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Third party action under German law and recent
legal developments

by

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Introduction and overview

Scope: Third party action from an insurance law perspective; direct claims of injured party against insurer under German insurance law.

- Direct claims according to the German Compulsory Insurance Act.
- Special provisions for compulsory indemnity insurances, Sections 158b to 158k German Insurance Contract Act (VVG).
- Direct claims under the German Oil Pollution Act.
- Direct claims according to Art. 40 Introductory Law of the German Civil Code.

German Compulsory Insurance Act

- Principle: Under German insurance law at present only the German Compulsory Insurance Act provides direct claims of the injured party against the insurer.
- This Act, however, only applies to motor vehicle indemnity insurances. It is not, neither directly nor by analogy, applicable to P & I insurances or any other kind of marine insurance.



Special provisions for other compulsory indemnity insurances, Sec. 158b et seqq VVG 1

- These provisions rule the legal relationship between injured party and insurer. Purpose: Securing the rights of injured party in case of a “sick” insurance contract.
- Concept: Fiction that insurance contract is still valid and that insurer stays liable in relation to injured party.
 - Discharge from liability does not apply in relation to injured party.
 - On-going liability in case of termination of insurance contract.
 - However: Injured party is not entitled to direct claims against insurer, Sec. 158b Subsec. 6 VVG.



Special provisions for other compulsory indemnity insurances, Sec. 158b et seqq VVG 2

- Applicability to P & I insurance?
 - In principle not applicable.
 - Provisions of Insurance Contract Act generally do not apply to marine insurances, Sec. 186 VVG.
 - P & I insurance is not compulsory under German insurance law.
- New developments
 - Present draft to reform the Insurance Contract Act provides a direct claim of injured party against insurer, Sec. 115, 117 of the draft.



Direct claims under German Oil Pollution Act 1

Content:

- Legal obligation for ship-owners to take out an insurance covering oil pollution damage, Sec. 3 of the Act.
 - Applies to vessels with cargo capacity of more than 2000 t of oil.
 - Applies to any vessel navigating on German waters.
- Consequence: P & I insurance covering such risks is to be considered as compulsory indemnity insurance.
- Express reference to Convention on Civil Liability for Oil Pollution Damage in terms of liability and compensation (the “Convention”).



Direct claims under German Oil Pollution Act 2

Legal relationship injured party/insurer

- Injured party is entitled to a direct claim for damage caused by oil pollution, Sec. 1 Oil Pollution Act in connection with Art. VII no. 8 of the Convention.
 - insurer may rely on liability limitations granted to the ship-owner.
 - also holds true if ship-owner is not entitled to limitation of liability.
- Applicability of sec. 158b et seqq VVG?
 - if at all, only by analogy in case of special insurance coverage; not in case of P & I insurance.



Art. 40 no. IV Introductory Law of the German Civil Code

1

Content and purpose

- Wording of Art. 40 no. IV:

“The injured party may assert his claim directly against the insurer of the party liable for damages, in the case that the law applicable to the tort or the law governing the insurance contract provides such direct claim.”
- Purpose: Preference for injured party; aim is to secure fast compensation.
- Provision was actually mainly conceived for damages caused by car accidents. However, the scope of application is much wider.



Art. 40 no. IV Introductory Law of the German Civil Code

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Application in practise:

- Applicable only in case of tort. Injured party has a justified claim for damage resulting from tort and wishes to assert this claim directly against the insurer of the party liable for the damage.
- Clause provides for a true alternative. German court has to choose the favourable alternative.
 - Statute of tort.
 - Statute of contract.



Art. 40 no. IV Introductory Law of the German Civil Code

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Application in practise:

- Statute of tort: The law of the country where the party liable for the damage acted in tort, Art. 40 no. I.
 - Only determines the possibility of a direct claim.
 - Determines whether insurer may put forward justified general objections under the relevant country law.
- Statute of contract: The question whether insurer is liable for the damage claimed and to what extent, is solely subject to the insurance contract (e. g. exclusion of risks).



Art. 40 no. IV Introductory Law of the German Civil Code

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- Case of a German marine insurer
 - Direct claims can only be asserted on the basis of the statute of tort.
 - Example of a German P & I insurer.
 - Note: Insurer may rely on limitation of liability according to London Convention, if applicable.
- Effect on foreign marine insurers
 - Art. 40 no. IV includes direct claims of German injured party against foreign insurers.
 - Jurisdiction of German court? ⇔ Art. 9, 11 Brussels Regulation.





Thank you very much for your attention!

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