dispute whether court proceedings can be initiated by the third party only against the insurer without the participation of the insured (S. Veler, *Insurance*, Vol. 2, p. 369).

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

b. If no, does the liability insurer have remedies or recourse against the insured?

According to the Insurance Contract Law, "any argument which the insurer has against the insured shall be valid also towards the third party". Accordingly, the insurer is allowed to defend itself against the third party by denying coverage, and coverage can be established in the proceeding between the third party and the liability insurer.

5. Are there any further conditions for allowing a third party to have direct access?

No.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

According to section 69 of the Insurance Contracts Law, in the event of the bankruptcy of an insured, the insured's rights towards its liability insurer will be transferred to the third party and will not become part of the bankruptcy assets which are divided among the insured's creditors.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

a. Is attachment or seizure of an insurance payment allowed in full?

b. Are the defence costs of the insured excluded from attachment and seizure?

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Prejudgment attachment is allowed in the Israeli jurisdiction, so accordingly a third party is allowed to attach an insured's claim against the insurer. There are no limitations on a third party's rights to seek such attachments on the insured's rights towards the insurer, including the right to defence costs. Nevertheless, the insurer can defend itself by denying coverage.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

a. Would a settlement between the insurer and the insured be binding on the third party?

b. If so, under what conditions?

There are no Supreme Court precedents referring to the insured's right to reach a settlement with its liability insurer and to whether such agreements may be binding on the third party. Discussions of this issue in the lower courts (whose rulings do not set binding precedents) have reached contradicting conclusions. For example, in a court ruling handed down by the Magistrate Court of Tel Aviv the judge stated that an insured is entitled to reach a settlement with its liability insurer, and that such settlement will bind the third party as well (C.C. 49562/95 Dolev Insurance Co. v. Yishaayahu Shwartz). On the other hand, in a recent judgment handed down by Haifa District Court, the court ruled that an insurer and an insured cannot reach an agreement which prejudices the third party's right to recover its damages directly from the insurer (C.A. 2411-07-11 Tel Or v. Sando Boyon).

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

The Motor Vehicle Insurance Ordinance - 1970, which imposes a mandatory duty to insure liability for physical damage resulting from the usage of a motor vehicle, provides that the third party's right to recover from the driver's liability insurance depends on the existence of a court judgment against the driver. According to Supreme Court precedent, this provision does not limit the third party's right to initiate court proceedings against the insurer together with the driver, even if no judgment has yet been handed down against the driver (C.A. 33/54 Commercial Union v. Sher, PD 8 427).

10. Is there anything else you would like to add that could be of interest to this project?

In June 2011 new directives issued by the Commissioner of Insurance concerning claim-handling procedures came into force. The new directives included several provisions intended to improve the services granted by insurance companies to insureds and to third parties.

For example, according to the directives, if a third party approaches an insurer and requests information regarding the existence of the liability insurance of a certain insured, the insurer must provide the requested information within 14 business days. In addition, if the third party demands that the insurer pay insurance benefits, the insurer must notify the insured of this demand within seven days, and notify the insured that if it does not object to the payment the insurance benefits will be paid to the third party 30 days afterwards.

The above directives reflect the fact that Israeli law treats a third party's rights against an insurer as an important matter.

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MALAYSIA

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

The general rule is that insurance taken out by an insured is essentially a contract between the policyholder and the insurer. The English common law doctrine of privity of contract as enunciated in the House of Lords decision of Dunlop Pneumatic Tyre Co. Ltd v Selfridge & Co. Ltd. [1951] AC 847 has been approved and applied in Malaysia. (See notably the advice of the Privy Council in Kepong Prospecting Ltd. & Ors v Schmidt [1968] 1 MLJ 170). Therefore, only the insured may bring a claim directly under a liability insurance policy, except under construction or motor insurance policies as indicated under sub-paragraph (d) below.

a. Fully?

Yes, but only in the case of motor insurance.

b. Only for specific types of parties (e.g. individuals/companies)?

In the case of motor insurance, the case law indicates that third party individuals only may have a direct claim under a liability insurance policy on the basis of public policy, although it is a moot point whether this may be extended to companies as well.

c. Only for specific types of loss or damage?

In the case of motor insurance, no distinction is made between the types of loss or damage that needs to be occasioned in order for a claim to be made by a third party.

d. Only for specific types of insurance?

An exception to the principle of privity of contract detailed above concerns motor insurance.

Another established category where third parties not privy to the contract of insurance may bring a direct action against the insurer is in construction policies, particularly involving contractors and sub-contractors. Where a contractor takes out insurance, it has been held that the sub-contractors too have direct and full access against the insurer. (see Petrofina (UK) Ltd. v Magnaload Ltd. [1983] 2 Lloyd's Rep. 91).

e. Other?

In Pacific & Orient Insurance Co. Sdn Bhd. v Lim Sew Chong & Anor [1985] 2 MLJ 60, the plaintiff had taken out insurance in his deceased father's name. The subject matter insured was his late father's lorry. When the lorry was damaged, the insurer sought to avoid liability and the plaintiff brought an action to recover

the insurance proceeds. The Federal Court noted that the plaintiff had a direct cause of action against the insurer, despite the fact that the policyholder (i.e the father) was not a party in the proceedings. The Court reasoned that the plaintiff had acted as an executor de son tort and thus had sufficient "insurable interest" in the subject matter insured.

In group employee policies, the third party employees have no direct access against the insurer even where the employer expresses that the policy is for the benefit of the employees. This is due to the doctrine of privity of contract (see above). However, where the employer is declared a trustee and the policy states that the employer will hold any insurance proceeds for its employees as beneficiaries, then the third party employees will have a direct cause of action against the insurer for the insurance proceeds. (See the High Court decision of GR Nair v Eastern Mining & Metals Co. Sdn Bhd. [1974] 1 MLJ 176.) In such cases, the employer acts as a bare trustee for the employee beneficiaries and the employees would be placed in the same position as the employer, having the rights and obligations that the employer would have had.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No claim may lie against the insurer by a third party, notwithstanding the existence of a claim by the insured against the insurer. The third party may only bring an action against the insured in respect of the loss and damage suffered in tort. In QBE Insurance Ltd. v Thuraisingam [1982] 2 MLJ 62, Wong Kim Fatt JC noted:

> The third party at common law may only sue the insured for tort or breach of duty of care, if any, and, although the insurers have undertaken to indemnify the insured, the third party in the present appeal has no right of action against them.

Again, an exception is made for motor insurance. In motor insurance cases, there is no prerequisite that a claim be made by the insured. The third party's claim is independent of the insured's claim.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

A third party may initiate court proceedings against an insurer under a motor insurance policy, and no specific conditions have been set as a prerequisite for such proceedings by the Court. It was observed by the Malaysian Supreme Court in Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165 that the purpose of compulsory motor insurance against third party risks in

Malaysia was to ensure that innocent third parties who are injured in vehicular accidents are given full and effective protection, regardless of the private insurance arrangement between the insurer and the insured.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

As outlined above, the proceedings between the third party and the insurer is independent of the insured's participation. In fact, the third party is actually in a better position compared to the insured in the proceedings, as has been observed by Ong Hock Thye CJ in New Zealand Insurance Co. Ltd. v Sinnadorai [1969] 1 MLJ 183, on the basis that the insured is bound by the policy and the contractual terms therein in respect of its claim, but no such restriction applies to a third party.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

The insurer in a motor insurance policy would be very hard pressed in finding a way to deny coverage. Both under common law and in statute, it is well entrenched that terms and conditions contained in the policy will not bind or bar the claim of a third party. Section 95 of the Malaysian Road Transport Act 1987 ("**RTA 1987**") provides very extensive grounds on which the insurer may not rely on to avoid liability. Similarly, it is a common term in most motor insurance policies that an insured must bring an action against the insurer within a certain time frame or the insured's claim would be time barred. Whilst this term would bar the insured's claim out of time, it would not bar a claim by a third party. (See section 94 of the RTA 1987 and Revell v London General Insurance Co. Ltd. [1934] All ER Rep. 744).

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

N/A

b. If no, does the liability insurer have remedies or recourse against the insured?

Yes, the insurer in a motor insurance policy has a recourse because it may in turn require the insured to repay the monies that it had paid out to the third party. This is found in the proviso to section 94 of the RTA 1987 and appears to be a formal statutory requirement that an insurer must have in place in its policy a term to require the policyholder to repay to the insurer the compensation which the insurer has been legally obliged to pay to a third party under the section.

5. Are there any further conditions for allowing a third party to have direct access?

No, there are no further conditions. For completeness, it is noteworthy that an insurer will often reserve the right to handle claims brought by a third party against an insured. In addition, the policy would also usually impose a duty on an insured not to make any admission of liability to a third party. Graham Rogers J in Terry v Trafalgar Insurance Co. Ltd. [1970] 1 Lloyd's Rep. 524 upheld the aforesaid term despite a challenge made that the term is contrary to public policy.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

No, there are no such specific rules for third party claims in the case of bankruptcy, except in the case of housing insurance policies. Under such policies, a third party may bring a direct action against the insurer in the event the insured becomes insolvent, though in Normid Housing Association Ltd v Ralphs [1989] 1 Lloyd's Rep. 265, the Court held that the third party is only entitled to succeed on the rights of the insured AFTER the insured becomes insolvent. This turned on the interpretation of the terms of the policy itself and is persuasive authority in Malaysia.

Under section 100 of the RTA 1987, the rights of the third party to claim under a motor insurance is preserved notwithstanding the solvency (or otherwise) of the insured.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

A third party would be estopped from claiming directly under an insurance policy primarily on the basis of the doctrine of privity of contract. Whilst the bankruptcy of the insured would undoubtedly prejudice the rights of the said third party, no protection is made available to the third party since it has no contractual interest in the underlying policy. This is unless the policy is expressly made subject to the interests of the said third party or purportedly confers a benefit on this third party.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Yes, prejudgment attachments and seizures of assets are provided for under section 19 of the Debtors Act 1957. Prejudgment attachments and seizures are also allowed by the common law under Mareva injunctions and Anton Piller orders.

a. Is attachment or seizure of an insurance payment allowed in full?
Yes, it is.

b. Are the defence costs of the insured excluded from attachment and seizure?
The defence costs of the insured may be excluded from attachment and seizure at the discretion of the Court under section 20 of the Debtors Act 1957.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?
As prejudgment attachments and seizures are often a form of interim remedy pending full resolution of the subject dispute at hand, the threshold is often quite low and denying coverage on its own, without more, would rarely be adequate.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

a. Would a settlement between the insurer and the insured be binding on the third party?
Generally, in a motor insurance policy, a settlement between the insurer and the insured would not bind the third party. The third party would always stand in a better position than the insured in this way. (See the New Zealand Insurance case above).
Furthermore, in the case of motor insurance, under section 99 of the RTA 1987, no settlement between the insurer and the insured can defeat or affect the rights of a third party. The section states : "...no agreement made between the insurer and the insured after liability has been incurred to a third party...shall be effective to defeat or affect the rights transferred to the third party". Under section 101 of the RTA 1987, the third party must be made a party to such a settlement or the settlement would not be valid.
Conversely, in Kitchen Design & Advice Ltd v Lea Valley Water Co. [1989] 2 Lloyd's Rep. 221, which involved the insurance of business premises, a settlement was concluded between the insurer and the third party. It was held

that the third party was protected against possible suits by the insured as the court deemed the insurer an agent of the insured. This case is persuasive authority in Malaysia.

b. If so, under what conditions?

Not applicable

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No.

10. Is there anything else you would like to add that could be of interest to this project?

No.

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NETHERLANDS

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

Under Dutch law, a third party does not have a general right to claim directly under a liability insurance policy. There are, however, exceptions to this rule, as set out below.

b. Only for specific types of parties (e.g. individuals/companies)?

Please see the answer to the next question

c. Only for specific types of loss or damage?

Article 7:954(1) of the Dutch Civil Code ("**DCC**") states:

> Where, in the case of an insurance against liability, the insurer is notified pursuant to article 7:941 DCC of the materialization of the risk, the injured party may demand, if the insurer is liable to make a payment, that the amount which the insured may claim on account of the loss of the injured person as a result of death or personal injury be paid to him

At first sight, this provision appears to imply that only an injured individual can claim directly from the insurer. However, it has been argued in the Dutch legal literature that if another individual or legal entity pays the medical costs (or funeral costs) of an injured individual, this loss could be claimed under article 7:954(1) of the DCC.

On this basis, an employer could possibly even claim reimbursement of wages paid to the injured individual during his or her incapacity. There is however no case law on this issue. This provision grants a third party the right to claim payment, but this does not entail a transfer of all of the insured's rights and obligations under the insurance to the injured party. The third party is merely allowed the right to demand payment from the insurer, i.e. specific performance by the insurer of the insurance agreement between the insurer and the insured.

The right to claim payment is not transferable, and it does not apply to the extent the injured person is indemnified or to the extent an independent right of indemnification for his loss against the insurer is vested in him by law. This implies that another insurer having recourse cannot demand payment on the basis of article 7:954(1) of the DCC.

d. Only for specific types of insurance?

Article 7:954 of the DCC applies to all types of non-mandatory liability insurance agreements entered into by individuals and legal entities.

With respect to motor vehicle insurance, liability insurance being mandatory under Dutch law, a specific provision applies, i.e. article 6 of the Motor Vehicles Liability Insurance Act ("**WAM**"). Pursuant to this provision, a third party has a direct claim against the insurer in the case of personal injury or property damage.

Also, article 55 of the Flora and Fauna Act allows third parties suffering loss arising out of hunting rifle accidents to claim directly from the insurer covering this type of damage in the context of the hunter's insurance.

Under the WAM and the Flora and Fauna act, the third party has an independent right of indemnification, instead of merely the right to demand payment.

e. Other?

For the purpose of this project, this contribution focuses on the right to claim payment pursuant to article 7:954 of the DCC.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

Under article 7:954 of the DCC, a third party can claim directly from the insurer only if the insurer has been notified by the insured of the materialized risk. The insured is obliged to notify the insurer of the materialization of the risk as soon as reasonably possible.

However, for purposes of long-tail risk, an exception applies if the insured is a legal entity that has ceased to exist. In this event, if the obligation to indemnify the injured party has not been transferred to someone else, the injured party may demand payment without prior notification.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

Under article 7:954 of the DCC, an injured third party is entitled to take legal action to secure payment, including by initiating court proceedings against the liability insurer. The liability of the insured party can be established in such proceedings. However, the injured party is only allowed to initiate court proceedings if the injured party ensures that the insured is summoned in time to be able to participate in the proceedings and represent its interest. This is pursuant to article 7:954(6) of the DCC. A judgment between the insurer and the injured party alone is binding on the insured only if the insured party was summoned timely.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes. Pursuant to article 7:954(1) of the DCC, only if the insurer is liable to make a payment may the third party demand payment. Therefore, the insurer may deny coverage as a way of defending itself against a third party.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes, but as stated above, the third party is obliged to summon the insured to join the proceedings against the insurer.

b. If no, does the liability insurer have remedies or recourse against the insured?

N/A.

5. Are there any further conditions for allowing a third party to have direct access?

No.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

No, the bankruptcy of an insured does not impact the possibility of a third party claiming directly under an insurance policy.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

Yes, the third party's claim for damages is a preferential debt in the bankruptcy of the insured. Under article 3:287(1) of the DCC, it is preferential with respect to the insured's claim on the insurer to indemnify the insured with respect to the loss and damage that the insured inflicted on the third party. The claim of the third party has priority over all other creditor claims with respect to the insured's claim against the insurer. With respect to the other assets of the insured, the third party's claim is a non-preferential debt.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

a. Is attachment or seizure of an insurance payment allowed in full?

Yes, article 718, read in conjunction with article 475, of the Dutch Code of Civil Procedure allows the prejudgment seizure of an insured's claim against the insurer.

b. Are the defence costs of the insured excluded from attachment and seizure?

Dutch courts have ruled that defence costs are not excluded from prejudgment seizure. However, in the case of prejudgment seizure, an insured could be unable to mount a defence because of financial restraints. If that were the case in proceedings to lift the attachment, it would not be unlikely for the balance of interests to shift towards the insured. In that case, a judge may very well rule that the outcome of weighing these various interests is that the seizure has to be lifted. This would depend on all the other circumstances of the case as well. It is noted that there is only limited lower-court case law on this point.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Yes, the insurer is allowed to defend itself by denying coverage.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

Yes, in the case of death or personal injury. Article 7:954(3) of the DCC provides that if an insured requests payment under the insurance, but the third party has not yet requested payment, the insurer cannot indemnify the insured and be discharged of

its obligation against the third party, unless four weeks have passed after the insurer requested the third party to notify him whether the third party will exercise his right. The insurer may also pay the insured if the third party has waived his right to request payment.
This rule does not apply in the case of other loss or damage, but it is noted that special rules apply under the WAM and the Flora and Fauna Act.

a. Would a settlement between the insurer and the insured be binding on the third party?

b. If so, under what conditions?
As stated above, in the case of death or personal injury, payment to the insured will discharge the insurer only if the insurer has unsuccessfully requested the injured person to inform the insurer within four weeks whether the injured person is exercising or waiving such a right (article 7:954(3) DCC).
In the case of other loss or damage, a settlement between the insurer and the insured would be binding on the third party, except under the WAM and the Flora and Fauna Act.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No.

10. Is there anything else you would like to add that could be of interest to this project?

No.

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NEW ZEALAND

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Yes. In appropriate circumstances, a third party may claim directly under a liability insurance policy. By s. 9 of the Law Reform Act 1936 (**Act**), if the insurance policy indemnifies the insured against liability to pay any damages or compensation, the amount of the insured's liability to the third party will be a charge on all insurance money that is or may become payable in respect of that liability. The charge arises at the time of the event giving rise to the claim against the insured, regardless of whether the amount of liability has been determined at that time.[24] The charge is enforceable by way of an action against the insurer.[25]

a. Fully?

The charge is enforceable against the insurer in the same way as if the action were to recover damages or compensation from the insured.[26] The full amount of the claim may be charged up to a maximum of the whole of the unexhausted policy limit at the date when the event takes place (ie the claimant cannot recover a greater sum than that recoverable by the insured).[27]

b. Only for specific types of parties (e.g. individuals/companies)?

The entitlement to enforce the charge is not restricted to certain classes of parties.

c. Only for specific types of loss or damage?

The Act expressly contemplates "damages" or "compensation".[28] The term "damages" is likely to cover all types of damages, including exemplary and punitive damages, amounts payable under a settlement of a claim for breach of contract or tort, and amounts payable by way of a contribution or indemnity to another wrongdoer. It does not cover amounts payable as “had and received” or amounts payable under a statute.[29] "Compensation" is said to cover a wider range of liabilities than "damages" in light of the broad meaning of compensation: "to make up for, or counterbalance".[30]

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[24] s. 9(1), Law Reform Act 1936 (NZ).

[25] s. 9(4), Law Reform Act 1936.

[26] s. 9(4), Law Reform Act 1936.

[27] *American Home Assurance Company trading as Chartis v Houghton*, High Court, Auckland, CIV-2011-404-7152, 2 December 2011, Rodney Hansen J. This proceeding was transferred to the Court of Appeal to be heard in conjunction with the appeal in the *Steigrad* matter referred to below.

[28] s. 9(1), Law Reform Act 1936.

[29] *Kelly & Ball, Principles of Insurance Law* at [14.0040.5].

[30] *Ruscoe & Anor v Canterbury Policy Holders* (2011) 9 NZBLC 103, 483, [2012] 2 NZLR 438 at [13].

d. Only for specific types of insurance?

A third party claim against the insurer is only sustainable if the insurance policy indemnifies the insured against "liability to pay any damages or compensation".[31]

e. Other?

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No. The charge is created (and therefore enforceable) immediately upon the happening of the event giving rise to the claim[32]—regardless of whether the insurer has received or accepted a claim from the third party or the insured. Whilst it is not mandatory for the insured to have claimed against the insurer before the charge arises or before a third party can initiate its claim[33], the claimant will need to establish that the insured is entitled to cover in respect of the insured's liability to the claimant in order to enforce the charge (see below).

3. Can a third party initiate court proceedings against a liability insurer?

Yes. The charge is expressly enforceable by way of action by the third party against the insurer in the same way, and in the same court, as if the action were to recover damages or compensation from the insured.[34]

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

In some cases, the claimant will require leave of the court before it is able to initiate court proceedings directly against an insurer. The only circumstance in which leave is not required is when the insured is insolvent on the happening of the event giving rise to the claim for damages or compensation.[35] To grant leave, the court must be satisfied that: (i) the third party has a prima facie claim against the insured; (ii) the insured has a prima facie claim under the insurance policy; and (iii) the insured is not a "perfectly good common law defendant" (ie there are doubts as to the insured's capacity to meet the claim).[36]

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[31] s. 9(1), Law Reform Act 1936.

[32] s. 9(1), Law Reform Act 1936.

[33] *Steigrad v BSFL 2007 Limited* (2011) 16 ANZ Insurance Cases 61-910 at [28]. An appeal against this decision has been lodged.

[34] s. 9(4), Law Reform Act 1936.

[35] *Chow v Thomson*, High Court, Auckland, CIV-2009-404-4865, 15 March 2012, Peters J at [12].

[36] *Chow v Thomson* at [13].

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

It is not necessary for the insured to participate in proceedings instigated by a third party. However, the practical reality of establishing the necessary criteria to prove a claim may be more onerous in proceedings where the insured is not involved.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes. A liability insurer can defend a third party claim by denying coverage under the insurance policy. Where the insurer establishes that it is entitled to disclaim liability under the policy or where there is a vitiating factor in its formation, no charge will exist.[37]

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Coverage can be established in proceedings between the third party and the liability insurer in various ways (eg the insurer could accept the claim of cover, or the third party could establish coverage in proceedings taken against the liability insurer directly under the Act).

b. If no, does the liability insurer have remedies or recourse against the insured?

N/A.

5. Are there any further conditions for allowing a third party to have direct access?

Under the statutory scheme, where an injured third party can and does claim directly against an insurer, the parties have the same rights and liabilities as if the third party had sued the insured.[38] The third party is therefore subject to the same limitation period as would have applied had the proceedings been against the insured rather than against the insurer. The limitation period runs from the date of the event giving rise to the insured's liability to the third party.[39]

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[37] *Steigrad* at [30].

[38] s. 9(4), Law Reform Act 1936. Note also the requirements explained above.

[39] *Laws of New Zealand* at [477].

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

Yes. The statutory direct recourse regime is intended to operate primarily when the insured is insolvent.[40] The statutory charge survives any insolvency, bankruptcy or winding up of the insured, provided that the insolvency commenced "not later" than the happening of the event giving rise to the claim.[41]

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

Leave Requirements: If the insured is insolvent on the happening of the event giving rise to the claim, the third party will not be required to obtain leave from the court before initiating proceedings under the Act. In all other circumstances, leave will be required.

Priority of Claims: The Act alters the priority of claims against the assets of such an insured by removing the monies payable under the insurance policy from the pool of funds available to meet debts owing to the other creditors of the insured.[42] Every charge created by the Act has priority over other types of charges affecting the insurance money. Where the same insurance money is subject to two or more charges under s. 9 of the Act, those charges are prioritised between themselves in the order of the dates of the events out of which liability arose.[43]

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

If a third party cannot claim directly under an insurance policy, it may still be able to prove in the insured's bankruptcy or liquidation. In New Zealand a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation[44] or individual in bankruptcy[45]—provided that the debt or liability arose prior to the insured's insolvency. If the third party is an unsecured creditor, its claim will rank equally with other unsecured creditor's claims and behind any secured creditor's claims.

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[40] *Ludgater Holdings Limited v Gerling Australia Insurance Co Pty Limited* [2010] 3 NZLR 713 at [21], Supreme Court.

[41] s. 9(2) and (4), Law Reform Act 1936.

[42] *Steigrad* at [23].

[43] s. 9(3), Law Reform Act 1936.

[44] s. 303, Companies Act 1993.

[45] ss. 231 and 232, Insolvency Act 2006.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

While prejudgment attachment or seizure of assets may be permitted in New Zealand in certain circumstances, the charge created by s. 9 of the Act protects third parties' claims in this context and it is not likely to be necessary for a third party to separately apply to attach or seize an insured's claim against the insurer.

The following responses are given in the context of enforcing a charge under s 9 of the Act and do not relate to prejudgment attachment or seizure of assets:

a. Is attachment or seizure of an insurance payment allowed in full?
See paragraph 1(a) above. The charge created will be a charge on all insurance money that is or may become payable in respect of the insured's liability to the third party.[46] However no insurer is liable under the Act for an amount beyond the limits fixed by the insurance policy itself.[47]

b. Are the defence costs of the insured excluded from attachment and seizure?
This is a point of contention in New Zealand. In 2011, the High Court held that where an insurer has agreed to provide an indemnity against legal liabilities and defence costs and the maximum amount payable under the policy is a single aggregate limit, the amount charged is the whole of the unexhausted policy limit at the date when the event takes place.[48] The insurer and/or insured is therefore not entitled to prefer its defence costs over any amounts payable to the third party by reason of the charge.[49] The effect of this decision has caused concern within the insurance sector as it arguably means that, where the policy has a single aggregate limit for legal liabilities and defence costs (combined):
(i) unless there are sufficient funds available to satisfy the insured's maximum liability to the third party and meet any legal costs, any payments towards defence costs are voluntary on the part of the insurer;
(ii) to the extent that such payments of defence costs affect the amount recoverable by the third party from the insurer under the insurance policy, the insurer may be required to pay the amount of the defence costs payments into the pool (and thus effectively pay the amount twice); and

[46] s. 9(1), Law Reform Act 1936.
[47] s. 9(7), Law Reform Act 1936.
[48] *Steigrad.* See also *American Home Assurance Company (Chartis)* at [2].
[49] *Steigrad* at [60].

(iii) given that the charge is enforceable notwithstanding that the claim may not yet have been quantified, claimants may be encouraged to overstate their claims at the outset in an attempt to prevent the insured from having defence costs paid by insurers.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

See paragraph 4 above.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

The statutory charge arises upon the happening of the event regardless of whether the insurer has accepted the claim. The charge created by the Act is designed to prevent an insured from receiving and disbursing the proceeds of an insurance claim for purposes other than satisfying the liability in respect of which the insurer made the payment. The charge also prevents an insured from entering into a corrupt bargain with the insurer that would frustrate the claimant's ability to gain access to the monies payable under the policy held by the insured.[50] However, any payment made by the insurer under the contract of insurance without actual notice of the charge shall, to the extent of that payment, be a valid discharge to the insurer.[51]

a. Would a settlement between the insurer and the insured be binding on the third party?

It is unlikely that a settlement between the insurer and the insured would be binding on the third party (unless the third party was a party to the settlement). The third party is entitled to claim against the insurer to the full extent of the third party's loss (capped at the maximum payable under the policy). If the insurer settled with the insured without actual notice of the charge, the insurer may be released from any claim by the third party to the extent of that settlement; however, the insurer would likely still be liable for any additional insured loss within the policy limits that is proved and payable.

b. If so, under what conditions?

N/A.

[50] *Steigrad* at [24].

[51] s. 9(6), Law Reform Act 1936.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

N/A.

10. Is there anything else you would like to add that could be of interest to this project?

- **Origins, nature of charge, and extraterritoriality issues**
  The Supreme Court decision in Ludgater v Gerling [2010] 3 NZLR 713 contains a helpful explanation of the historical origins of the statutory regime, the adoption of the New Zealand regime in parts of Australia (in slightly modified form), and the nature of the charge. It also addresses the question of whether the Act had extraterritorial effect. The Supreme Court held that s. 9 of the Act had to be interpreted in accordance with the rules of private international law, and did not apply where the situs of the obligation (if any) of the insurer under the insurance policy was outside New Zealand and any such obligation was governed by foreign law. The New Zealand third party was not able to issue court proceedings in New Zealand to enforce a charge claimed under the New Zealand legislation over any money payable in Australia by an Australian insurer (not registered in New Zealand) to an insolvent Australian insured under a policy entered into in Australia.

- **Impact of statutory regime where liability and defence costs indemnities are subject to the same aggregate limit**
  Steigrad v BSFL (2011) 16 ANZ Insurance Cases 61-910 has highlighted the effect of the statutory regime—particularly where policy indemnities for both liability and defence costs are subject to the same aggregate limit. An appeal to the Court of Appeal has been lodged. The appeal in the Steigrad matter is due to be heard in conjunction with the application for a declaration as to the effect of the statutory charge in American Home Assurance Company (Chartis) v Houghton.

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NIGERIA

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Generally, a third party cannot claim directly under an insurance policy. A person has to be a party to an insurance contract before that person could enforce the contract for his or her right to any benefits under it.

It is, however, allowed in the case of specific types of loss or damage.

Under the Motor Vehicles (Third Party Insurance) Act 1950 Cap M22 LFN, 2004, certain steps are prescribed to ensure that third parties who obtain judgments against an insured are not prejudiced by settlements between an insured and an insurer, in the event of death or bodily injury.

In addition, under the Motor Vehicles (Third Party Insurance) Act 1950 Cap M22 LFN, 2004, there is a statutory obligation to pay out the judgment sum (including costs and interests) notwithstanding the fact that the insurer may be entitled to avoid or cancel the policy.

A similar rule exists in relation to mandatory insurance. Section 69 of the Insurance Act 2003 provides as follows:

> (1) Where-
> (a) civil proceeding are taken in respect of any claim relating to any risk required to be insured against under this Act or any other law; and
> (b) a judgment is obtained against the person insured then, notwithstanding that the insurer be entitled to avoid or cancel or may have avoided or cancelled the policy,
>
> the insurer shall, subject to this section, pay to the person entitled to the benefit of such judgment the sum payable (including costs and interest sum) not later than 30 days from the date of delivery of the judgment.

In addition, it is noted that in project finance transactions, lenders usually insist on a 'cut-through' clause in an insurance policy taken out by the borrower. Such a clause gives the lender the right (in accordance with the terms of the insurance provision) to claim as a loss payee if the target projects or security interests are destroyed. It is however doubtful whether such a cut-through clause can be enforced, as in practice such a claim has never arisen. Possibly, Nigerian courts would treat such insurance

as a joint interest policy rather than a single party contract for the benefit of a third party.

a. Fully?

Once the conditions set out above have been fulfilled, then a Third Party can fully recover to the extent of the judgement sum and other associated cost and interest.

b. Only for specific types of parties (e.g. individuals/companies)?

The Acts stated above apply to individuals and incorporated limited liability companies.

c. Only for specific types of loss or damage?

In respect of the Motor Vehicles (Third Party Insurance) Act, it is restricted to bodily injury or death; while in respect of Insurance Act, there is no restriction on the type of loss or damage.

d. Only for specific types of insurance?

Motor vehicle insurance and mandatory insurance are treated differently from other types of insurance policies. In the case of a judgment obtained against the insured which thus confers the right on the Third Party to claim on the insurer, the Insurance Act, 2003 applies to all the types of insurance covered by the Act. (Note: the philosophy behind it is to assure the sceptical insurance public about faithful compensation payment and to prevent unethical practices of insurance companies who were, hitherto, reluctant to meet the obligations to the insuring public on mostly technical grounds).
See section 69 of the Insurance Act 2003 quoted above.

e. Other?

Apart from the above, third parties cannot claim directly under liability insurance under Nigerian law.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

In the case of motor vehicle insurance and mandatory insurance, the third party does not need to wait until the insured make a claim against his insurer. There is however a need for the third party to establish liability of the insured before proceeding against the insurer.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

Judgment must first be obtained against the insured before a recourse is had to the liability insurer and not otherwise. See the explanation above.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

A third party cannot successfully enforce an insurance contract or the third party's right to any benefit under it, with the exceptions set out above. With respect to motor vehicle insurance and mandatory insurance, the liability of the insured is required to be established first before the third party can have a recourse to the insurer. Once the liability of the insured is established, proceedings against the insurer can be initiated without involving the insured in such proceedings.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

A liability insurer can only defend itself if a condition precedent to the claim is not fulfilled by the third party (e.g. notice of the action to the insurer or filing a suit outside the statutory time allowed).

Under section 10(2) of the Motor Vehicles (Third Party Insurance) Act the following defences can avail the insurer against the third party:

a. failure to notify the insurer of the action against the insured before or within 7 days of the commencement thereof;
b. a stay of the execution of the action against the insured pursuant to an appeal;
c. cancellation by mutual consent of the policy by the insurer and the insured, or surrender of the policy by the insured prior to the event giving rise to the liability; or
d. a court declaration of non-disclosure of material facts by the insured, obtained by the insurer in an action commenced by the insurer before or within 3 months of the action of the third party against the insured.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

The only coverage defence available would be non-disclosure of material facts by the insured. However, an insurer can only invoke such non-disclosure if a court declaration has been obtained by him. Therefore, at that stage, coverage

will have already been established. Consequently, there is in such case no need to establish coverage in the proceedings between the third party and the insurer.

b. If no, does the liability insurer have remedies or recourse against the insured?

This is a moot question. One would contend that the right of the insurer would then fall on the principles of deemed contract whereby non payment of premium (for example) could be recovered as a simple debt claim by the insurer against the insured.

5. Are there any further conditions for allowing a third party to have direct access?

It is reiterated that, generally, there is no direct access for third parties. In the exceptional cases of motor insurance and mandatory insurance, there are no conditions other than the conditions set out above.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

No. In the case of bankruptcy, third parties can still claim directly under a liability insurance policy, but only in case of motor vehicle insurance and mandatory insurance.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

Under section 11 of the Motor Vehicles (Third Party Insurance) Act, the rights of the insured under the applicable insurance policy are transferred to the third party in the case of (amongst other things) bankruptcy. This section provides as follows:

> (1) Where under a policy issued for the purposes of this Act a person, hereinafter referred to as the insured, is insured against liabilities to third parties which he may incur, then-
> (a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or
> (b) in the event of the insured being a company and a winding up order being made or a resolution for the voluntary winding up of the company being passed in respect of the company or a receiver or manager of the company's business or undertaking being duly appointed or in the event of possession being taken by or on behalf

of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge,

if either before or after either event any such liability is incurred by the insured his rights against the insurer under the policy in respect of that liability shall, notwithstanding anything in any written law to the contrary contained, be transferred to and vest in the third party to whom the liability was so incurred.

Other than this rule, no other specific rules apply.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

No. In the event of the insolvency of an insured, third party beneficiaries are treated as unsecured creditors, and will rank behind statutory and secured creditors.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

A Mareva action, a common-law remedy that freezes assets so that a defendant to an action cannot dissipate their assets from beyond the jurisdiction of a court so as to frustrate a judgment, is a remedy within the jurisdiction of the court under Nigerian law. This remedy could possibly be available to an insured with a claim against an insurer. However, this remedy may not be available to a third party since there is no privity of contract between the third party and the liability insurer.

Once a judgment is obtained against the insured, the third party may initiate so called garnishment proceedings, in which the third party can collect what is owed from the insured by reaching the insured's property in the hands of insurer.

Garnishment is similar to lien and attachment. Liens and attachments are court orders that give a creditor an interest in the property of the debtor. Garnishment is a continuing lien against the non-exempt property of the debtor. Garnishment is not, however, an attachment. Attachment is the process of seizing property of the debtor that is in the debtor's possession, whereas garnishment is the process of seizing property of the debtor that is in the possession of a third party.

a. Is attachment or seizure of an insurance payment allowed in full?

Only to the extent of the coverage, or to the extent of the judgment obtained against the insured, whichever is less.

b. Are the defence costs of the insured excluded from attachment and seizure?

No, defence costs are not excluded. The insured could however request special dispensation of the court.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Yes.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

No. Generally, neither the insurer nor the insured has an obligation to look after the interest of the beneficiary. However, the following exceptions will apply:

(i) the policy expressly provides for the interest of the beneficiary to be taken into account; or

(ii) the policy provides for notification to the third party of the claim made under the insurance by the insured by either the insurer and/or the insured, prior to payments made under the insurance; or

(iii) the policy names the third party as the loss payee.

b. Would a settlement between the insurer and the insured be binding on the third party?

Section 15(1) of the Motor Vehicles (Third Party Insurance) Act specifically provides as follows:

> No settlement made by an insurer in respect of any claim which might be made by a third party in respect of any liability as is required to be covered by a policy issued under the provisions of this act shall be valid unless such third is a party to such settlement.

If a direct action is made under another kind of insurance, a settlement may be binding. Reference is made to the answer to the next question.

c. If so, under what conditions?

Apart from the situation under the motor vehicle insurance, with respect to other insurance matters, settlements would be binding on the third party:

(i) If the settlement is reached pursuant to a court proceeding between the insurer and the insured; or

(ii) if the interest of the third party is served by the settlement.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

There is none other than the instances cited above.

10. Is there anything else you would like to add that could be of interest to this project?

It will interest you to note that insurance claims are usually not litigated in Nigeria due to cultural and religious beliefs. There is therefore a paucity of authority to rely on to buttress the responses above.

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NORWAY

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

b. Only for specific types of parties (e.g. individuals/companies)?

c. Only for specific types of loss or damage?

d. Only for specific types of insurance?

e. Other?

This is a question that must be considered by reference to the Norwegian Insurance Contracts Act 1989 (the "**ICA**"). The ICA sets out mandatory rules that are applicable to insurance contracts governed by Norwegian law. Among other things, the ICA grants a third party the right to direct action against an insurer. Section 7-6 of the ICA states as follows:

> *"When the insurance covers the liability of the Insured for compensation, the injured party may claim compensation directly from the Insurers. The Insurers and the Insured are under a duty to inform the injured party upon request whether liability cover exists.*
>
> *When a claim for compensation is advanced against the Insurers, they shall notify the Insured without undue delay and keep the Insured informed about the further handling of the claim. Any admissions by the Insurers to the injured party are not binding on the Insured.*
>
> *If legal action is brought against the Insurers they may request that the injured party claims against the Insured in the same action.*
>
> *The Insurers may raise those objections against the claim which the Insured has as regards the injured party. The Insurers may also raise their own objections against the Insured unless the objections are related to the Insured's circumstances after the insurance event occurred.*
>
> *An action against the Insurers under this section must be brought in Norway unless anything else follows from Norway's obligations under international law.*
>
> *The provisions of this section shall not preclude that a business trader in relation to the Insured waives the right to claim compensation for a business loss directly from the Insurers. Any such agreement will nevertheless not be legally enforceable in the event of the Insured's insolvency."*

The general rule is that the ICA is mandatorily applicable to all insurance contracts. However, there are some exceptions. It follows from section 1-3 of the ICA that insurance contracts relating to business operations of a certain size are generally not subject to the ICA. This means that the insured and the insurer may agree on terms in the insurance contract that depart from the provisions in the ICA.
Where insurance contract terms do not depart from the ICA, the ICA rules will "fill in the gaps" in the insurance contract. Therefore, if an insurance contract contains no provision expressly prohibiting direct action, such as a "pay to be paid" clause in marine insurance contracts, the direct action rules in the ICA will nevertheless apply.

The second paragraph of section 1-3 of the ICA provides that liability insurance in accordance with section 7-8 of the ICA will always be mandatory. Section 7-8 provides that the rules on direct action under section 7-6 (and under section 7-7 in relation to compulsory liability cover) are always mandatory where the insured is insolvent regardless of any express provisions to the contrary.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No, this is not required; cf. ICA section 7-6 above.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

Yes, please see below for clarification.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

No, please see below for clarification.

A third party can initiate court proceedings against a liability insurer and the participation of the insured is not required. There are no specific conditions; however, if a legal action is brought against the insurer, the insurer may request that the injured party bring the action against the insured in the same proceedings (see paragraph three of section 7-6).
In circumstances where an action is brought against the insured directly, the insurer may in most cases be joined to the action as a "helper" (in Norwegian, "*partshjelp*") under section 15-7 of the Norwegian Civil Procedure Act 2005 (the "**CPA**").
In any case, the insurer may be joined as a helper if this is approved by the defendant/insured.

If proceedings are brought against both the insured and the insurer, the two cases may be heard before the same court under section 15-2 of the CPA.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

The answer to this question is not a clear yes or no. Please see below for a clarification.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

b. If no, does the liability insurer have remedies or recourse against the insured?

As set out in paragraph four of section 7-6, an insurer may rely on the insured's defences to the claim. The insurer may also rely on a defence available under the insurance contract, provided such a defence is not based on the insured's breach of an insurance contract term after the insured event occurred. For example, if the insured fails to notify the insurer of the insured event, this is a defence that the insurer may not rely on against the injured third party.

If the insurance is compulsory under Norwegian law, the insurers' defences are regulated by section 7-7 of the ICA, which significantly reduces the defences available to direct action by third parties. According to this section, the insurer may not rely on the defences that they would have had against the insured under the insurance contract.

5. Are there any further conditions for allowing a third party to have direct access?

No.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

Yes, the bankruptcy of an insured impacts the possibility of a third party claiming directly under an insurance policy.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

Section 1-3 of the ICA provides that liability insurance in accordance with section 7-8 of the ICA will always be mandatory. Section 7-8 provides that the rules on direct action under section 7-6 (and section 7-7 in relation to

compulsory liability cover) are always mandatory where the insured is insolvent regardless of any express provisions to the contrary.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

[N/A]

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Yes, prejudgment attachment is allowed in Norway. The basic premise is that the third party may attach any assets belonging to the debtor. There are a number of rules limiting this right, but not with regard to claims under a liability insurance.

a. Is attachment or seizure of an insurance payment allowed in full?
Yes

b. Are the defence costs of the insured excluded from attachment and seizure?
No, money to be used for defence costs is not explicitly excluded from attachment.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?
An attachment may be laid in a claim that is conditional, provided that the claim is not too uncertain.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

As stated above, a third party's right to direct action under the ICA is not conditional on the insured's actions after the insured event has occurred.
According to section 7-6 of the ICA, the insurers and the insured are, on request, under a duty to inform the injured party whether liability cover exists.

a. Would a settlement between the insurer and the insured be binding on the third party?
No, a settlement between the insurer and the insured will not deprive the third party of this right.

b. If so, under what conditions?

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

There are a number of laws that give an injured third party a right to direct action. The most important is the Norwegian Merchant Shipping Act, which provides direct action to third parties in the case of oil and bunker pollution. There are also rules concerning direct action in the Motor Vehicle Liability Act and the Workers Compensation Act.

10. Is there anything else you would like to add that could be of interest to this project?

N/A

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POLAND

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

Yes, under article 822 § 4 of the Polish Civil Code, a person entitled to indemnity in connection with an event covered by a contract of third party civil liability insurance may vindicate claims directly from the insurer (*action directa*). Thus, in the case of any liability insurance contract, a third party that is entitled to indemnity may claim directly from the insurer.

b. Only for specific types of parties (e.g. individuals/companies)?

N/A

c. Only for specific types of loss or damage?

N/A

d. Only for specific types of insurance?

N/A

e. Other?

N/A

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

The claim of a third party entitled to indemnity is not conditional on any action by the insured. Thus, even in the absence of any activity by the insured, the third party may claim directly from the insurer if the third party establishes that the insured is covered by the liability insurance provided by the relevant insurer.

3. Can a third party initiate court proceedings against a liability insurer?

Yes, under the general rules of civil procedure, a third party can initiate court proceedings against a liability insurer.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

General rules of civil procedure, i.e. those that apply in ordinary court proceedings, will apply. The insurer "enters into" the legal situation of the insured; therefore, a third party can sue the insurer instead of suing the insured. The third party will need to prove that the loss or damage caused by the insured was insured under a liability insurance contract and that the claim is legitimate

(e.g. that the event causing the loss or damage is covered by the insurance, etc.).

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

In principle, the participation of the insured is not required; however, there may be cases where such participation will be necessary to establish the relevant facts of the case (e.g. the testimony of the insured may have an impact on the court judgment). In any case, the participation of the insured is not a formal requirement in the proceedings regarding liability insurance initiated by third party.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes, in principle, an insurer can defend itself on the basis of general rules and raise any justifiable objections concerning the coverage. It should be noted, however, that the insurer cannot raise any objections based on a breach by the policyholder or the insured of duties (either under the contract or the general insurance conditions) if the breach occurred after the insured event took place.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes, in fact, a third party would have to establish that the insured was covered by the insurance in order to successfully sue the insurer.

b. If no, does the liability insurer have remedies or recourse against the insured?

N/A

5. Are there any further conditions for allowing a third party to have direct access?

No, as stipulated above, there are no preliminary formal conditions for a third party to have a direct claim against the insurer, apart from establishing the existence of the liability insurance and the insurer that concluded this liability insurance.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

The answer to this question is not a clear yes or no. Please see below.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

With regard to compulsory insurance coverage, Polish law expressly provides that the bankruptcy of an insured has no influence on the insurance contracts concluded by the insured. With regard to other (voluntary) insurance contracts, bankruptcy of the insured generally does not have an influence on whether a third party files a claim against the insured. However in the case of the insured's bankruptcy, the executor has certain rights regarding the insurance contract, e.g. in certain circumstances the executor may cancel the contract and claim reimbursement of the insurance premium.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

As indicated above, in the case of third party liability insurance, a third party can always claim directly from the insurer.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

This question refers to a kind of legal action instituted by a third party against an insurer even before the statement of claim against the insurer is filed with the court, the purpose being to secure payment of the claim if the insurer loses the case (e.g. by seizure of the insurer's assets). There are such proceedings in Polish law but in order to obtain such security from the court, the plaintiff has to establish that certain conditions are met. Generally the court will provide such security in cases where denying it would significantly hinder, or make impossible, the execution of the judgment. In the case of legal proceedings concerning liability insurance cover instituted against the insurer by a third party that suffered certain damage, such a situation is very unlikely. The insurers are subject to restrictive supervision and must have appropriate assets to pay the claims resulting from the insurance cover provided. Therefore in practice it would be quite difficult for a plaintiff (third party) to obtain such security against the insurer, but it is possible.

a. Is attachment or seizure of an insurance payment allowed in full?

If the security is granted by the court (which against an insurer is very unlikely) the manner and the amount of security (in the case of financial security) is specified by the court and generally may correspond with the amount of the claim.

b. Are the defence costs of the insured excluded from attachment and seizure?

It is the court's decision whether to include such costs when granting the security. It also depends on the scope of the application for such security filed by the claimant.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Yes, the insurer could argue that the claim is groundless, so there is no reason to secure the insured's claims against the insurer.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

According to Polish law, anyone may notify an insurer of the occurrence of an event (e.g. loss triggering the insurer's obligation to pay the benefit relating to a third party liability insurance contract). Therefore, an insured may notify the insurer of such event. In this event, the insurer must institute appropriate proceedings in order to investigate the case and verify whether the insurance benefit should be paid. Generally, the rules regarding such proceedings and the rights of the person entitled to the insurance benefit are the same regardless of who notified the insurer of an event.

a. Would a settlement between the insurer and the insured be binding on the third party?

No, such settlement would have no impact on the legal situation of the third party.

b. If so, under what conditions?

N/A

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

Generally the most important provision regarding third party liability insurance is art. 822 of the Civil Code, which states as follows:

> *"Article 822. § 1. By the contract of civil liability insurance the insurer shall assume the obligation to pay the indemnity specified in the insurance contract for a damage done to third parties to whom the insurance taker or insured is liable for the damage.*

§ 2. If not agreed otherwise by the parties, the contract of civil liability insurance shall cover the damage referred to in paragraph 1, being a consequence of an event envisaged in the contract, which event occurred during the period of insurance.

§ 3. The parties may provide that the contract will cover damage that took place, was disclosed or the notice of which was submitted during the insurance period.]

§ 4. The person entitled to indemnity in connection with an event covered by a contract of civil liability insurance may vindicate claims directly from the insurer.

§ 5. The insurer shall not raise against the party entitled to indemnity any objection referring to the breach by the insurance taker or insured of duties resulting from the contract or general insurance conditions, if the breach occurred after the accident."

There are also certain provisions regarding such contracts in other statutes (e.g. the Insurance Activity Act dated 22 May 2003), but they are not as significant as the above-cited provision.

10. Is there anything else you would like to add that could be of interest to this project?

N/A

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SPAIN

1. Does the law in your jurisdiction allow a third party to claim directly under liability insurance policy?

a. Fully?

Yes. According to article 76 of the Spanish Insurance Contract Act[52] (hereinafter ICA):

> the injured third party or his heirs shall have a direct right of action against the insurer to enforce its obligation to indemnify, without prejudice to the insurer's right to recover from the insured in the event that the damage caused to the third party is due to the insured's wilful misconduct. The direct action shall be immune to the defences that the insurer may raise against the insured. The insurer may, nonetheless, raise the exclusive fault of the injured party and any personal defences that the insurer may have against him. For the purposes of the exercise of the direct action, the insured is obligated to communicate to the injured third party or his heirs the existence of an insurance contract and its contents.

In short, the third party injured or harmed by the insured may sue either the insured or the insurer or both.

b. Only for specific types of parties (e.g. individuals/companies)?

Under the ICA, any injured third party (be it an individual or company) is entitled to exercise a direct action against the insurer who insured the individual or company who caused a loss or damage covered by the insurance contract.

c. Only for specific types of loss or damage?

The injured third party's right to sue the insurer directly applies to any type of loss or damage in contract or in tort covered by a third party liability insurance contract. A qualification is needed in this regard. The natural field of this insurance is extra-contractual liability or tort, but case law has extended it to contractual liability as well (e.g., Decision of the Supreme Court of 30 November 2011 – RJ\2012\3519).

d. Only for specific types of insurance?

Yes. The third party direct action right only applies to third party liability insurance contracts.

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[52] Insurance Contract Act 50/1980, 8th October.

e. Other?

Under article 76 of the ICA, the insurer is not allowed to raise against the third party those defences that the insurer may raise against the insured, e.g., failure to pay the premium. However, the insurer may raise the exclusive fault of the injured third party and whatever personal defences the insurer may have against it. We refer to this issue again under question 5.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No. The claim against the insurer by the insured is not required for a third party to be able to claim directly. The injured third party has a personal right arising out of the law against the insurer.

Nevertheless, the right of the injured third party to claim against the insurer requires the following:

(i) There must be a valid obligation on the part of the insured to indemnify the third party for the loss or damage caused by an act or omission specified in the insurance contract.

(ii) There must be a validly existing insurance contract between the insurer and the insured.

3. Can a third party initiate court proceedings against a liability insurer?

Yes. A third party can initiate court proceedings against a liability insurer.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

The third party must refer in his claim to the insurance policy. To do this the third party may request the disclosure of the policy to the insured either in court or out of court. There is a pre-lawsuit court proceedings (*diligencias preliminares*) which the third party can instigate to compel the insured to disclose the policy if the insured refuses to do so voluntarily.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

The participation of the insured in such court proceedings is not required since liability can be established in proceedings only between the third party and the insurer.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes. The injured third party's right to claim directly against the insurer arises only in connection with the risks covered by the liability insurance contract and within the limits set out in the policy.

Consequently, the insurer is allowed to defend itself by denying coverage.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes.

b. If no, does the liability insurer have remedies or recourse against the insured?

5. Are there any further conditions for allowing a third party to have direct access?

As suggested above, the general requirements or conditions for the third party action are mainly two-fold: the claim of the third party must be covered by the policy and the insured must be liable for the loss.

The insurer will not be liable to the third party if the claim falls outside the scope of coverage under the policy. However, as explained in more detail below, there are reservations because it is not always easy to determine if and when a claim falls out of the insuring grant. Occasionally there are contractual clauses limiting or restricting the insured's rights or even exclusions that may add to the confusion. These limits and/or exclusions cannot necessarily be raised against the third party. However, the third party must also abide by the limits of indemnity as set out in the policy.

The third party has certain procedural and substantive privileges. In particular, the insurer will only be allowed to raise against the third party his possible exclusive fault on the occurrence of the loss or any personal defences the insurer might have against him. The insurer will not be allowed to raise defences it may have against the insured, e.g., breach of duty to declare the risk to the insurer[53], suspension of coverage for non-payment of premium[54], breach of the insured's duty to declare the circumstances (loss or damage) to the insurer[55], breach of the insured's duty to use

[53] ICA, article 10 (Duty of declaration of the policyholder).

[54] ICA, article 15 (Effects of the non-payment of the premium).

[55] ICA, article 16 (Duty of declaration of the loss to the insurer).

all means available to mitigate the consequences of the loss[56], failure of the insured to declare the existence of several insurance contracts covering the same risk[57].

Further, the insurer cannot raise defences based on: (i) the wilful misconduct of the insured (despite the general rule that losses caused in bad faith by the insured are uninsurable under article 19 of the ICA); (ii) clauses that limit or restrict the insured's rights; and (iii) exclusions contained in the policy which by nature do not delimit and specify the coverage afforded by the insurer. Clauses specifying the risk are those relating to the subject matter or object of the insurance, the sum insured, the period of insurance, the geographic scope and the like. The rest may be the so-called limitative clauses or exclusions, which to be valid must be accepted explicitly by the policyholder/insured and singled out in bold letters in the contract. This is not required where so called "large risks" (as defined) are concerned since these are not subject to the otherwise mandatory provisions of the ICA. In these cases the insurer may recover from the insured but cannot oppose the third party's claim on the basis of such clauses. It should also be noted that the case law (e.g., Decision of the Supreme Court of 30 November 2011, RJ\2012\3519) has drawn a subtle (and not always too clear) distinction between clauses delimiting cover and clauses delimiting the rights of the insured or providing for exclusions. Occasionally, these exclusions have been described as delimiting cover objectively and therefore in pure theory they could be raised against the third party. A key exercise is therefore to examine each contract on a case-by-case basis. This is particularly true in the case of motor insurance, for example.

To sum up, the insurer has a very narrow margin of opposition against the third party. The insurer will be entitled to oppose the claim successfully solely if the loss was caused by the exclusive fault of the third party or if the claim falls outside the scope of coverage under the policy and related terms and conditions (sum insured, territory, period of insurance). Other than that, the insurer will have to pay, although the insurer will generally be able to recover from the insured. This is not necessarily a good prospect, particularly if the insured is insolvent.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

No. The insolvency or bankruptcy of the insured does not affect the right of the injured third party to claim directly against the insurer. It should be recalled that the

[56] ICA, article 17 (Duty to use all means available to mitigate the consequences of the loss).
[57] ICA, article 32 (Multiple Insurance).

action of the third party against the insurer arises by operation of the law and is independent of, and additional to, the actions/claims that the third party may have against the insured.

a. ***Are there any specific rules relating to third party claims in the case of bankruptcy?***
No.

b. ***If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?***
The third party would have to file the third party's claim against the insured at the appropriate commercial court where the insolvency of the insured is being dealt with. There are peculiarities if the third party's claim/credit arises out of a contract or a tort. Payment eventually would be subject to the general insolvency rules.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Subject to certain requirements the Spanish Civil Procedure Act[58] provides for prejudgment attachment or seizure of assets as a general rule ensuring the eventual enforcement of monetary judgments.

Since the injured third party has a direct right of action against the insurer to claim damages it would make no sense to attempt attaching the insured's claim against the insurer under the liability policy.

a. ***Is attachment or seizure of an insurance payment allowed in full?***
Yes. However, it is not common practice in the context of third party liability insurance since, as stated above, the third party may claim directly to the insurer.

b. ***Are the defence costs of the insured excluded from attachment and seizure?***
No, but please refer to a) above.

c. ***Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?***

[58] Civil Procedure Act 1/2000, 7th January.

The insurer could argue that the civil procedural requirements for the court to grant provisional measures have not been met. These requirements are as follows: the claim must "**appear**" to have a legal foundation (this would entail looking into coverage); and there must be a sound indication of danger or risk that the delay involved in the lawsuit may hinder or prevent the eventual enforcement of the judgment.

8. Is the insurer or the insured (or both) required to take the interest of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

It is customary for policies to require or permit the insured to give notice of the circumstances that could eventually give rise to a claim or the claim itself within a certain period of time. Once notice of the claim has been given, under normal circumstances the insurer will handle it and pay the third party. The third party will be required to sign a full release in favour of both the insured and the insurer. If this is not the case, it is difficult to see how the insurer will pay the insured without a claim being filed by the third party. In that unlikely event, the insurer would have to take the interest of the third party into account, but on its own behalf because the third party would maintain his action against the insurer. This means that the insurer would have to make sure that payment has been made to the third party from whom a full release would be required.

a. Would a settlement between the insurer and the insured be binding on the third party?

No. As mentioned, the injured third party has a personal right to claim directly to the insurer, and that settlement would not bind him.

b. If so, under what conditions?

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

Duty to declare the existence of the insurance contract and its contents.

Article 76 of the ICA requires the insured to disclose the existence of the policy and its contents thereof to the injured third party or his heirs. This is intended to facilitate the direct action of the injured third party against the insurer.

If the insured refuses to disclose the information—which often happens in practice—the injured third party may have recourse to the courts and file a so-called

preliminary inquiry procedure. Costs will be generally ordered against the insured if the court compels the insured to disclose the information.

10. Is there anything else you would like to add that could be interest to this project?

The Insurer's right of recovery against the insured.

As a general rule the insurer cannot recover from the insured, unless the loss or damage was caused by the insured's wilful misconduct. Also, valid clauses delimiting the rights of the insured may be enforced allowing the insurer to recover from the insured.

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SWEDEN

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

The general rule under Swedish contract law is that a contract confers rights and obligations only on the parties to the contract. Thus, the default position under Swedish insurance law is that an injured party does not have a right to claim indemnification directly from an insurer under a liability insurance policy held by the liable party.[59] The insured interest is generally considered to be the liability of the insured. However, there are exceptions where the injured party's interest in being compensated has been deemed to justify direct third party access under the liable party's liability insurance policy. Under Chapter 9, section 7, of the Swedish Insurance Contracts Act (2005:104) ("**ICA**"), a third party may claim indemnification directly from the insurer if:

(i) the insured has a statutory obligation to have third party liability insurance covering the loss;

(ii) the insured has been declared bankrupt or an order has been issued for public composition; or

(iii) the insured is a legal entity that has been dissolved.

In addition, under Chapter 9, section 7, and Chapter 4, section 9, of the ICA, an injured third party (either a consumer or a legal entity) may claim indemnification directly from the insurer if the injury covered by the *consumer* liability insurance policy has been caused by gross negligence, violation of safety regulations or the insured's failure to mitigate loss, provided also that the insured is not able to pay (in the following referred to as "**subsidiary extended liability**" (*subsidiärt ansvar*). See question 1(b) below.

b. Fully?

In cases where direct third party access to liability insurance exists and the claim is also included in the scope of the coverage (and falls within any caps or limitations), the injured party has a right to be fully compensated for its claim.

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[59] In Sweden, the following scenarios are typically not considered cases of direct third party access to liability insurance:
i) the injured party can claim directly against the insurer pursuant to the terms of the policy,
ii) the insured voluntarily transfers the right to indemnification to the injured party,
iii) the injured party, after having received a judgment for damages against the insured, seizes the insurance compensation; or
iv) the injured party has a claim for damages against the insurance company for negligence.

c. Only for specific types of parties (e.g. individuals/companies)?

Regarding liability insurance for consumers (i.e. liability insurance covering the liability of a consumer and not a business), an injured party may claim directly from the liable party's liability insurer on the basis of subsidiary extended liability. The burden of proving that the liable party lacks the ability to pay rests with the injured party, but in practice can be met, for example by showing a failed attempt to seize the insured's assets.

The possibility of claiming directly from the insurer on the basis of subsidiary extended liability does not apply to business insurance, irrespective of whether the injured third party is a natural person (consumer) or a legal entity.

d. Only for specific types of loss or damage?

For some loss or damage, the insured is statutorily required to have liability insurance covering the loss. In these situations, an injured third party has been granted direct access to the liability insurance under Chapter 9, section 7, subsection 1 of the ICA (see the answer to question 1(i) above). Consequently, the right to third party access to the liability insurance for specific types of loss or damage is based on the insured being required by statute to have liability insurance (see 1(i) above) and not on the bankruptcy of, public composition of, or dissolution of, the insured (see 1 (ii) and 1(iii) above.

e. Only for specific types of insurance?

Please see the answer to question 1 above.

f. Other?

Under the old Insurance Contracts Act (1927:77) (the "**Old ICA**"), which applies to some insurance policies issued prior to 1 January 2006, an injured party is entitled to have the right to claim insurance compensation transferred from the insured if the insured becomes bankrupt (section 95, paragraph 3, of the Old ICA). Accordingly, under the Old ICA, the insured must transfer its right to compensation when placed in bankruptcy. This differs from the current ICA, which came into force on 1 January 2006, under which an injured party automatically has a right to direct third party claims against the insurer if the insured becomes bankrupt.

In addition, the possibility of an injured third party claiming compensation directly from the insurer can naturally also originate from the terms and conditions of a liability insurance policy.

Moreover, an issue that is not quite clear under Swedish law is whether there are any circumstances in which an insurer (instead of the insured) can claim set-off against a third party claim directed towards the insurer.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No, where Swedish law allows a third party to claim directly under a liability insurance policy, a claim against the insurer by the insured is not required for the third party to be able to claim under the liability insurance policy. However, under Chapter 9, section 7, paragraph 3, of the ICA the insurer shall, if possible, immediately notify the insured of such third party claims.

In the Swedish legal literature, it has been argued that it is somewhat unclear whether certain clauses in an insurance contract, such as "pay-to-be-paid clauses"[60] and "judgment clauses"[61], would be binding in conjunction with direct third party claims. In our opinion, it is uncertain whether such clauses would be binding because they would most likely be in conflict with mandatory law. Moreover, in situations where the interpretation of a clause in an insurance contract is unclear, the clause is generally interpreted to the benefit of the insured or, as the case may be, the injured party.

3. Can a third party initiate court proceedings against a liability insurer?

Yes.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

No, nothing prevents a third party from initiating court proceedings claiming indemnification directly from a liability insurer. However, in order for the third party to be successful in its submission, the legal action must be based on a right of direct third party access to the liability insurance.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third part and the insurer?

If there is direct third party access to the liability insurance, the insured is not required to participate in the proceedings in order for liability to be established. However, as explained under question 2 above, the insurer shall, if possible, immediately notify the insured of such a claim.

Although a judgment against the insurer or a settlement between the injured party and the insurer is not binding on the insured, it may have substantial evidential value in a subsequent proceeding against the insured. Thus, such a

[60] A clause in an insurance policy that requires that payment must be made by the insured before insurance indemnification can be received.

[61] A clause in an insurance policy that requires that the liability must be established or declared in a certain form.

judgment or settlement could be a disadvantage in a future proceeding against the insured, for instance, if the insured was insolvent when the claim was directed against the insurer but later regained its financial strength and subsequently became subject to a claim by the injured party or by the insurer. Moreover, it should be noted that the insured has a right to intervene in proceedings between the injured party and insurance company (Chapter 14, sections 9–11 of the Code of Judicial Procedure (1942:740) in order to safeguard its own interests.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

An insurer may submit the same objections to liability as the insured would be able to do.
The insurer may also argue that the injury falls outside the scope of the insurance coverage or that the injury occurred before the insurance policy was in force. However, an insurer may not always submit the same objections against the injured party as it would be able to make against the insured. For instance, regarding subsidiary extended liability within consumer insurance, the insurer may not object to the insured's gross negligence, violation of safety regulations or failure to mitigate loss. In these situations, the insurer is left with the possibility of recovering indemnification from the insured.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes.

b. If no, does the liability insurer have remedies or recourse against the insured?

As explained in our answer to question 4 above, the insurer may, in cases of subsidiary extended liability, be prevented from objecting to the insured's gross negligence, violation of safety regulations or failure to mitigate loss. In these situations, the insurer is thus left with the possibility of recourse against the insured.

5. Are there any further conditions for allowing a third party to have direct access?

No.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

Yes, as further explained in our answer to question 1 above, an injured third party has an automatic right to direct third party claims against the insurer if the insured has been declared bankrupt or an order has been issued for public composition. The requirement may entail the injured party filing a petition for the insured's bankruptcy in order to achieve the right to direct third party claims against the insurer. A court order to the insured for company reorganization (*företagsrekonstruktion*) or debt relief (*skuldsanering*) does not generate a right to direct action for the injured party.

If the injured party does not have a right to make direct claims against the liable insured party's insurer, and if the liable party becomes bankrupt during the liability proceedings, the injured party will automatically be granted direct third party access to the liability insurance in accordance with the provisions explained above under question 6(a).

Moreover, it should be noted that the insurer, under certain circumstances, may be obliged to pay indemnification to the injured party, even though the equivalent amount has already been paid out to the insured (please see our more comprehensive answer under question 8 below).

a. Are there any specific rules relating to third-party claims in the case of bankruptcy.

Yes, such provisions can be found in Chapter 9, section 7, of the ICA. Please see our answer to question 1 above.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

Not applicable

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Prejudgment attachment or seizure of assets is allowed under Swedish law (Chapter 15, sections 1-3 and section 10, of the Code of Judicial Procedure). If the injured party's right to damages is declared in a judgment against the insured, but the insured resists paying, the injured party may ask a court to order the attachment of sufficient assets for the damages to be paid in full or to order the attachment of the insured's claim for compensation against the insurer.

a. Is attachment or seizure of an insurance payment allowed in full?
Yes.

b. Are the defense costs of the insured excluded from attachment or seizure?
Yes. Under Chapter 15, section 1, of the Code of Judicial Procedure, the court may order the provisional attachment of as much of the opponent's property as may be assumed will be enforced in the claim. According to the case-law, defence costs are to be excluded from attachment (NJA 1966 p. 541), but service costs for future enforcement may be included.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?
Yes, the judgment against the insured merely determines that the insured is liable; it does not determine whether the insurer has to indemnify the loss. If the insurer resists indemnification and there is an uncertainty about whether the seized claim is to prevail, the Swedish Enforcement Authority may order the injured party to initiate proceedings against the insurer regarding the insurance indemnification (Chapter 4, section 23, of the Enforcement Execution Code (1981:774)).
In the proceedings between the injured party and the insurer, each party may invoke the policy terms and possibly summon the insured to give evidence as a factual witness. The purpose of the proceeding is for the Enforcement Authority to assess whether or not the insurer has valid reasons for resisting indemnification. The Enforcement Authority has to complete the seizure proceedings in order for the insurance compensation to ultimately be paid to the injured party.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

Yes, the insurer is obliged to take the injured party's interest into account in connection with paying out indemnification under a liability insurance policy. If the insurer pays indemnification to the insured and later learns that the injured party did not receive equivalent indemnification from the insured to which it was entitled, the insurer is obliged to indemnify the injured party for any shortfall. However, such amount should not exceed the amount paid by the insurer to the insured (Chapter 9, section 8, of the ICA).

a. Would a settlement between the insurer and the insured be binding on the third party?

No, as explained under question 1 above, the general rule under Swedish contract law is that a contract confers rights and obligations only to the parties of the contract.

b. If so, under what conditions?

N/A

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No.

10. Is there anything else you would like to add that could be of interest to this project?

As explained under question 1 above, the insurer's limited options for objecting to the liability of the insured in cases of subsidiary extended liability only applies to consumer insurance, not to business insurance. The design of this provision can lead to unsatisfactory results, since it does not take into account whether the injured party is a natural person (consumer) in need of extended protection or a legal entity.
In addition, where several injured parties are entitled to indemnification for injury covered by a liability insurance policy, but the policy limit is not enough to satisfy all claims, including any potential claims, the indemnification should be calculated proportionate to each party's individual claim. The insurer may thus also have to take into account the interest of other potential third parties. However, the aforementioned does not apply if there is reason to believe that an injured party must cover its own loss or if two years have passed since the first claim (Chapter 9, section 9, of the ICA).
Finally, it is uncertain whether the insurer would be able to successfully argue that a claim is statute-barred in relation to the injured party on the grounds that the claim is statute-barred with respect to the insured. If so, an injured party's claim could in fact be statute-barred before the injured party becomes aware of the possibility of directing a third party claim against the insurer. This would not occur if the limitation period began when the injured party became aware of the possibility of claiming indemnification directly from the insurer. The position under Swedish law must be considered unclear on this issue.

Mannheimer Swartling

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SWITZERLAND

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Except for certain specific areas of strict liability in tort where liability insurance is mandatory and the insured activity requires a public licence or concession, the injured third party has no direct claim against the liability insurer of the party which caused the damage. Only the insured is entitled to claim against its insurer.

Instead, the Swiss Insurance Contract Act (**ICA**) provides for a statutory pledge of the injured third party. It is regulated in article 60 of the ICA which reads as follows (unofficial translation):

> [1]The injured third party has, to the extent of its claim for damages, a pledge of the claim for indemnification derived from the insurance against the consequences of statutory liability. The insurer is entitled to pay the indemnification directly to the injured third party.
> [2]The insurer is liable for every action which curtails the right of the third party.

The rationale behind article 60 ICA is that since there is no direct claim by the injured third party against the liability insurer under the ICA, the injured third party would risk being left without indemnification if its debtor, i.e. the party which caused the loss, became insolvent. In the case of bankruptcy proceedings, the insured's claim against its liability insurer would fall into the insured's estate and all creditors would be entitled to recovery according to the statutory order of distribution. As a result, the claim of the injured third party would be impaired, at least to a large extent. In order to avoid this, article 60 of the ICA establishes a legal lien for the benefit of the injured third party on the right of recovery under the policy and allows the insurer to pay directly to the insured third party. In addition, the law states that the insurer is legally liable if the insurer makes payment to the insured without the consent of the injured third party, and the injured third party suffers a loss as a consequence of this. Thus, if the insurer pays directly to the insured or if the insurer enters into a settlement agreement with the insured without having obtained the consent of the injured third party, the insurer is exposed to the risk of having to pay twice. This risk is not dependent on any fault of the insurer.

If there are several injured third parties, the insurer is liable to each individual injured third party for any loss arising out of the failure to comply with the statutory lien. The risk of being held liable under article 60(2) ICA can only be excluded by way of an agreement between the insurer and *all* injured third parties.

As mentioned above, Swiss law allows an injured third party to claim directly under a liability insurance policy in specific areas of strict liability in tort where liability insurance is mandatory and the insured activity requires a public licence or concession. There are a number of statutes providing for such a right to a direct claim. The most important one in practice is the Road Traffic Act (*Strassenverkehrsgesetz*). Article 65 reads as follows (unofficial translation):

> [1]Within the framework of the contractual insurance cover, the injured party has a direct claim against the insurer.
>
> [2]The insurer is not entitled to raise coverage defences based on the insurance contract or the Insurance Contract Act.
>
> [3]The insurer has a right of recourse against the policyholder or the insured to the extent it would be entitled to refuse or reduce its performance under the Insurance Contract Act.

Other statutes containing similar provisions are the following:

- the Inland Water Navigation Act (*Binnenschifffahrtsgesetz*),
- the Nuclear Energy Liability Act (*Kernenergiehaftpflichtgesetz*),
- the Pipeline Act (*Rohrleitungsgesetz*) and
- the Game Law (*Jagdgesetz*).

The following comments refer to the regimes under these special laws, in particular under the Road Traffic Act.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No. The injured third party is entitled by law to claim against the insurer. It is an independent claim not requiring any action or participation on the part of the insured.

3. Can a third party initiate court proceedings against a liability insurer?

Yes.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

No. The direct third party access to the liability insurance is triggered by the liability of the insured vis-à-vis the injured third party only.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

The insured is not obliged to participate in the proceedings initiated by the injured third party against the insurer (as long as the insured has not been sued by the third party as well, which is in the third party's discretion). However, the insured is *entitled* to participate, in which case the insurer and the insured form a permissive joinder with the insurer keeping control over the proceedings.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

The insurer is only liable within the limit of indemnity, the amount of coverage. Apart from that, the insurer is not entitled to deny coverage. Immediately on the occurrence of the insured event, a legal relationship between the injured third party and the insurer comes into existence, which has a statutory basis, not a contractual one. As a consequence, the insurer is not entitled to assert statutory or contractual defences under the insurance contract. For example, the insurer is not entitled to reduce its payment because the insured caused the insured event in a grossly negligent way (which in the direct relationship between the insurer and the insured would in fact legitimate the insurer’s reduction of the indemnification according to the degree of the insured's fault).

Yet, the insurer is entitled to assert any defences arising from the legal relationship between the insured and the injured third party. The right to a direct claim against the insurer must not extend or increase the third party's liability claim. Rather, the insurer is to be liable under the same conditions and to the same extent as the insured, the amount of coverage being the upper limit of the insurer's liability.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

N/A

b. If no, does the liability insurer have remedies or recourse against the insured?

Yes. Because the insurer must not assert defences under the insurance contract against the injured third party's claim, there is an inherent risk that the insurer has to pay more to the third party than it had to according to the terms and conditions of the ICA and the insurance contract. The adjustment takes place in the relationship between insurer and insured by way of recourse. However, a claim of recourse against the insured is only possible after indemnification of the third party. Thus, the insurer fully bears the risk of the insured's insolvency.

5. Are there any further conditions for allowing a third party to have direct access?

No. The direct third party access to the liability insurance is not tied in with the third party itself but with its claim. In the case of assignment or subrogation, it passes on to the legal successor.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

No. In the event of the opening of bankruptcy proceedings against the insured, the injured third party is still entitled to assert its claim directly against the liability insurer.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

No. As far as the injured third party is concerned, its claim against the insurer is not affected by the bankruptcy of the insured. As far as the insurer's possible claims of recourse are concerned, it is put on a par with any other creditor of the insured.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

See the answer to question 1 above.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

In principle, the attachment of assets is allowed in Switzerland, provided that one of the following six grounds for obtaining a freezing order as stated in article 271(1) of the Swiss Debt Enforcement and Bankruptcy Law is fulfilled (unofficial translation):

1. if the debtor has no fixed domicile;
2. if the debtor is concealing his assets, absconding or making preparations to abscond so as to evade the fulfilment of his obligations;
3. if the debtor is passing through or belongs to the category of persons who visit fairs and markets, for claims which by their nature must be fulfilled at once;
4. if the debtor does not live in Switzerland, and none of the other grounds for a freezing order is fulfilled, provided the claim has a sufficient connection with Switzerland or is based on recognition of debt pursuant to art. 82 para. 1;
5. if the creditor holds a provisional or definitive certificate of shortfall against the debtor;

6. if the creditor holds against the debtor a title to definitively set aside the objection against the summons to pay in summary proceedings.

However, a freezing order can only be obtained by the creditor with respect to an *unsecured* claim. As the insured's claim against its liability insurer is pledged by law for the benefit of the injured third party (article 60 ICA; see para. 1 above), it would be difficult to imagine a situation where the conditions for an attachment order could be fulfilled.

In the scope of the direct claim of the injured third party against the insurer, an attachment would appear possible if one of the above mentioned six grounds for obtaining a freezing order is fulfilled. In practice, only nos. 5 and 6 can come into consideration. For example, if an insurer refused to indemnify an injured third party in spite of a final judgment confirming the insurer's obligation to do so, it would be possible for the third party to obtain a freezing order against the insurer.

In this case, the attachment would encompass the entire claim of the third party against the insurer, and the insurer would not be allowed to defend itself against the attachment by denying coverage.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

See the answer to question 1 above regarding the mechanism of article 60 ICA.

a. Would a settlement between the insurer and the insured be binding on the third party?

No, unless the injured third party has agreed to the settlement as well. This is true for both: for the ordinary situation under the ICA where the third party has no direct claim against the insurer (see question 1 above); and for the third party's direct claims which cannot be affected by agreements between the insurer and the insured from the outset.

b. If so, under what conditions?

N/A

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

For the sake of completeness, reference should be made to article 113 of the Swiss Code of Obligations: Where an employer has taken out liability insurance and the

employer's employee has contributed at least half of the premiums, the employee has sole claim to the policy benefits. As it is very rare for employees to pay part of the premium for the employer's PI insurance, this provision has hardly any relevance in practice.

10. Is there anything else you would like to add that could be of interest to this project?

The ICA is currently under revision. According to the governmental draft, which is at the parliamentary debate stage, the statutory pledge pursuant to article 60 of the ICA is to be replaced by the injured third party's direct claim against all liability insurers. It is intended that third parties will be able to file direct claims for personal injury and for physical loss. For other losses, namely for pure economic losses, however, the direct claim must be specifically agreed upon by the parties to the insurance contract. As far as voluntary liability insurance contracts are concerned, the insurer is to be entitled to all defences under the insurance contract.

It is unclear today if and when the new law will enter into force and what exactly the suggested direct third party access will ultimately look like.

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PRAGER DREIFUSS

RECHTSANWÄLTE
ATTORNEYS AT LAW

TAIWAN

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

Under Taiwanese law, if an insured has been determined liable for indemnification, an injured third party may claim payment directly from the insurer within the scope of the insured amount and based on the settled ratio.

Generally, whether an injured third party may claim under a liability insurance policy used to be a subject of debate in Taiwan until the amendment of the Insurance Act in 2001. The prevailing theory and the main view held by the courts was that an injured third party could not claim under such a contract because liability insurance is not a third-party beneficiary contract and the general principle of privity of contract applied. However, the trend of liability insurance reform has gradually shifted towards protecting the injured in addition to compensating the economic losses of the insured. The 2001 amendment made it abundantly clear that an injured third party may claim directly under a liability insurance policy. Article 94 Section 2 provides,

> "Where the insured has been determined liable to indemnify a third party for loss, the third party may claim for payment of indemnification, within the scope of the insured amount and based on the ratio to which the third party is entitled, directly from the insurer."

a. Fully?

Yes. Article 94 Section 2 allows for compensation based on the ratio to which the third party is entitled. If the claim falls within the scope or other limits of the coverage, an injured third party may recover fully.

b. Only for specific types of parties (e.g. individuals/companies)?

No. Article 94 Section 2 of the Insurance Act applies to individuals and companies without distinction.

c. Only for specific types of loss or damage?

Article 94 Section 2 of the Insurance Act does not specify the types of loss or damages, as long as the liability is determined.

d. Only for specific types of insurance?

Article 94 Section 2 of the Insurance Act is generally applicable to all types of liability insurance. However, special rules may apply to specific types of insurance. For instance, the Compulsory Automobile Liability Insurance Act requires that automobile operators be mandatorily enrolled in automobile liability insurance policies. Injured third parties may also directly claim under such insurance policies.

e. Other?

Liability insurance policies seen in Taiwan are generally "occurrence based" or "claim based." Claim-based insurance policies were propagated to limit insurers' exposure to long-tail liability. Long-tail liability is liability for claims that do not proceed to final settlement until a length of time beyond the policy year.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No. An injured third party may directly claim under a liability insurance policy pursuant to Article 94 Section 2 of the Insurance Act as discussed above. A claim against the insurer by the insured is not a precondition.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

An injured third party may directly claim under a liability insurance policy, including by initiating court proceedings. There are no specific conditions under the Insurance Act for a third party to initiate such court proceedings.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

The insured may participate or not participate depending on the development of the litigation. Both parties may request the insured to participate, and the court may require the insured to participate. Barring the above circumstances, the insured may be left out of the proceedings and liability be established in proceedings only between the third party and the insurer.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

A liability insurer is allowed to defend itself against a third party by denying coverage to the insured. Article 9 of the Enforcement Rules for the Insurance Act provides,

> "Where a third party, in accordance with Article 94, paragraph 2 of the Act, claims for payment of indemnity directly from the insurer, the insurer may raise a defense against the third party based on any of the reasons for defense against the insured as stipulated in the insurance contract."

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes. Coverage can be established in the proceedings between the third party and the liability insurer referred to in the answer to Question 3(b).

b. If no, does the liability insurer have remedies or recourse against the insured?

Not applicable.

5. Are there any further conditions for allowing a third party to have direct access?

There are no further conditions proscribed by law for allowing a third party to have direct access to the liability insurance of the insured.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

As explained earlier, an injured third party may claim directly under an insurance policy. Under the insurance policy, if bankruptcy of the insured is not a cause for the insurer to deny coverage to the insured, then the injured third party may claim irrespective of the bankruptcy of the insured.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

As mentioned above, if the insured is determined liable to the third party, the third party may claim directly under an insurance policy. However, if an injured third party cannot claim directly under an insurance policy due to denial of coverage by the insurer, and the insured goes into bankruptcy, then the third party has creditor's right over the insured's bankruptcy assets. [However, there is no special form of protection in that case.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Prejudgement attachment and seizure of assets are allowed in Taiwan. Seizure of assets is allowed before a final judgment. If the third party explains the cause of the claim and the grounds, and provides a security deposit when required, the court may order for provisional attachment or provisional injunction.

a. Is attachment or seizure of an insurance payment allowed in full?

Attachment or seizure is allowed to the extent necessary to preserve the status quo. Theoretically, an attachment or seizure of an insurance payment can be allowed in full, but a creditor must explain to the court the reasons why this is necessary with showing of the impossibility or extreme difficulty to satisfy the claim by compulsory execution in the future.

b. Are the defence costs of the insured excluded from attachment and seizure?

There is no requirement of mandatory attorney representation in the court of first and second instances, and representation by a compensated counsel is not a protected right in Taiwan. While the defence costs of the insured may be a separate amount in the insurance policy, a creditor may sue for a lump sum and the defence costs are not excluded from attachment and seizure.

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Whether there is insurance coverage is a substantive matter, and will be resolved through a final judgment from the courts. Provisional attachment or injunction, as a procedural measure to ensure the future compulsory enforcement, takes place before the final judgment without reviewing the case on merits. Therefore, denying coverage is unlikely to be helpful in the insurer's defence against attachment or seizure.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

Article 94 Section 1 of the Insurance Act provides, "prior to indemnification of a third party for loss caused by an event attributable to the insured, an insurer may not pay all or any part of the insured amount to an insured." The insured may not request payment from the insurer before a claim is made against the insured by the injured third party. Thus, a third party's interests will be taken into account in an insured's request of payment.

a. Would a settlement between the insurer and the insured be binding on the third party?

The insured may only request indemnification when it receives a claim from the third party. The extent of indemnification provided by the insurer to the insured is determined by the claims of the third party. Also, the insured may only be indemnified to the extent that it compensates the injured third party. Hence a settlement between the insurer and the insured, without the involvement of the third party, has no binding effect on the third party.

b. If so, under what conditions?

Not applicable.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

No, the relevant provisions in Taiwan with respect to direct access are summarised above.

10. Is there anything else you would like to add that could be of interest to this project?

Following the 2001 amendment, the current unknown is how the insured can be "determined liable" for the purpose of Article 94 Section 2. Conceptually, a person may be "determined liable" through a variety of methods, including litigation, settlement and arbitration. To be fair to the insurers, the model insurance liability policy provides that insurers have the right to participate as a party in any of these proceedings. Article 93 allows insurers to deny coverage if a settlement is entered into by the insured and injured.

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TURKEY

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

b. Only for specific types of parties (e.g. individuals/companies)?

c. Only for specific types of loss or damage?

d. Only for specific types of insurance?

e. Other (?)

Until recently, insurance contracts were mainly governed by the insurance section of the Turkish Commercial Code numbered 6762 and dated 29 June 1956 ("the old TCC"). A new Commercial Code numbered 6102 ("the new TCC")[62] was published on 14 February 2011. It entailed a new, broader section on insurance contracts (both life and non–life) and entered, to a significant extent, into force on 1 July 2012. The relevant provisions of both the old and the new TCC will be described where relevant in our explanations below.

The old TCC does not contain any provision with respect to the right of direct claim/court action by third parties against a third party liability insurer (except for Article 1310 of the old TCC on fire third party liability insurance). Certain other Codes such as the Highway Traffic Act[63], the Highway Transportation Act[64], the Turkish Code of Obligations[65] (with respect to employee liability policies) and general conditions of some of the third party liability insurance types[66] (prepared by the Insurance General Directorate of the Turkish Treasury) also explicitly provide for such right. The Turkish Court of Appeal however has long recognized with respect to all types of third party liability policies the right of direct claim/court action by the third

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[62] According to the report of the Commission in charge of the preparation of the draft on the Section on Insurance Contracts of the new TCC, current developments in the insurance laws of Germany, France, England and Switzerland have been considered in the drafting of the insurance section of the Code. The first and major source was the German `Versicherungsvertragsgesetz` enacted in 30.05.1908 as amended and applicable at the time of the preparation of the draft of the insurance section of the new TCC. German and English general conditions constituted the second source of reference considering the high effect of especially the English general conditions on Turkish as well as world insurance practice.

[63] Numbered 2918 and dated 13 October 1983

[64] Numbered 4925 and dated 17 July 2003

[65] Numbered 818 and dated 22 April 1926

[66] E.g., General Conditions of Environmental Pollution Liability Insurance, Mandatory Maritime Passenger Transportation Liability Insurance, Mandatory Liquefied Petroleum Gas Liability Insurance, Mandatory Highway Passenger Transportation Liability Insurance, Mandatory Private Security Liability Insurance, Mandatory Sea Pollution Liability Insurance for Coastal Plants.

party against the third party liability insurer, although many aspects in that regard have remained unclear or controversial due to lack of provisions in the old TCC and lack of court precedents.

In this respect, a very important improvement in the new TCC is the introduction of an entire section of special provisions applicable to third party liability insurance (which does not exist under the old Code) including a specific article in relation to the right of direct court action by third parties suffering a loss. The new TCC under Article 1478 explicitly provides the right of the third party to bring a claim/court action against the insurer subject to time limitation period applicable to the insurance contract and the insurance sum.

Article 1478 states as follows:

> Right of Direct Court Action
>
> The third party who incurred a loss, is entitled to claim its loss directly from the insurer subject to the insurance sum and the time limitation period applicable to the insurance contract.

Although the heading of the article refers to the right of direct action, the wording of the article also refers to the direct claim of the loss by the third party without referring to a condition for a court action. Also Article 1475 of the new TCC on the duty of the insured to notify the insurer of events leading to the loss, refers to the option of "application to the insurer by the third party".

The new TCC defines third party liability policies in Article 1473. This article explicitly provides that the insurer makes the payment to the third party. Whereas in the old TCC there was no provision in that regard, in practice payments have been usually made directly to third parties. Current general conditions with respect to certain types of third party liability policies[67] reserve the right of the insurer to direct payment to the third party and prevent the insured to negotiate and settle with the third party claimant etc. without the consent of the insurer, although they do not provide for the right of direct claim/court action by third parties. However these provisions of the said general conditions were not based on any provision of the old TCC.

The conditions for such a claim and court action were established in practice and are now explicitly provided in the new TCC as follows:

[67] E.g., General Conditions of Employer Liability Insurance, Elevator Accidents Liability Insurance, Environmental Pollution Liability Insurance, Mandatory Maritime Passenger Transportation Liability Insurance, Mandatory Highways Motor Vehicles Liability Insurance, Mandatory Sea Pollution Liability Insurance for Coastal Plants, Professional Liability Insurance, Optional Motor Land Vehicles Liability Insurance, Mandatory Private Security Liability Insurance, Mandatory Liquefied Petroleum Gas Liability Insurance, Mandatory Highway Passenger Transportation Liability Insurance.

(i) The claim is covered under the relevant third party liability policy (in principle, the conditions for liability of the insured must also be met).

(ii) The claim remains within the limits of the insurance sum of the relevant policy.

(iii) The claim does not fall outside the time limitation period applicable to the insurance contract.

No other condition is required for bringing a direct claim/action against the liability insurer by the third party suffering a loss. There is no restriction in terms of types of loss/damage, identity of third parties, or types of the insurance either in the old TCC or in the new TCC.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

There is no provision in the old TCC in that regard, although the provisions on notification and claim and also the general provisions applicable to different types of third party liability policies refer to the notification of the claim by the insured. Article 1475(2) of the new TCC, however, also refers to ”application to the insurer” by the third party having the same effect as the notification of the insured. It is therefore possible to say that no claim against the insurer by the insured is required for a third party to be able to claim under a liability insurance policy.

3. Can a third party initiate court proceedings against a liability insurer?

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

Article 1478 of the new TCC explicitly refers to the right of a direct claim through a court action, whereas under the old TCC there was no provision in that regard. As explained under Question 1 above, the Turkish Court of Appeal has long recognized the right of direct action by the third party. The conditions of such action are set out above under Question 1.

Court proceedings can be initiated against both the insurer and the insured. However, if such proceedings are initiated only against the insurer, the participation of the insured would not be required where the liability of the insured can be established between the third party and the liability insurer. Under current practice third parties usually bring an action against both the insured and the liability insurer.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

b. If no, does the liability insurer have remedies or recourse against the insured?

There was no specific provision in the old TCC on whether the liability insurer can, against a third party, raise defences that can be raised against its insured. The General Assembly of the Turkish Court of Appeal recognized in a judgment[68] that an insurer is entitled to raise its defences (i.e. those which can be raised against the insured) against a third party, and coverage and liability can be established between the third party and the liability insurer. Also in practice denial of coverage is raised as a defence against the third party. However, if there is any special provision in an applicable Code preventing the use of such defences, the insurer would have to pay the third party and will then recourse against its insured on the basis of its defences against the insured.

For example, there is a provision preventing the use of such defences against a third party under Article 95 of the Act on Highway Traffic. Accordingly, a mandatory traffic liability insurer is not entitled to raise any defences against a third party which would lead to the removal of, or decrease in, the insurer's liability for payment of insurance indemnity. Under the regime of the old TCC, the Turkish Court of Appeal and the doctrinal views suggested that the referred rule foreseen for Mandatory Highway Traffic Liability Insurance were also applicable to all other mandatory liability insurance types considering the nature of such types of insurance.

Now the new TCC under Article 1484 explicitly provides the following in terms of mandatory third party liability insurance:

(i) Even if the insurer has been entirely or partially relieved from its liability against its insured, its liability against the third party continues up to the insurance sum.

(ii) The expiration of the insurance relationship shall bear its consequences against a third party only within a month following the notification of the expiration by the insurer to the relevant authorities.

(iii) The insurer is relieved from its liability against the third party to the extent the third party is indemnified by the social security institutions.

[68] The Decision of the General Assembly of the Court of Appeal dated 25.04.1989 and numbered 1998/5101-2606

In terms of optional liability insurance policies, according to interpretations by some of the doctrinal views of the provisions of the new TCC—including Article 1484 above and Article 1480 (which provides that the insurer cannot set off its receivables arising from the insurance contract against the insurance indemnity to be paid to the third party)—the insurer is not able to raise against the third party any defence of increase of the loss or risk by the insured due to breaches by the insured of its duties under the policy such as its duty of notification. Otherwise the insurer should be able to raise defences of lack of liability of the insured or general coverage issues under the insurance policy.

5. Are there any further conditions for allowing a third party to have direct access?

Please see our explanations under Questions 1 and 3.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

Under Turkish law, the protection of the third party against the insured's bankruptcy is constituted by the third party's right to bring a direct claim/court action against the third party liability insurer.

It is worth noting that Article 1417(2) is a general provision under the Insurance Section of the new TCC applicable to all types of insurance contracts (including liability insurance). This article provides for the situation in which the insured goes bankrupt before the insurance premium is paid. Article 1417(2) provides that where the insured goes bankrupt before the insurance premium is paid, the insurer may request a guarantee from the insured securing payment of the premium. If no guarantee is given by the insured within a week[69], the insurer will be entitled to terminate the insurance contract.

Other than the article referred to above, there is no other provision in the new TCC with regard to the bankruptcy of the insured. However, as explained above, the new TCC explicitly adopts direct claim/court action by the third party against the liability insurer and provides for direct payment by the insurer to the third party. Considering

[69] Under Articles 1302 and 1457 of the old TCC regulating the same principle, the period foreseen for securing a guarantee is regulated as three (3) days.

this, it is possible to say that the insurance indemnity may be deemed an asset of the third party which will not be affected by the bankruptcy of the insured.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

a. Is attachment or seizure of an insurance payment allowed in full?

b. Are the defence costs of the insured excluded from attachment and seizure?

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Prejudgment attachment and seizure of assets are in principle permissible under Turkish law. However, except for certain cases, the protection regarding pecuniary claims under Turkish law is established by the prejudgment seizure of assets constituted in accordance with the Turkish Enforcement and Bankruptcy Act[70]. If a creditor is concerned that the debtor might sell its assets or potentially dispose of its assets or funds before a judgment can be obtained and enforced, an application for the seizure of assets before the establishment of a judgment can be made to secure the collection of debts.

Although there is no provision under Turkish law preventing a third party that has suffered loss/damage because of an insured's act within the scope of the liability insurance from securing its insurance compensation by requesting prejudgment seizure of the insurer's assets, the likelihood of obtaining such decision in practice is low.

The insurer is in principle not prevented from raising a defence of denial of coverage but this defence will not be sufficient in its own to prevent a seizure if conditions for seizure were met.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

a. Would a settlement between the insurer and the insured be binding on the third party?

b. If so, under what conditions?

The new TCC provides for direct payment by the insurer to the third party in Article 1473. This provision is not mandatory where the parties are allowed to agree to the

[70] Numbered 2004 dated 19 June 1932.

contrary in the insurance policy. Therefore, although there is no specific provision in the new TCC with regard to the payment of the insurance indemnity to the insured, there is no provision in the code preventing such payment either. In this respect, the insurer can settle with the insured. However, a settlement between the insurer and the insured would not be binding on the third party. The third party would have a claim under relevant provisions of liability against the insured and a claim against the insurer as set out above under the provisions of the new TCC.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

N/A

10. Is there anything else you would like to add that could be of interest to this project?

N/A

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UNITED KINGDOM

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

No. In the absence of insolvency, and with the exception described at 1(d) below, third parties do not usually have a direct cause of action against insurers.
The doctrine of privity of contract in English law generally prevents a third party from enforcing a term of a contract, even if the contract benefits the third party.

The Contracts (Rights of Third Parties) Act 1999 (the "**1999 Act**") has qualified this doctrine to some extent by providing that a third party can bring an action under a contract made for the third party's benefit if:
(i) the contract expressly provides for this; or
(ii) the contract confers a benefit on the third party.
In practice, however, the 1999 Act will rarely apply as these strict requirements are rarely met. Furthermore, the 1999 Act is often specifically excluded by agreement in insurance policies.

The usual rule changes if the insured is insolvent. Under the Third Parties (Rights Against Insurers) Act 1930 (the "**1930 Act**"), a third party acquires the right to claim directly under a contract of insurance if the insured has become liable to the third party before or after an insolvency event, as defined by section 1(1) of the 1930 Act.

In order to bring a claim against the insurer, the third party must first establish and quantify the liability in relation to its claim against the insured. Liability can be established and quantified by securing a judgment, arbitration award or, in some cases, a binding settlement. The third party then gets a direct claim against the assured's liability insurers by way of statutory assignment or subrogation.

The 1930 Act is due to be replaced by the Third Parties (Rights Against Insurers) Act 2010 (the "**2010 Act**"), which is still awaiting a commencement date. The basic principle that a third party can only bring a direct action against an insurer where the insured has become insolvent will remain unchanged. The definition of insolvency however is more widely defined under the 2010 Act.

a. Fully?

If any of the conditions set out above are fulfilled, a third party will be fully entitled to claim directly under a liability insurance policy.

b. Only for specific types of parties (eg individuals/companies)?

The 1930 Act applies to individuals, companies and limited liability partnerships. However, it does not expressly refer to other types of partnership.

The 1930 Act will not apply where the corporate insured has been dissolved (although this can be circumvented by resurrecting the dissolved company where a person has a potential legal claim against it).

The 2010 Act will apply to companies that have been struck off, regardless of whether the company was insolvent when it was struck off.

c. Only for specific types of loss or damage?

No. The wording of the 1930 Act is very general and applies to "any contract of insurance". The Court of Appeal confirmed the generality of this wording in Re OT Computers [2004] and held that both tortious and contractual liabilities were covered by the 1930 Act.

The 2010 Act provides that liability will be covered whether or not it is voluntarily incurred.

d. Only for specific types of insurance?

Motor insurance is treated differently to other types of liability insurance.

Under section 151 of the Road Traffic Act 1988, it is possible for a third party to directly enforce judgment against the driver's insurers regardless of whether the driver is insolvent or not.

The provisions of the 1930 Act and 2010 Act allowing a third party to have a direct claim against insurers in the event of insolvency do not apply to reinsurance.

e. Other?

Individual voluntary arrangements are not captured under the 1930 Act as an insolvency event but will be under the 2010 Act.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No, but as explained above, a third party will be able to claim under the insurance policy only where the insured is insolvent, in which case the insured's right to claim against the insurer will have transferred to the third party under the 1930 Act.

3. Can a third party initiate court proceedings against a liability insurer?

Yes, in certain prescribed circumstances.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

Yes. The first condition that must be satisfied, whether the proceedings are brought under the 1930 Act or the 2010 Act (when it finally comes into force), is that the insured must be insolvent.

Secondly, under the 1930 Act, a third party must establish and quantify the insured's liability before bringing proceedings against the insurer. Liability can be established or quantified by obtaining a judgment, arbitration award or, in some cases, a binding settlement in respect of the insured's liability to the third party.

This second condition will change under the 2010 Act, which allows proceedings to be brought (though not enforced) against the insurer before liability has been established and quantified. As the 2010 Act provides that liability may be established and quantified by obtaining a declaration from the court, it is expected that in practice a third party will be able to bring a single set of proceedings for establishing and quantifying the insured's liability and for establishing the insurer's liability under the policy.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

In practical terms, liability can be established in proceedings only between the third party and the insurer.

Where a third party brings proceedings against an insured to establish and quantify liability, an insurer will often take over the defence of those proceedings pursuant to the terms of the liability policy. Therefore, although the claim is against the insured, the true defendant may be the insurer.

Proceedings concerned with establishing the insurer's liability under the policy can be between the third party and insurer only as the rights of the insured against the insurer transfer to the third party upon the insured's insolvency.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

Yes. The basis for a claim under the 1930 Act is the insured's rights against the insurer rather than the injury suffered by the third party. The courts have held that the third party cannot be put in a better position than the insured. Therefore, if the insurer can show that the insured was not covered under the policy, the third party will also have no right to claim under the policy.

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

Yes.

b. If no, does the liability insurer have remedies or recourse against the insured?

Not applicable.

5. Are there any further conditions for allowing a third party to have direct access?

No.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

Yes. If the term "bankruptcy" is used synonymously with the term "insolvency", then the relevant provisions described above will apply. "Bankruptcy" can however have a more specific meaning under English law, which can further impact a third party's claim.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

Please see answers above for the relevant provisions under the 1930 Act and the 2010 Act in the event that the insured becomes insolvent.

In the case of a formal bankruptcy under English law, the courts have provided an exception for how the third party may establish its claim against the insured. Where the insured has become bankrupt before the third party has secured a judgment against it, the court in Law Society of England and Wales v Shah [2008] provided that a third party would be able to establish its claim against the insured if the trustee in bankruptcy admitted the debt; in those circumstances there was no need for the third party to obtain a judgment, arbitration award or settlement.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

Yes. Please see answers above for the relevant provisions.

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Generally, under English law, claimants can apply for a freezing injunction, which operates to prevent the dissipation of a defendant's assets pending the outcome of the relevant trial. Due to the draconian effects of freezing injunctions, the courts will

grant such an injunction only in exceptional circumstances. The claimant would have to satisfy the court that:

(i) the claimant has a good arguable case against the defendant;

(ii) the defendant owns assets against which such an order could be made; and

(iii) there is a real risk that the defendant would dispose of the defendant's assets in order to frustrate enforcement of a judgment in the claimant's favour.

Where the court does grant a freezing injunction, it would be in respect of any assets in which the defendant has a beneficial interest and would be limited to the value of the claim.

We do not think that a freezing injunction would be the appropriate mechanism for giving the third party access to the insured's claim against the insurer. As set out in answer to question 1 above, if the insured is solvent the third party's rights in respect of the insured's claim against the insurer would be limited by the doctrine of privity of contract. If the insured becomes insolvent the third party is able to claim directly against the insurer under the 1930 Act and therefore would have no cause to seek a freezing injunction.

b. Is attachment or seizure of an insurance payment allowed in full?

Please see above.

c. Are the defence costs of the insured excluded from attachment and seizure?

Not applicable.

d. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

Not applicable.

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

They are not required to take the interests of the third party into account if the insured is solvent.

a. Would a settlement between the insurer and the insured be binding on the third party?

Yes, in certain circumstances.

b. If so, under what conditions?

Any settlement entered into between the insurer and insured before the insolvency of the insured, which limits the insurer's liability under the policy, will

be binding on the third party. However, section 3 of the 1930 Act renders any such settlement ineffective if it takes place after the insured became insolvent.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

The 1930 Act protects the rights of third parties in respect of the insurance policy where the insured becomes insolvent by prohibiting any term in an insurance policy that purports to avoid or alter the rights under the contract of insurance upon the insured's insolvency. This protection will continue under the 2010 Act.
It was decided in Cox v Bankside Members Agency Ltd [1995] that where there are a number of third parties with competing claims against an insurer, which together exceed the limit of the insurance policy, the insured sums should be applied according to the order in which the claims were received. This is commonly referred to as a "first past the post" approach, which will remain the approach under the 2010 Act.

10. Is there anything else you would like to add that could be of interest to this project?

Once the 2010 Act comes into force it will apply to all cases if either the liability or the insolvency arises on or after commencement of the Act.

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UKRAINE

1. Does the law in your jurisdiction allow a third party to claim directly under a liability insurance policy?

a. Fully?

According to Ukrainian insurance law, insurance payments and payments of insurance compensation are effected by an insurer in accordance with an insurance policy on the basis of the claim of the insured (his/her legal successor) or a third party. Thus, Ukrainian law allows a third party to claim directly under a liability insurance policy. Nevertheless, a different claiming procedure may be prescribed by liability insurance rules for third parties or a liability insurance policy concluded between the insurer and the insured.

b. Only for specific types of parties (e.g. individuals/companies)?

There are no restrictions on the types of parties in this regard. Physical and legal entities, residents and non-residents of Ukraine are entitled to claim directly under a liability insurance policy.

c. Only for specific types of loss or damage?

There are no restrictions in this regard.

d. Only for specific types of insurance?

There are no restrictions in this regard.

e. Other?

There are no restrictions in this regard.

2. Is a claim against the insurer by the insured required for a third party to be able to claim under the liability insurance policy?

No, a claim by the insured against the insurer is not required for a third party to be able to claim under the liability insurance policy. Ukrainian law provides a third party with the right to claim insurance payment in its favour, i.e. provides a third party with the rights of the insured, but does not impose the latter's obligations on the third party.

Nevertheless, as stated above, a different procedure may be prescribed by the liability insurance rules for third persons or a liability insurance policy.

3. Can a third party initiate court proceedings against a liability insurer?

Under Ukrainian legislation, a third party is entitled to initiate court proceedings against a liability insurer.

a. For a third party to initiate court proceedings against an insurer, are there specific conditions?

There are no specific conditions for a third party to initiate court proceedings against an insurer.

b. Is the participation of the insured in such proceedings required or can liability be established in proceedings only between the third party and the insurer?

Participation of the insured in such proceedings is not required. After losses have been caused, the third party has the right to choose against whom the claim will be made: the insured or the insurer.

4. Is a liability insurer allowed to defend itself against a third party by denying coverage?

a. If yes, can coverage be established in proceedings between the third party and the liability insurer?

A liability insurer is allowed to defend itself against a third party by denying coverage and enjoys all the rights of a party in court proceedings prescribed by the Civil Procedural Code of Ukraine. Coverage can be established in proceedings between the third party and the liability insurer. If that insurance benefit is paid by the insurer to a third party, the insurer may have remedies or recourse against the insured.

b. If no, does the liability insurer have remedies or recourse against the insured?

5. Are there any further conditions for allowing a third party to have direct access?

There are no restrictions in this regard.

6. Does the bankruptcy of an insured impact the possibility of a third party claiming directly under an insurance policy?

The bankruptcy of an insured does not impact the possibility of a third party claiming directly against an insurer under an insurance policy.

a. Are there any specific rules relating to third-party claims in the case of bankruptcy?

Specific rules relating to a third-party claiming directly against an insurer will not apply.

b. If there is a third party that cannot claim directly under an insurance policy, are the rights of this third party protected if the insured goes bankrupt?

A third party under an insurance policy is entitled to claim directly, also in the case of the bankruptcy of the insured

7. Is the prejudgment attachment or seizure of assets allowed in your jurisdiction? If so, is a third party allowed to attach or seize an insured's claim against the insurer?

Prejudgment attachment or seizure of assets is not allowed under Ukrainian legislation.

a. Is attachment or seizure of an insurance payment allowed in full?

b. Are the defence costs of the insured excluded from attachment and seizure?

c. Is the insurer allowed to defend itself against the attachment or seizure by denying coverage?

8. Is the insurer or the insured (or both) required to take the interests of a third party into account if an insured requests payment under the insurance but the third party has not yet requested payment?

If the insured addresses the insurer with a claim for compensation of a third party, such a claim will be considered on the basis of the documents presented.

a. Would a settlement between the insurer and the insured be binding on the third party?

A settlement between the insurer and the insured will be binding on the third party.

b. If so, under what conditions?

If the insurer decides to refuse the insurance benefit payment or not to pay the full amount of the insurance benefit payment, a third party will still be entitled to address the insured or the insurer with a claim for compensation.

If the insured files the statement of claim for compensation to a third party, regardless of whether or not the latter is involved as a third party on the side of a plaintiff, such a statement of claim will not be granted. Thus, in order for a third party to receive insurance benefits as the result of a court decision, a third party is to initiate court proceedings on its own, i.e. be a plaintiff in the case.

9. Are there any other relevant provisions in your jurisdiction with respect to direct access by a third party?

Legal relations regarding direct access by a third party are not strictly regulated under Ukrainian law. Thus, general provisions in Ukrainian statutory law will apply to a certain extent in this matter.

10. Is there anything else you would like to add that could be of interest to this project?

N/A

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