

IBA Insurance Committee Substantive Project 2012

Direct Third-Party Access To Liability Insurance

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International Bar Association



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):

¹The 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.

²The 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 injured 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):

¹Within the framework of the contractual insurance cover, the injured party has a direct claim against the insurer.

²The insurer is not entitled to raise coverage defences based on the insurance contract or the Insurance Contract Act.

³The 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 (*Binnenschiffahrtsgesetz*),
- 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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