

# ASSOCIAZIONE ITALIANA DI DIRITTO MARITTIMO



## Questionnaire for National MLA's on Rights of Direct Action Against Insurers

Note: References to “national laws” in this Questionnaire includes any statutory law of whatever level in each nation and, for common law jurisdictions, any caselaw precedent establishing a right of direct action.

### 1. Direct action against liability insurer by third party claimants

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

Italian law does not generally allow direct claims of the damaged party against the liability insurer.

If so,

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

(not applicable)

If not,

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

Direct claims of the damaged party against the liability insurer are permitted only in a number of specific cases, namely:

- 1) the liability arising in tort from the circulation of motor vehicles and pleasure boats insurance, pursuant to art. 144 of the Italian Insurance Code;
- 2) the liability either in tort or in contract arising from the exercise of medical and health care activities pursuant to art. 12 of law 24/2017;
- 3) the liability of the air carrier towards the passenger, either in tort or in contract, pursuant to art. 942 of the Italian Navigation Code
- 4) the damages caused by aircrafts to third parties on the surface pursuant to art. 1015 of the Italian

Navigation Code;

- 5) the liability in tort arising from hunting activities pursuant to art. 12 of law 157/1992; and
- 6) the liability in tort arising from nuclear activities pursuant to art. 18 of law 1860/1962.

The above mentioned cases are all relating to compulsory insurance coverage.

## 2. Jurisdiction

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

When direct action is permitted under Italian law or the applicable law, if the Insurers are domiciled in a European Union Member State, pursuant to art. 13.2 of Regulation no. 1215/2012/EU actions brought by the injured party directly against the liability insurer may be filed before an Italian Court provided:

- (a) the insurer is domiciled in Italy; or
- (b) the claimant is domiciled in Italy; or
- (c) if the Insurer is a co-insurer, the proceedings against the leading insurer are brought in Italy;
- (d) the place where the harmful event occurred is in Italy.

If the Insurers are not domiciled in a EU Member State but have a branch, agency or other establishment in Italy, they are considered to be domiciled in Italy, but only for disputes arising out of the operations of such branch, agency or establishment.

The Court of Justice of the European Union in the case C-368/16 Assens Havn v. Navigators Management (UK) Limited has determined that, when Regulation 1215/2012/EU applies, an injured third party bringing a direct action against a liability insurer is not bound by an exclusive jurisdiction agreement between the insurer and the policy holder in the insurance contract.

If the Insurers are not domiciled in a EU Member State and do not have a branch, agency or other establishment in one of the Member States and/or the disputes do not arise out of the operations of a branch, agency or establishment, then the general rule on Italian Court jurisdiction as set by art. 3 of law 218/1995 dictating rules on Private International Law applies. According to such rule actions brought by the injured party directly against the liability insurer may be filed before the Italian Courts if:

- (a) the Insurers are domiciled in Italy; or

(b) a general representative of the Insurers, duly authorised to appear in Court on their behalf, is domiciled in Italy; or

(c) the Italian Court has jurisdiction pursuant to one of the criteria established by the Brussels Convention of 27<sup>th</sup> September 1968, and subsequent modifications applicable in Italy.

It should be noted that the criteria for direct actions against Insurers set by the Brussels Convention 1968 (as amended) are basically the same of Regulation 1215/2012/EU but for one case, since according to the Brussels Convention 1968 (as amended) it is permitted to sue the Insurers in the EU Member State where the “policy holder” (and not the “claimant”) is domiciled.

However, recently the Court of Cassation (the Supreme Court in Italy) decided (albeit in a case not concerning a direct action) that the reference to the Brussels Convention 1968 in art. 3 of law 218/1995 should be now read as a reference to Regulation 1215/2012/EU, so that the same criteria should apply to Insurers, irrespective of their domicile.

The Court of Cassation has also decided (without referring the matter to the European Court of Justice) that, if the action for damages against the liable party is subject to special jurisdiction rules which are deemed to prevail on EU Regulation 1215/2012 pursuant to its art. 71, then also the direct action of the injured party against the Insurers permitted by Italian law is subject to such special rules; e.g. in case of a collision between two leisure yachts, the jurisdiction of Italian Courts for the direct action against the Insurers of one of the leisure yachts involved in the collision, permitted under Italian law and filed by the other yacht, must be established according to the Brussels Convention on Certain Rules concerning Civil Jurisdiction in Matters of Collision dated 10<sup>th</sup> May 1952, if all the vessels involved in the collision fly the flag of States which are party to such Convention.

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

It is generally understood that, in the specific cases when the right of direct action is directly conferred by Italian law to the injured party, such injured party is not privy to the arbitration clause stipulated into the insurance contract and therefore it is not bound by such agreement.

### **3. Applicable law**

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

Being Italy a Member State of the European Union, pursuant to art. 18 of Regulation no. 864/2007/EC on the law applicable to non-contractual obligations the person having suffered damages may bring

the claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

On the other hand, there is no specific conflict of law provision in Italian law concerning the right of direct action against Insurers if the person liable to provide compensation must do so as a result of a contractual obligation (which is outside the scope of application of said art. 18 of Regulation no. 864/2007/EC).

3.2 Is the proper law governing such direct action established on the basis of the general conflict of laws rules applicable to the insurance contract stipulated with the liability insurers, or to the claim in tort or in contract brought by the third party claimant, or on the basis of other general rules?

Absent any Court precedents on the matter, it may be maintained that the person having suffered damages may bring the claim directly against the insurer of the person liable to provide compensation if the law applicable to the contractual obligation or the law applicable to the insurance contract so provides.

#### 4. Procedure

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

Yes

4.2 Can the third party sue directly the insurer only?

As a general principle no, because this is typically considered a case of "*litisconsorzio necessario*", i.e. a compulsory joinder of parties, so either the liable party and the insurer must be summoned (e.g. art. 144 of the Italian Insurance Code expressly provides so for the direct action permitted for motor insurance).

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

Yes, and such a possibility would exist also in matters where there is no direct action against the liability insurer.

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

Yes, given that either the insured and the insurer should be summoned, and the liability insurer may benefit from the defences raised by the liable party in challenging the claim and the liability

for the event

4.5 In case the liable party and the insurer are joined as respondents in the same proceedings, can the insurer file in the same proceedings an action seeking recovery from the insured under the terms of the contract of insurance for the indemnity to be paid by the insurers to the third party?

Yes

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

For actions under question 4.3 above, pursuant to art. 13.1 of Regulation 1215/2012 the insurer may be joined in the proceeding which the injured party has brought against the insured.

For actions under question 4.4 above, pursuant to art. 13.3 and 14 of Regulation 1212/2012 if the law governing the direct action provides that the insured may be joined as a party to the action, the same Court has jurisdiction over the insured also for the third party proceedings filed by the Insurers against the latter.

## 5. Defences

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

5.1.1 Can the insurer raise any defence which would be available to the liable party as regards the merits and quantum, whether or not the latter is joined in the proceedings as a defendant?

When direct actions are permitted under Italian law, the defences originally available to the liable party, whether on the merits or the quantum, would also be available to the insurer in any case. Joining the liable party in direct action proceedings is compulsory in specific cases (e.g. Art. 144 of legislative decree 209/2005, concerning motor insurance).

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

Yes, he can.

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

No, he cannot. With the exception of extreme cases (e.g., the contract of insurance does not exist or is radically null and void), the insurer cannot challenge the action on grounds of exceptions and defences arising from the contract of insurance (e.g., insured's failure to pay the premium or to

mitigate the damages).

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

On this point Italian case law (considering that in Italy there is no binding authority of decided cases) may look still unsettled.

Until a recent decision of the Supreme Court (Cass. Sez. III Civile, 9/7/2019, n. 18325) a separate judgement against the liable party was considered by the majority of Court decisions (the conflict of decided cases dates as from 1963) to be binding against an insurer (Cass. 20/2/2013, n. 4241; Cass. 31/1/2012, n. 1359). The reasoning was based on the theory of the *giudicato riflesso*: in other words, the *res iudicata* was held to be binding not only between the parties, their heirs etc. (art. 2909 Civil Code) but also, indirectly, to all the subjects which, although external to the proceedings, were found to be in a legal position subordinate/depending from the main case.

The Supreme Court with said decision 9/7/2019 reversed this trend and held (also taking into account Constitutional principles, art. 24 and 111) that a judgement against the liable party in proceedings to which the insurer had not participated is not binding for him.

There may be room, therefore, for a future intervention of the United Sessions of the Court of Cassation, competent in case of conflicting precedents on a relevant point of law.

If so,

5.4.1 does this also apply to judgements in default?

(not applicable)

5.4.2 does this also apply to foreign judgements?

(not applicable)

## 6. Time limits

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

For the direct actions pursuant to art. 144 of the Italian Insurance Code (motor vehicles and pleasure boats) and art. 12 of law 12/2017 (medical activities) it is expressly stated by the law that the time limit for the direct actions against the Insurers is the same as the one applicable to the action against the liable parties.

In the other specific cases of direct action permitted under Italian law, absent an express rule of law, the Courts usually apply the same principle.

If so,

### 6.1.1 how can they be protected?

The time limit for the action against the insurer is normally qualified as “prescrizione”. As a result, to protect the time bar, it is necessary to send a written request of indemnity for the damages suffered and stating the intention to exercise the right to seek their recovery .

From the receipt of the above mentioned letter a new time limit, whose extension is equal to the one protected, starts to run.

The time limit can be protected also by starting Court proceedings or, when required, mediation proceedings.

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

Generally speaking, under Italian law when two or more parties are jointly responsible for payment, if the claimant protects the time bar by sending the required written claim to one of them, the time bar is considered as protected also for all the other responsible parties, so that it cannot happen that the action against the liable party is time barred and the direct action against the insurer is not.

This principle is applicable to direct actions permitted under Italian law.