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

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.

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