Third Party Direct Rights of Action against Insurers under UK Law and International Maritime Liability Conventions

Third Party Rights of Direct Action

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1 Introduction

The notion that a third party might be entitled to seek redress by a direct right of action against the insurer of the party who has incurred liability to the third party has an obvious attraction. Notwithstanding that the liability is that of the insured, if the insurer is the ultimate payor, it appears to be procedurally sensible, efficient, secure and cost effective to facilitate the recovery of compensation directly from the insurer. The alternative is cumbersome. It involves the third party suing the insured to establish liability, and thereafter the insured claiming an indemnity against the insurer under the policy, with the insurance monies or their equivalent value thereafter passing through the insured to the third party claimant.[[1]](#footnote-1)

This issue is peculiarly specific to liability insurance and although the concept of third party direct right of action is attractive it is not without its analytical difficulties. And even if these are surmountable there survives the question of policy. There is no direct link in law as between the third party claimant and insurer. The insurer is in a contractual relationship with the insured only, and in turn the insured is in a distinct legal nexus with the third party claimant, whether contractual or non-contractual. As between third party claimant and insurer there is no contractual relationship,[[2]](#footnote-2) but this does not prevent some manner of legal relationship arising in particular circumstances.[[3]](#footnote-3)

There is a broad division of opinion as to the question whether a legal link should be established between third party and insurer and, if so, to what extent and subject to what terms and conditions. This division is readily visible when global legal traditions and national laws are compared.[[4]](#footnote-4) The common law tradition has been resistant to the concept of a direct right of action, an approach much influenced by the principle of privity of contract.[[5]](#footnote-5) Nonetheless, many nation States within the common law tradition have legislated to permit direct rights of action but to different degrees and conditions. The differences may be significant. For example, direct rights of action are generally accepted in state law in the USA but with significant variations: and the same is true of the law of South Africa, Nigeria and Canada.[[6]](#footnote-6) In UK law the right is recognised in limited and specific circumstances.[[7]](#footnote-7) By contrast Australia and New Zealand have adopted a different course and respectively conferred on third parties preferential rights against insurers including the benefit of a charge over the insurance monies.[[8]](#footnote-8)

The direct right of action is more freely accepted in the civil law tradition although the procedure may again vary as between different jurisdictions.[[9]](#footnote-9) This is true of Belgian and French law.[[10]](#footnote-10) The Spanish Penal Code, article 117, provides for the direct civil liability of liability insurers[[11]](#footnote-11) and article 76 of the Insurance Contracts Act 50/1980 enables a third party to bring a claim governed by Spanish law directly against the liability insurer, either separately or concurrently with the claim against the insured.[[12]](#footnote-12)

There is a close but not inseverable relation between compulsory insurance and third party direct rights of action.[[13]](#footnote-13) Where insurance is by law obligatory,[[14]](#footnote-14) there is benefit to both insured and third party.[[15]](#footnote-15) It ensures that a party exposed to liability has the protection of insurance, converting what is an act of prudence to a legal obligation, thereby protecting against the risk of ruinous financial obligations. As for third parties, without the availability of insurance compensation might not be available and the pursuit of a remedy in the courts or arbitration not a realistic or sensible option. Where there is insurance, the financial circumstances of the party liable are removed from immediate consideration, the insurance acts as a guarantee or an assurance.[[16]](#footnote-16) It has long been appreciated that to succeed in a claim against a defendant without funds to feed the judgment or award is a pyrrhic victory. It is a claim which has no value.

An additional and often predominant motive underlying compulsory insurance is the protection of the interests of third parties, by virtue of their membership of an exposed class of persons. In this circumstance the third party may be given a right of direct action against the insurer, with the power to enforce the rights of the insured under the insurance against the insurer. This provides still greater protection to third parties because it protects against the risk of misconduct or insolvency on the part of the insured, or the risk that the insured may not be in a position to claim under the insurance or that insurance monies paid to the insured may not be available to the third party.[[17]](#footnote-17)

This interplay between compulsory insurance and rights of direct action against insurers is evident in the emergent international maritime liability conventions relating to oil pollution, passenger liabilities and wrecks.[[18]](#footnote-18) In this sector the principal source of insurance cover is provided by P & I Clubs which are members of the International Group of P & I Clubs,[[19]](#footnote-19) but other mutual and market insurers may also underwrite these risks. The international conventions contain a standard mandatory insurance obligation and with third parties given rights of direct action. These provisions are analysed later in the text..[[20]](#footnote-20)

The debate surrounding rights of direct action against insurers relates not only to the question whether such a right should exist, but also, if it does exist, the terms and conditions that attach to the right. In outline the core debate is whether the position of the insurer when sued by the third party should be precisely the same as had the claim been instigated by the insured. Or should the position of the third party be strengthened so that defences available to the insurer are more limited than would be the case had the claim been made by the insured.[[21]](#footnote-21) The former position takes the support of strict logic but the latter may be supported by considerations of public policy. If the primary object of obligatory insurance and third party rights of direct action is the protection of identified third parties, it is arguable that third parties should be secure in their expectation that the insurance will pay. This may also mean that third parties should be in an even more secure position than the insured and protected against the risk of defensive counter-measures by insurers, particularly when based on conduct of the insured to which the third party was not privy. If this policy is accepted the question then arises about the extent of the additional protection that should be recognised, as to which opinions may differ.

It is now proposed to examine the issues raised in this Introduction in the context of UK law and the relevant international maritime liability conventions.

2 UK Law[[22]](#footnote-22)

2.1 Common Law

At common law[[23]](#footnote-23) a third party beneficiary of a liability policy has no direct rights of action against the insurer. There is no privity of contract between the third party and insurer. Privity of contract exists only between the insurer and insured, and although the third party may be considered an intended beneficiary of the insurance this does not give the third party any rights under the contract of insurance.[[24]](#footnote-24) The design under the common law is that it is for the insured to recover under the policy and thereafter discharge the liability to the third party with the aid of the fiscal benefit provided by the insurance.

The common law doctrine of privity of contract has been modified by the Contracts (Rights of Third Parties) Act 1999 but it would be rare for this legislation to provide the foundation for a third party claim in connection with liability insurance.[[25]](#footnote-25) The insurance contract may itself also exclude any application of the Act.[[26]](#footnote-26)

The risk that the presumptions underlining the common law might malfunction detrimentally is borne by the third party. There is no guarantee that the insured provided with the insurance funds will compensate the third party:[[27]](#footnote-27) there is very clearly no obligation to transfer the precise funds received to the third party.[[28]](#footnote-28) Also, beyond the possibility of dishonest conduct, the insured may become insolvent or, in the case of an incorporated insured, cease to exist. In the event of insolvency, insurance monies paid to the insured are considered part of the general assets of the insured to be distributed to the general creditors in accordance with the appropriate insolvency rules. There is no trust or rule of preference in favour of the third party who may consequently recover a much smaller sum than the insurance monies paid to the insolvent insured or even nothing at all.[[29]](#footnote-29) The same position prevails if at the time of the insolvency only the legal right to claim under the policy exists. The legal right is again considered an asset of the company for the benefit of all the creditors in the insolvency process.[[30]](#footnote-30) There is also the risk that the insurance monies paid may be the subject of a charge or floating charge with the chargees secured creditors with priority over the claims of third parties.[[31]](#footnote-31)

Some of the potential difficulties and risks inherent in the common law can to some degree be avoided when the insured is characterised as an agent or trustee of the third party,[[32]](#footnote-32) or by the procedural device of joining the insurer to litigation to establish the liability of the insured,[[33]](#footnote-33) or by contractual provisions in the policy relating to the payment of indemnities.[[34]](#footnote-34) But, nonetheless, risks remain some of which have been cured by legislation.

2.2 Statutory Law

The common law continues to hold sway generally but a small number of statutes have been enacted which establish direct rights of action against liability insurers in the case of particular categories of insurance and circumstances.[[35]](#footnote-35) For the present I ignore statutes which give effect to international maritime conventions which I return to later in the text.[[36]](#footnote-36)

Of particular significance is the *Third Parties (Rights against Insurers) Act 2010 (as amended)*, which is the closest that exists to a statutory measure of general application, and the only statute to be considered in this contribution. It repeals and replaces a statute of the same title enacted in 1930 which increasingly proved to be dated and deficient, and became the object of persistent criticism.[[37]](#footnote-37)

The 2010 Act makes significant substantive and procedural reforms, bringing the law into alignment with commercial practice and streamlining the process by which direct rights of action against insurers may be pursued in specified circumstances.[[38]](#footnote-38) The Act also materially improves the right of third parties to obtain information relating to insurance.[[39]](#footnote-39)

Although the Act consistently makes reference to contracts of insurance, it is specifically applicable to contracts which insure liabilities, as is made clear by the Preamble,[[40]](#footnote-40) with the concept of “liabilities” not defined. But it is the case that a third party liabilities contract must be in its essence a contract of insurance.[[41]](#footnote-41) Contingent insurance, where the payment of an indemnity is discretionary, is not in strictness founded on a contract of insurance.[[42]](#footnote-42) Although aspects of P & I insurance cover may be discretionary this is not the case with regard to the generality of the cover[[43]](#footnote-43)

The Act is an aspect of the *lex fori* and applicable whenever a UK court is vested with jurisdiction.[[44]](#footnote-44) It is consequently of potential relevance to P & I insurance provided by Group members of the International Group of P & I Clubs domiciled in the UK.[[45]](#footnote-45) All these Clubs adopt English law as the governing law of their insurance contracts and also English jurisdiction and/or London arbitration[[46]](#footnote-46) and may be exposed to third party claims[[47]](#footnote-47)￼ The position in relation to the other Clubs in the International Group will depend on the chosen governing law of each, dependably the domestic substantive and procedural law.[[48]](#footnote-48) Nonetheless a restricting factor on the availability of the procedure made available under the Act is the implicit requirement that the necessary status of the insured as being insolvent or defunct must result from procedures within the jurisdiction[[49]](#footnote-49)￼

It is now proposed to scrutinise the substance of the Third Parties (Rights against Insurers) Act 2010 (as amended)[[50]](#footnote-50) in some detail.

2.3 Third Parties (Rights against Insurers) Act 2010 (as Amended)

The Act relates to two broad issues, the transfer of contractual rights and disclosure of insurance information to third parties. The following analysis adopts this division

2.3.1 Transfer of Contractual Rights

In the Preamble the statute declares that it is, ‘An Act to make provision about the rights of third parties against insurers of liabilities to third parties in the case where the insured is insolvent, and in certain other cases’.[[51]](#footnote-51)

The Act applies to liability insurance generally: but it is restricted to occasions when the insured is or becomes insolvent or defunct, the latter relating to incorporated or unincorporated bodies which are or have been dissolved by legal process. The factor common to these two general categories is that they are situations where the insured has lost the “effective power to enforce its own rights and dispose of its own assets”.[[52]](#footnote-52) Otherwise, the application to insureds is unqualified: the insured may be a natural person or an incorporated or unincorporated body or association.

The concept of insolvency is broadly defined as bankruptcy and winding up, and extends to include the range of judicial orders that may be made in the modern law in the face of parties experiencing financial difficulties.[[53]](#footnote-53) An incorporated or unincorporated body is defunct when it has ceased to exist as a matter of law, as when a company is removed from the company register, and not subsequently restored.[[54]](#footnote-54) The statute refers to insureds who or which fall within the Act by the generic term ‘relevant person’.[[55]](#footnote-55)

The private international law dimensions of the Act are far from straightforward. Although the point is not expressly made in the legislation it would appear that the insured must be made bankrupt or wound-up or dissolved in England and Wales, Northern Ireland or Scotland. This appears to be a necessary implication for the way ‘relevant person’ is defined.[[56]](#footnote-56) It is, however, the case that in England and Wales the courts have jurisdiction in specific circumstances to grant winding-up orders against foreign insureds. Otherwise, no other connection with any part of the UK is necessary with regard to the location of the liability, the residence or domicile of the parties, the governing law of the insurance contract, and the place where sums due under the insurance are payable.[[57]](#footnote-57) The Act does not apply to reinsurance.[[58]](#footnote-58)

2.3.2 Liability of Insured

The broad proposition on which the Act is based is that the liability of the insured to the third party must always be established before rights may be enforced against the insurer. But it is no longer a condition precedent to the commencement of proceedings, which may be initiated following the incurring of liability.[[59]](#footnote-59)

As this proposition makes clear, the Act draws a distinction between “incurring” and “establishing” liability. Liability is established only if both the existence and amount of the liability are established by a declaration made under the Act or a judgment or arbitral award, or an enforceable agreement.[[60]](#footnote-60) The liability of the insured may relate not only to injury and loss caused to the third party but also to liabilities voluntarily assumed by the insured,[[61]](#footnote-61) such as legal expenses and health insurance.[[62]](#footnote-62)

When liability is “incurred” is not specifically defined in the legislation. Logically it must be at an earlier point in time than the establishment of liability. It is also a patently important issue because it is the time that the rights under the contract of insurance transfer to the third party, placing the third party in a position to bring proceedings to enforce the rights against the insurer.[[63]](#footnote-63) The probable interpretation is that the concept alludes to the moment the facts support the conclusion that a cause of action exists but even this suggestion requires qualification. This particular issue is discussed further in the following section.[[64]](#footnote-64)

2.3.3 Transfer of Contractual Rights

The Act does not create new rights, but transfers the rights that arise under the contract of insurance which relate to the insured’s liability to the third party.[[65]](#footnote-65) As previously observed the Act does not provide a definition of ‘contract of insurance’ but it may be anticipated that the designation will be given a commercial construction and include indemnity insurance.[[66]](#footnote-66)

The Act transfers the insured’s rights by a process which is customarily described as a ‘statutory transfer’.[[67]](#footnote-67) It is not an assignment or subrogation, or any similar concept. Section 1(2) states –

The rights of the relevant person[[68]](#footnote-68) under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the “third party”).

This reproduces the technique adopted in the 1930 Act which Lord Denning described in the following terms –

Under the section the injured person steps into the shoes of the wrongdoer. There are transferred to him the wrongdoers’ rights against the insurer under the contract. What are these rights? When do they arise? So far as the liability of the insured is concerned, there is no doubt that his liability to the injured person arises at the time of the accident, when negligence and damage coincide. But the ‘rights’ of the injured person against the insurer do not arise at the same time.[[69]](#footnote-69)

The dictum begs the question as to when precisely rights of the insured against the insurer transfer but without providing a direct answer. Under the 1930 Act there was some uncertainty about this question but the predominant view appears to have been that rights transferred to the third party when the liability of the insured was established. Prior to this moment the third party acquired no right or even a contingent right to an indemnity.[[70]](#footnote-70)

Under the 2010 Act the position is different because the precise moment liability is established is irrelevant. The answer to the question appears to be when the insured acquires the status of a relevant person, in other words becomes insolvent or defunct. The insured may have this status at the time liability is incurred or at a later date, after liability has been incurred, and the transfer of rights will occur accordingly.[[71]](#footnote-71)

Section 1 of the 2010 Act is the basis of this proposition. It is nonetheless a difficult provision: it provides for the transfer of rights when the insured, of the appropriate status, has “incurred” liability. The meaning of this phrase is not immediately clear but in the context of the section it logically must mean something other than, and which occurs at an earlier moment in time than, when liability is “established”.[[72]](#footnote-72) The only viable suggestion is that it refers to the occurrence of the factual circumstances out of which liability arises, in other words when the facts establish the cause of action. In the Law Commission Report the word is understood as referring “to the creation of a liability” which appears to support the interpretation suggested.[[73]](#footnote-73) But this test must be applied before those facts have been established and it would appear that the most that may be demanded is that the third party honestly and reasonable believed that the facts indicated a liability on the part of the insured, such that he is justified in commencing proceedings against the insurer under the legislation. It is possible that the third party may misjudge the position and ultimately fail to establish liability but providing the litigation has been initiated in good faith there should be no repercussions. Of course, if the issue of liability has already been established no similar question arises.[[74]](#footnote-74)

At their core the rights of the insured relate to the right to an indemnity under the contract of insurance, subject to the terms and conditions of the contract. The transfer is limited to “the liability incurred” by the insured, so, for example, if the insured is entitled to receive a greater sum by way of indemnity from the insurer than the sum of his liability to the third party, the right to the difference is not transferred.[[75]](#footnote-75)

The assertion of transferred rights is dependent on the insured establishing a valid and binding contract of insurance in accordance with the applicable legal principles and complied with the terms and conditions of the contract. To provide an example, under English law a contract of insurance is a contract of good faith and an insured in placing the insurance is under a duty to make fair presentation of the risk.[[76]](#footnote-76) Further, the terms of the contract may place obligations on the insured with regard to the management of the risk and the making of claims. Breach of one or more of these obligations may have many consequences, one of which may be to prejudice the right to a recovery under the insurance.[[77]](#footnote-77)

The insurer may raise any defence against the claim by a third party based on transferred rights that would have been available to the insurer had the claim been made by the insured. The insurer may also raise any defence that would have been available to the insured to a claim brought by the third party to establish liability. This latter defence is expressly recognised in the Act[[78]](#footnote-78) and the former follows from the way the ‘right of an insured under the insurance’ is construed as meaning an effective right that would have been open to the insured in an action on the insurance. This approach gives full meaning to the notion that the third party “steps into the shoes” of the insured wrongdoer and that the position of the insurer is, with some qualification,[[79]](#footnote-79) precisely the same as had proceedings been commenced by the insured.[[80]](#footnote-80)

Consistent with this analysis it is also the case that any right of set off the insurer would have had as against the insured survives against the third party making a direct claim.[[81]](#footnote-81)

Once the rights of an insured under the insurance contract, in respect of its liability to the third party, are transferred to the third party they cease to be enforceable against the insured to the extent of those rights. But they may be enforced against the insured to the extent that the sum recoverable from the insured is greater than the sum recoverable from the insurer,[[82]](#footnote-82) as also may rights not connected with the liability of the insured.

2.3.4 Protective Provisions – Modification of the General Rule Relating to Transfer

The principles relating to the transfer of rights under the Act might on occasions operate oppressively and unfairly to third parties in the absence of legal protection. To counter this possibility the Act sets out protective provisions which apply in identified circumstances.

Where the transfer of rights is subject to a condition in the insurance contract to be fulfilled by the insured, providing it continues to be possible the condition may be fulfilled by the third party, whose acts are deemed to have been done by the insured.[[83]](#footnote-83) Consequently, failure to satisfy the condition by the insured is not crucial and prejudicial to the third party transferee. The clearest example is a condition requiring the insured to give notice of a claim or service of proceedings within a specified period of time. Under the Act the insurer is denied the right to insist on personal performance by the insured:[[84]](#footnote-84) the third party is entitled to perform the obligation if that continues to be possible.

If the insurance contains a condition which requires the insured to provide information and assistance to the insurer that cannot any longer be fulfilled because the insured is an individual who has died or a body corporate which has been dissolved, the condition does not continue to apply to the rights transferred.[[85]](#footnote-85) Further, such a condition is not to be construed as requiring the insured to notify the insurer of the existence of a claim under the contract of insurance.[[86]](#footnote-86)

The Act also protects transferees from the effect of what is known as the ‘pay to be paid rule’ or ‘pay first rule’, which is declared void. In the language of the Act, transferred rights are not subject to a condition requiring the prior discharge by the insured of the insured’s liability to the third party.[[87]](#footnote-87) An exception is made with regard to marine insurance[[88]](#footnote-88) where the ‘pay to be paid’ rule continues to attach to rights transferred except where the insured’s liability relates to death or personal injury.[[89]](#footnote-89) This provision is of particular significance to P & I insurance relating to maritime liabilities in which the ‘pay to be paid’ rule assumes a significant position.[[90]](#footnote-90) The Act follows what had become the established position in the practice of P & I Clubs.[[91]](#footnote-91) Beyond the question of policy, it is a logical absurdity for the condition to survive as against third party transferees.[[92]](#footnote-92) That it does in the case of maritime liabilities, subject to the one qualification, is an acknowledgement of the desirability of arriving at an internationally agreed position on the question.

2.3.5 Procedure under the Act

The most significant aspect of the 2010 Act is the reform introduced to the procedure for the assertion of third party rights. These reforms are additional to the former procedure and represent an alternative approach for third parties. Under the preceding procedure it was essential to first establish the liability of the insured to the third party by obtaining a judgment or award or by agreement.[[93]](#footnote-93) In the case of a defunct insured, it was necessary to restore the legal identity of the insured so that liability could be established.[[94]](#footnote-94) Under the new procedure neither step is necessary. The claim may be made directly against the insurer with all issues determined in those proceedings. The broad effect of the reforms is to bring the legal procedure into line with the way third party claims against insureds are actually conducted in practice, with insurers taking a major managerial role and insureds only a small or no part save in name.[[95]](#footnote-95) It is anticipated that the new procedure will be far simpler and bring about a saving in cost and time.

2.3.6 Procedure When Liability Separately Established

The 2010 Act continues to recognise the availability of a procedure based on the transfer of rights separate and distinct from the new procedure introduced by the 2010 Act. Under this procedure the third party takes a first and separate step to establish the liability of the insured, by obtaining a judgement, arbitral award or settlement agreement. Thereafter, having established liability, and relying on the transfer of rights under the 2010 Act,[[96]](#footnote-96) the third party commences a separate proceeding directly against the insurer to establish liability to pay under the insurance and obtain judgment.[[97]](#footnote-97)

This procedure may arise in various circumstances. The insured may become a relevant person after the liability has been established by a judgment, award or agreement. In this circumstance the third party has no option but to initiate proceedings, founded on the transfer of rights, directly against the insurer. The third party may also choose to adopt this approach when the insured becomes a relevant person during the course of litigation commenced by the third party to establish his liability. It may be a better option to continue the proceedings than abandon them and commence the new procedure under the 2010 Act.

When this approach is adopted, there is at least the risk that the third party may be out of time to make a claim under the insurance contract against the insurer under the 2010 Act. A provision of the Act guards against this risk by providing that the cause of action against the insurer arises at the time the liability of the insured is established.[[98]](#footnote-98) This means that time starts to run from the time of the judgment establishing liability.

2.3.7 New Procedure before Liability Established

The new procedure introduced by the 2010 Act provides that a third party who claims to be the transferee of insurance rights but who has yet to establish the liability of the insured may proceed directly against the insurer.[[99]](#footnote-99)

In this circumstance the third party commences proceedings directly against the insurer by initially seeking a declaration as to (a) the insured’s liability, and/or, (b) the insurer’s potential liability, to him.[[100]](#footnote-100) As this provision indicates the third party has a choice how to proceed but it may be imagined that in most circumstances the application will be for declarations against both the insured and insurer. In this proceeding the two major issues may be determined: the liability of the insured to the third party and the insurer’s obligation under the insurance contract to indemnify the third party.

Obviously both issues are to be determined on the evidence. On the presentation of sufficient proof, and subject to any defence the insurer may rely on, the court may grant the declaration(s) sought.[[101]](#footnote-101) Of particular relevance, where the declaration sought relates to the liability of the insured to the third party, the insurer may rely on any defence that the insured could have relied on had those proceedings been brought against the insured.[[102]](#footnote-102) Also, on the question of the insurer’s liability under the insurance contract, the insurer may rely on any defence that would have been available to the insurer had the claim been made by the insured.[[103]](#footnote-103)

A declaration merely declares the opinion of the court on the question(s) placed before it, and the remedy is discretionary in nature. Under the 2010 Act it appears that once the third party has satisfied the court on the evidence a declaration must be made. Where a declaration is made to the effect that the insurer is liable to the third party it may give a judgment against the insurer.[[104]](#footnote-104) But a declaration is only binding on the insured if it has been made a defendant in those proceedings.[[105]](#footnote-105)

It is to be noted that the insured may not be involved in this procedure and it is anticipated that overwhelmingly this will be the position in practice. But it will always be possible for the insured to be joined to the proceedings on the application of the insurer or insured. There is a specific provision in the Act to the effect that where the application for a declaration relates to the liability of the insured, the third party may make the insured a defendant in those proceedings.[[106]](#footnote-106) It is probable that the insurer will be able to achieve the same by reference to the rules of court procedure.[[107]](#footnote-107)

In summary, the significance of the new procedure is that the third party may proceed directly against the insurer without first establishing the liability of the insured. And in these proceedings, it is possible for all the legal issues to be determined, the liability of the insured to the third party and the liability of the insurer under the insurance contract. In these proceedings it is anticipated that the insurer will take the major managerial role, with the insured for the most part not participating.

2.3.8 Arbitration

It is always possible that the insurance contract may contain an arbitration clause with claims arising thereunder referred to an arbitral tribunal for determination. It follows from the nature of transferrable rights under the 2010 Act that such an arbitral agreement is binding on a third party to the extent that the insured would have been bound by it. To this extent, applications by third parties for declarations under the 2010 Act will be required to be referred to the designated arbitral tribunal.[[108]](#footnote-108)

The 2010 Act recognises this possibility and makes certain accommodating provisions. The procedural provisions of the Act continue to apply to the extent that they are relevant and this is achieved by amendments to the statutory drafting. “Tribunal” is substituted for “court” and the phrase “make the appropriate award” for “give the appropriate judgment”.[[109]](#footnote-109)

Where the third party has already established the liability of the insured the reference to arbitration will be concerned only with the claim under the insurance contract against the insurer. If the question of liability is yet to be ascertained, the reference may follow the new procedure under the 2010 Act. In this case the Act expressly provides that where the reference to arbitration relates to an application for a declaration relating to the insurer’s potential liability to the third party, the third party may also in the same proceedings apply for a declaration as to the insured’s liability.[[110]](#footnote-110)

Where an arbitration clause exists in the agreement between the third party and insured, providing it is applicable the liability of the insured will be determined in the reference to arbitration. But this arbitration agreement does not bind the insurer and would not be relevant to any later proceedings brought by the third party for a declaration against the insurer.

2.3.9 Limitation Periods of Time

The general position adopted is that a claim made under a transferred right relates to the right of the original insured under the insurance contract and is governed by the same limitation of time period as would have applied to a claim brought by the insured. Nonetheless, the precise position is to be considered in the context of the two procedural courses open to the third party.

Where the third party decides to first establish the insured’s liability in separate proceedings, independently of the Act, there arise more than one consideration. In this proceeding the relevant limitation of time will relate to the nature of the cause of action. Any subsequent proceedings by the third party against the insurers relying on rights transferred under the 2010 Act, is governed by the time limitation relating to claims under the insurance contract. There is a danger that the third party in this circumstance may run out of time to initiate the claim against the insurer and to protect against this risk the Act sets out the following rule. The claim against the insurer arises at the time the third party establishes the liability of the insured,[[111]](#footnote-111) so time does not commence to run until the moment the liability of the insured is established.[[112]](#footnote-112)

Where the third party proceeds directly under the 2010 Act seeking declarations against the insured and/or insurer, it would appear that the time limit relating to claims under the insurance contract applies subject to the following qualification.

The qualification relates to the position when the third party initiates separate proceedings to establish the liability of the insured but thereafter, while these proceedings are on-going, starts proceedings under the 2010 Act for a declaration of the insured’s liability. If the application for a declaration was commenced after the expiry of the limitation period applicable to an action against the insured to enforce that liability, but while that action was in progress, the insurer may not rely on the expiry of time as a defence unless the insured is entitled to rely on it in the action against him.[[113]](#footnote-113)

2.3.10 Prejudicial Agreements

The impact of agreements entered into by insured and insurer that are prejudicial to third parties was a troublesome issue under the 1930 Act and the problem survives into the 2010 Act. Prejudicial in this context alludes to an agreement which deprives or materially detracts from the rights that the third party would otherwise have possessed under the 2010 Act. It is a little surprising that the opportunity to resolve this matter was not addressed by the 2010 Act.[[114]](#footnote-114)

The issue has received little and always inconclusive attention in the authorities. If there is a solution it is probably to be found in the common law.

In *Normid Housing Association Ltd v Ralphs*, Slade LJ *obiter dictum* suggested that an agreement between insured and insurer might be challengeable if entered into in bad faith or collusively.[[115]](#footnote-115) This would be the case if the intention of the agreement was to cheat the third party or it was so disadvantageous to the third party that no reasonable person could consider it as representing the fair value of the third party claim. Where the evidence supported this conclusion, it was suggested that the transferable contract right was an asset and its availability could be protected by resort to an injunction. The same reasoning was cautiously followed in the Scottish case *A B v Transform Medical Group (cs) Ltd*. The court concluded that although it could not be said that an agreement entered into by insured and insurer could never be challenged by a third party, it was only in the most extreme of circumstances that such a challenge would be successful.[[116]](#footnote-116)

In both cases the contention failed on the facts. It was also a factor in both that the insured had not been under a contractual obligation to enter into the insurances. In entering into the insurance, the insured was acting as a volunteer. It was, therefore, not in breach of contract to the third party in negotiating a settlement with the insurer. They were also cases where the agreements had been entered into after liability had been incurred but before contractual rights transferred to the third party. But neither of these circumstances should necessarily preclude the emergence of a common law remedy.

2.4 Disclosure of Insurance Information

2.4.1 The General Position

There is a general issue whether in the legal process a claimant is entitled to obtain information from a defendant relating to his insurance status and, if insured, the details of that cover. Such evidence may be beneficial because it will assist the claimant in deciding whether or not to pursue the claim and, if so minded, the remedy to be sought. A negative reply could result in considerable financial savings in costs and the avoidance of wasted time and resources. These considerations are particularly relevant to liability insurance.

The general approach of English law is that the financial circumstances of a defendant, including insurances, are a private matter and not for disclosure.[[117]](#footnote-117) Where, however, legal proceedings have commenced the position changes. Under court procedural rules applicable in England and Wales insurance information is subject to standard disclosure.[[118]](#footnote-118) The position is much more restricted pre-action when little or no information about the prospective defendant’s insurances may be discovered. The position is governed by a narrowly based discretion and limited to specified documents and prospective litigants.[[119]](#footnote-119) An order, for example, could not be made against a broker. In general under the court procedure rules pre-action disclosure is confined to exceptional circumstances.[[120]](#footnote-120)

2.4.2 The Position under the 2010 Act

The position changes when the defendant insured is insolvent.[[121]](#footnote-121) The 1930 Act contained disclosure provisions but they were vague, limited and inadequate; and were subject to frequent criticism. A particular bone of contention was the requirement that liability had to be first established before disclosure could be ordered.[[122]](#footnote-122) The duty of disclosure was also conditional on the evidence provided by the insured to the third party revealing reasonably ground for supposing that rights under the Act had been transferred to the third party.[[123]](#footnote-123) There was also no duty to disclose imposed on brokers and other intermediaries.[[124]](#footnote-124)

The 2010 Act introduces a new, more comprehensive and lucid disclosure scheme, with the right to information no longer dependent on the liability of the insured being first established.[[125]](#footnote-125) It sets out a self-contained procedure by which third parties can obtain insurance information before commencing proceedings and without having to obtain a court order. Although the procedure is primarily about the disclosure of information, in specific circumstances it may relate to documents, sought after the commencement of proceedings, which relate to the insured’s liability to the third party. This will apply when the insured is a defunct corporate body.

The duty to disclose information only arises at the request of the third party by giving notice compliant with the terms prescribed by the Act: otherwise, the insurer is not under a duty to disclose or to assume the initiative. The right to request information may be exercised both before and after the commencement of proceedings. In the latter case the Civil Procedure Rules (cpr) will also apply.[[126]](#footnote-126)

The new regime improves the position of third party claimants significantly. They, in fact, stand in a better position than third parties claiming against solvent insureds. The information that may be requested and disclosed is specifically prescribed. The object is to enable a third party to obtain basic information relating to the insurance status of the insured, so as to be in a position to make an informed decision on whether or not to pursue a claim.[[127]](#footnote-127)

Any provision in the contract of insurance which purports, directly or indirectly, to undermine the effectiveness of the disclosure provisions is void. Thus, a term that provides that the insurance is avoided or terminated, or that the rights of the parties are altered, on the provision of information or giving disclosure as required under the Act, is void. As also is a term which prohibits or restricts a person from providing such information or giving such disclosure.[[128]](#footnote-128)

The right to disclosure under the Act is additional to any similar rights that may be conferred under the law.[[129]](#footnote-129) In the case of pre-action disclosure this is unlikely to be helpful because under the rules of court pre-action disclosure is very limited and with orders made only in exceptional circumstances.[[130]](#footnote-130) The position improves significantly once proceedings are commenced.[[131]](#footnote-131) But there is no obligation to disclose information and documents which are protected by legal professional privilege.[[132]](#footnote-132)

The legal position under the 2010 Act differs according to whether the insured is insolvent or defunct

2.4.3 Duty to Disclose Information When the Insured Is Insolvent

A third party may request insurance information from (i) the insolvent insured, when it is reasonably believed that that insured has incurred liability to him, and (ii) any person who is able to provide information relating to the insurance, when it is reasonably believed that the person liable to him is insured and that rights under the insurance have been transferred to him.[[133]](#footnote-133) This includes anyone who is in control of the specified information, which probably includes agents, brokers and other intermediaries.

The information that may be requested to be disclosed is specified by the Act.[[134]](#footnote-134)The initial enquiry relates to whether there is a contract of insurance which covers or might reasonably be regarded as covering the liability.[[135]](#footnote-135) If there is such a contract, the enquires may relate to (i) the identity of the insurer; (ii)the terms of the contract; (iii)whether the insured has been informed that the insurer is denying liability under the insurance (but not the grounds of that denial); (iv) whether there are or have been any proceedings between the insured and insurer with regard to the supposed liability of the insured, and if so, the details of these proceedings (but only such details as to enable him to apply to be substituted for the insured if he so decides) ;[[136]](#footnote-136) (v) if the insurance sets limits on the fund available to meet the liabilities of the insured, how much of it, if any, has been paid out in respects of other liabilities;[[137]](#footnote-137) and (vi) whether there is a fixed charge to which sums paid out under the insurance for the supposed liability would be subject.[[138]](#footnote-138)

As previously observed, the object underlying the disclosure of the specified information is to assist the third party in evaluating the acquired insurance rights. What the third party requires is the information and not the documents in which the information is to be found, and the law is so drafted. Consequently a request may be responded to by communicating the information contained in a relevant document or by providing a copy of the document.

The request must be made in a written notice which indicates the precise information requested, consistent with that permitted by the Act. The notice must also include particulars of the facts on which that person relies as entitlement to give the notice.[[139]](#footnote-139)

The recipient, must respond within 28 days beginning with the day of receipt, (a) by providing the information specified which he is able to provide and (b) identify any information the recipient is not able to provide, and explain why this is the case.[[140]](#footnote-140) The recipient is deemed to be able to provide information if it (i) can be obtained without undue difficulty from a document in that person’s control, or (ii) where the person is an individual, the information is within that person’s knowledge.[[141]](#footnote-141) A document is within a person’s control if it is in that person’s possession or has a right to possession or to take copies of it.[[142]](#footnote-142)

If the information sought cannot be provided because it was contained in a document once under recipient’s control, but not any longer, but the recipient knows or believes that it is now in the control of another person, the recipient is required to provide whatever particulars he can as to the nature of the information and the identity of that other person.[[143]](#footnote-143)

The duty to disclose is not a continuing duty. It is confined to information known at the time of the request: in other words a “snapshot” of information currently held. There is, however, nothing to prevent a third party making further requests for information. In the face of failure to comply, the party giving the notice may apply to the court for an order compelling compliance with the duty.[[144]](#footnote-144) Where this course is adopted any continuing breach can be punished as a contempt of court.[[145]](#footnote-145)

2.4.4 Disclosure of Documents When Insured Defunct

The 2010 Act circumvents the difficulties which arose under the preceding law when an insured becomes defunct. To remind ourselves, a body corporate is defunct if it has been dissolved under insolvency and corporate legislation, and it ceases to be defunct if it is subsequently restored to the companies register.[[146]](#footnote-146) The position adopted by the Act in this regard relates to the disclosure of “documents” and not “information”, and in particular to any documents relevant to the liability.[[147]](#footnote-147)

Where the third party has started proceedings under the 2010 Act against an insurer in respect of a liability incurred to the third party by an insured body corporate which is defunct, the third party may by notice in writing request the disclosure of any documents relevant to the liability from (i) a person who, immediately before the time of the alleged transfer of rights under the Act, was an officer or employee of the body corporate, and (ii) a person who, immediately before the body became defunct, was an insolvency practitioner in relation to the body or an official receiver relating to the winding up of the body.[[148]](#footnote-148)

The notice must be accompanied by a copy of the particulars of claim relating to the proceedings against the insurer, and, if there has been a reference to arbitration, the equivalent particulars of claim.[[149]](#footnote-149)

The duties of disclosure of the person receiving notice and the rights of inspection of the party giving notice are the same (subject to any necessary modifications) as the corresponding duties and rights under the Civil Procedure Rules in respect of which an order for standard disclosure has been made.[[150]](#footnote-150)

A party who is required to serve a list of documents must do so within 28 days beginning with the day of receipt of the notice,[[151]](#footnote-151) but is not required to disclose documents not in his possession at this moment in time.[[152]](#footnote-152)

2.5 International Maritime Liability Conventions

2.5.1 Development of the International Regime

A significant development in the recent history of international maritime law has been the growth of the international liability regime relating to maritime risks connected with the activities of commercial shipping. This has been led principally by the International Maritime Organisation (imo) and resulted in the emergence of a cluster of international maritime liability conventions.

In the field of oil pollution there are the International Convention on Civil Liability for Oil Pollution Damage 1992 (clc 1992),[[153]](#footnote-153) and the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunker Convention 2001).[[154]](#footnote-154) In relation to the carriage of passengers by sea, the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 2002 (Athens Convention 2002).[[155]](#footnote-155) And in connection with wrecks the Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi Convention 2007).[[156]](#footnote-156)

In the present discussion the provisions in these conventions are considered as they have been drafted in the convention text and not in the way they have been given effect to in UK legislation. There are on occasions differences.

2.5.2 Obligation to Insure

The conventions reveal a common substantive and procedural design in relation to insurance. An element of which, primarily for the protection of claimants, is that third party liabilities are buttressed by the requirement of mandatory insurance to cover convention liabilities.[[157]](#footnote-157) The obligation to insure falls on the party or parties liable under the convention. By way of an example, under the clc liability is borne by the registered owner who in respect of a ship registered in a Contracting State and carrying more than 2,000 tons of oil in bulk as cargo is “required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability” prescribed by the Convention.[[158]](#footnote-158)

A hallmark of the conventions is that they each establish the right to limit liability and with the obligation to insure limited to this sum.[[159]](#footnote-159) This approach is adopted notwithstanding that the right to limit may be broken in prescribed, yet very rarely experienced, circumstances.[[160]](#footnote-160) In effect the right is close to being an absolute right.

In parallel with the obligation to insure is a scheme of State attestation introduced to ensure that the insurance acquired is in accordance with the terms of the convention and is subsequently maintained.[[161]](#footnote-161) Each vessel is required to carry a certificate of attestation as proof that it complies with its obligation to be insured in accordance with the terms of the relevant convention.[[162]](#footnote-162)

2.5.3 Direct Right of Action against Insurers

The first point to make is that the 2010 Act does not have any application to direct rights of action against insurers under the clc 92 or any of the other international conventions.[[163]](#footnote-163)

Under all the conventions a claimant may proceed directly against the insurer or other provider of financial security, and in this regard the provisions in the conventions are identical.[[164]](#footnote-164) The precise convention wording in the clc 92 is “Any claim for compensation for pollution damage may be brought directly against the insurer …”.[[165]](#footnote-165) Thereafter the nature of the right and the obligation of the insurer are not expanded upon. The proper meaning of the words, therefore, is dependent on the proper interpretation of the words of the convention, bearing in mind that there is no one possibility.[[166]](#footnote-166)

There is in these words little to suggest that the claimant is standing in the shoes of insured or otherwise asserting the contractual rights of the insured. It is arguable that the claimant has an independent right to proceed against and claim compensation from the insurer who, in these circumstances, appears to be independently and primarily liable. In other words, the direct right of action is in addition to the right to claim against the convention defendant and insured. It is not the same right transferred, nor is it conditional on default by the insured. The insurer is not a guarantor in the legal sense, but is personally and directly liable under the convention. This analysis also takes some support from the fact that the liability of the insurer may be more extensive than the right of recovery of the insured under the insurance.

If this is an accurate interpretation it follows that the claimant has a choice of defendant. Proceedings may be initiated against the party liable under the convention or the insurer, or both. In proceedings directly against the insurer, it is given the power to join the party liable in the proceedings.[[167]](#footnote-167)

By contrast the legislation in the UK provides that “proceedings to enforce a claim in respect of the liability may be brought against the person who provided the insurance or other security …”.[[168]](#footnote-168) These words are again ambiguous and do not provide a clear answer to the question under consideration. They are certainly less precise and direct than the convention drafting. They do not suggest an independent liability on the part of the insurer with the same clarity. Nonetheless they could be construed in this way and there would be the argument that the legislation should be interpreted in a way that gives effect to the clc Convention.

In the event of litigation under the conventions, it is probable that the claimant would favour instituting proceedings directly against the insurer, with it thereafter open to the insurer to join the assured in the proceedings should that be viewed as appropriate or necessary.

In this context it is also worth repeating that in English law the right to claim against an insurer of third party liabilities arises once the liability of the assured to the third party has been established and quantified by a judgment, arbitration award or settlement.[[169]](#footnote-169)By contrast, in the case of indemnity insurance the liability arises when the assured indemnifies the third party claimant.[[170]](#footnote-170)

2.5.4 Position of the Insurer

In the event of litigation under the conventions the insurer may avail itself of the following provisions.

The limits of liability prescribed in the particular convention, even though the assured may not be entitled to limit liability. This is consistent with the obligation to insure, which is in a sum equal to the owner’s limitation sum under the Convention.[[171]](#footnote-171)

Any defence (other than the bankruptcy or winding up of the assured) which the assured would have been entitled to invoke under the relevant convention against a claim made against itself.[[172]](#footnote-172) This refers to defences to the substantive claim and procedural defences which are set out in the convention. It does not include ‘defences’ relating to the financial incapacity of the assured.

The defence that insured loss resulted from wilful misconduct by the assured.[[173]](#footnote-173) This is a defence based on the insurance contract and it survives in the present context as between third party claimant and the insurer. ‘Wilful misconduct’ alludes to insured loss caused by the intentional or reckless act of the owner.[[174]](#footnote-174) The assured has a similar defence to claims made directly against him by a third party.

The defendant insurer, otherwise, may not avail itself of any defence that it would have been entitled to invoke in respect any claim by the assured under the insurance contract.[[175]](#footnote-175) This alludes to remedial rights that may have existed in relation to the insurance contract, except for the defence of ‘wilful misconduct’ which is expressly retained independently of this broader provision. Such defences might be based on illegality, absence of an insurable interest, non-disclosure and/or misrepresentation of material circumstances in placing the risk, breach of warranty or other terms and conditions.

In the result the insurer may be obliged to compensate the third party in circumstances when it would have been in a position to resist the claim if it had been made by the assured under the insurance contract.

3 Conclusion

There are no firm international or national legal models for third party rights against insurers, though in the international maritime sphere there has emerged what may be identified as a standardised approach. Otherwise as between legal traditions and national jurisdictions the legal position is highly variable, as also are perceptions of the position to be occupied by parties influenced by considerations of public policy. The two legal regimes highlighted in this contribution, UK law and that under the international maritime liability conventions, are significantly distinct in substance and policy.

The position adopted in the 2010 Act which applies, with necessary amendments, throughout the UK is weightily analytical and logical. In broad terms the third party stands in the shoes of the insured and consequently third party rights and obligations run in parallel to those of the assured’s. The obligations of the insurer to indemnify the third party mirrors the position that would have prevailed had the claim been made directly by the insured. A few modifications to this model have been introduced but, nonetheless, the insurer is not significantly prejudiced by the emergence of a third party claim. With very few substantial exceptions, the defences available to the insured on the question of liability and to the insurer on a claim under the policy survive. It may be said that the law favours the third party in so far as it confers the procedural right to claim directly against the insurer; but it does not confer beneficial rights not enjoyed by the insured and which might be justified on grounds of public policy.

The position adopted in the international maritime liability conventions is significantly different. Beyond its traditional role as insurer, it would appear that the insurer bears a separate and distinct liability for the claim by the third party. The third party may sue the insured or the insurer, or both, but beyond this the conventions do not indicate any particular joint relation to exist between them. It may be that they are independent obligors. This to cast the insurer in a role much greater than a mere “guarantor” or “surety”; it is a principal debtor and consequently bears a significant exposure.

The international maritime conventions are evidence of an evolving trend, which is much broader that the province of the conventions, which views third party claimants as the primary beneficiaries of liability insurance. The logic of the insurance is perceived to be the protection of their interests over and above the precise terms of the contract of insurance. Consequently, not only do third parties take the benefit of mandatory insurance and direct rights of action against insurers, but also the protection of the insurer following its agreement to assume the risk. The insurer, in other words, occupies an independent role as guardian and on grounds of public policy assumes greater obligations than would have been owed to the insured under the contract of insurance.

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1. In the common law the insured does not receive insurance monies as bailor or trustee: consequently there is no obligation to pay over the precise insurance monies received to the third party. See, In Re Harrington Motor Co Ltd ex parte Chaplin [1928] 1 Ch. 105; Hood’s Trustees v Southern Union General Insurance Co of Australia [1928] 1 Ch. 793. [↑](#footnote-ref-1)
2. See the judicial analysis in Harrington Motor Co; Hood’s Trustees (n 1). [↑](#footnote-ref-2)
3. The insurer may occupy a non-contractual relationship with the third party such as to establish a legal duty. For example, in negotiating a settlement with a third party the insurer may be held to be in a fiduciary relationship and that a settlement negotiated may be avoided for undue influence, Horry v Tate & Lyle Refineries Ltd [1982] 2 Lloyd’s Rep 416. A settlement may also be avoided for misrepresentation, Saunders v Ford Motor Co Ltd [1970] 2 Lloyd’s Rep 379. [↑](#footnote-ref-3)
4. Third Parties (Rights against Insurers) Act 1930, Consultation Paper (1998) Law Com. No .152; Sot Law Com No 102, Appendix F, Summary of Schemes of Third Party Rights Against Insurers in Other Jurisdictions. [↑](#footnote-ref-4)
5. The position under the English common law has to a degree been modified by the Contracts (Rights of Third Parties) Act 1999. See Re E Dibbens & Sons Ltd [1990] b.c.l.c. 577; D G Finance Ltd v Scott [1999] Lloyd’s Rep ir 387. [↑](#footnote-ref-5)
6. ibid; Third Parties (Rights against Insurers) Act 1930, Consultation Paper (n 4). [↑](#footnote-ref-6)
7. See Watson v Hemingway Design Ltd [2020] Lloyd’s Rep ir 194. [↑](#footnote-ref-7)
8. Third Parties (Rights against Insurers) Act 1930, Consultation Paper (n 4). [↑](#footnote-ref-8)
9. Third Parties (Rights against Insurers) Act 1930, Consultation Paper (n 4). [↑](#footnote-ref-9)
10. Third Parties (Rights against Insurers) Act 1930, Consultation Paper (n 4). [↑](#footnote-ref-10)
11. The Spanish statutory provision was before the court in The London Steam-Ship Owners’ Mutual Insurance v The Kingdom of Spain (The Prestige) (No 3) [2020] ewhc 1582 (Comm), [2020] Lloyd’s Rep ir 413. [↑](#footnote-ref-11)
12. See, Hutchinson v Mapfre Espana Compania De Seguros Y Reaseguros SA and Another [2020] ewhc 178(qb), [2020] Lloyd’s Rep. ir 333. [↑](#footnote-ref-12)
13. For example, Directive 2009/20/ec on the insurance of shipowners for maritime claims, which does not contain a third party direct right of claim. [↑](#footnote-ref-13)
14. The obligation to insure may also arise, for example, from contract and professional rules of conduct. [↑](#footnote-ref-14)
15. See generally, Compulsory Liability Insurance, Ch 9, in Insurance and The Law of Obligations, R. Merkin and J. Steele (2013, oup, UK); Clarke, Policies and Perceptions of Insurance Law in the Twenty-First Century, 20 – 21 (2005, oup, Oxford). [↑](#footnote-ref-15)
16. It is often the case that the direct right of action when granted is limited to circumstances when the insured is not a viable defendant: see Watson (n 7)). [↑](#footnote-ref-16)
17. In UK law compulsory insurance has been introduced by legislation sparingly, the principal examples are in relation to employers’ liabilities, road traffic liabilities, maritime liabilities (considered infra), aviation liabilities and the liabilities of riding establishments. The obligation to insure is on occasions also introduced by or under an authority which derives from subordinate legislation. Alternatively it may be prescribed by the rules of professional bodies or by a contractual obligation. In the case of EU law the insurance of air passenger and related liabilities is compulsory under EU Regulation 785/04 as supplemented by the Civil Aviation (Insurance) Regulations 2005 si 2005/1089. [↑](#footnote-ref-17)
18. International Convention on Civil Liability for Oil Pollution Damage 1992 (clc 1992); The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunker Convention 2001); The Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea 2002 (Athens Convention 2002); The Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi Convention 2007). Hereafter the ‘international maritime liability conventions’. [↑](#footnote-ref-18)
19. These are mutual insurance corporate entities which insure third party liabilities of members representing in excess of 90% of global shipping on an indemnity basis. See generally, Hazelwood & Semark, P & I Clubs Law and Practice (4th ed) (2010, Lloyd’s List, London). [↑](#footnote-ref-19)
20. International Maritime Liability Conventions (n 18). [↑](#footnote-ref-20)
21. International Maritime Liability Conventions (n 18). [↑](#footnote-ref-21)
22. The description ‘UK Law’ in the title is not strictly correct but it is adopted as a convenient label to indicate that the main thrust and analysis in this contribution is applicable to all constituent regions of the UK, although the source of the law and its drafting may differ to some degree in relation to the law relating to Northern Ireland and Scotland. [↑](#footnote-ref-22)
23. The common law does not prevail in Scotland. [↑](#footnote-ref-23)
24. Harrington Motor Co Ltd; Hood’s Trustees 1 Ch 793 (n 1). [↑](#footnote-ref-24)
25. Bird’s Modern Insurance Law 11th edn, Ch 4, par 4.07 et seq, John Birds (2019), Sweet & Maxwell, London); Bowyer, Contracts (Rights of Third Parties) Bill and Insurance [1997] j.b.l. 230. [↑](#footnote-ref-25)
26. Section 1(2) of the 1999 Act permits such an exclusion, which right is adopted in many policies. [↑](#footnote-ref-26)
27. It could be argued that the insured is receiving the insurance monies for the benefit of the third party and is under a fiduciary duty to hold the proceeds for the benefit of the third party. see Re E Dibbens & Sons Ltd 577; D G Finance Ltd 387 (n 5). [↑](#footnote-ref-27)
28. This is because of the absence of a bailment in relation to the insurance monies, see Harrington Motor Co Ltd; Hood’s Trustees 1 Ch 793 (n 1). [↑](#footnote-ref-28)
29. Harrington Motor Co Ltd,; Hood’s Trustees (n 1); Dibbens & Sons Ltd (n 5)., ibid. [↑](#footnote-ref-29)
30. Harrington Motor Co Ltd .; Hood’s Trustees (n 1). [↑](#footnote-ref-30)
31. Siebe Gorman v Barclays Bank [1979] 2 Lloyd’s Rep 142; Re Charge Card Services [1989] Ch 497(ca); Re ccg International Enterprises Lt [1993] 1 bclc 1428. [↑](#footnote-ref-31)
32. Vandepitte v Preferred Accident Insurance Corp of New York [1933] ac 70. [↑](#footnote-ref-32)
33. Customarily this would be achieved under the rules governing court procedure and practice; in England and Wales the Civil Procedure Rules (cpr). [↑](#footnote-ref-33)
34. For example, the ‘Loss Payee” clause, which identifies the party to whom the payment of insurance monies is to be made. The party identified is a mere appointee, not an assured nor an assignee; Iraqi Ministry of Defence v Arcepey Shipping Co s.a. [1979] 2 Lloyd’s Rep 491, 497. [↑](#footnote-ref-34)
35. See, Birds’ Modern Insurance Law, Chs 21 & 22; Merkin & Steele, The Law of Insurance Obligations,, Ch 9; Policies and Perceptions of Insurance Law in the Twenty-First Century, Clarke, Ch 1, 20 – 21. [↑](#footnote-ref-35)
36. International Maritime Liability Conventions’ (n 8). [↑](#footnote-ref-36)
37. Goodliffe, What is left of the Third Parties (Rights against Insurers) Act 1930 [1993] jbl 590; Mance, Insolvency at Sea [1995] lmclq 34; Merkin, Liability insurance – the rights of third parties [1997] P & I Int 178; Purves, Claims Against Insolvent Insureds [1998] cfilr 98; Jess, Reform of direct rights of action by third parties against non-motor liability insurers [2000] lmclm 192; Merkin & Steele, 397 – 405. [↑](#footnote-ref-37)
38. For an analysis of the 2010 Act in the broader context of third party rights against insurers, see Peter MacDonald Eggers QC, Direct Action against Insurers and P & I Clubs, Ch 12 in Soyer and Tettenborn (eds), Maritime Liabilities in a Global and Regional Context (2019, Informa Law from Routledge, UK). [↑](#footnote-ref-38)
39. For a judicial analysis of the significant aspects of the 2010 Act see, Watson (n 7). [↑](#footnote-ref-39)
40. The ‘Preamble’ is cited in n. 51. [↑](#footnote-ref-40)
41. Medical Defence Union Ltd v Dept of Trade [1980] Ch 82; The Vainqueur Jose [1979] 1 Lloyd’s Rep 580. [↑](#footnote-ref-41)
42. ibid. [↑](#footnote-ref-42)
43. Wooding v Monmouthshire & South Wales Mutual Indemnity Society Ltd [1939] 4 All E R 570; The Allobrogia [1979] 1 Lloyd’s Rep 190. [↑](#footnote-ref-43)
44. Procedural rights under the 2010 Act are available in any tribunal which is recognised as a “court” although not formally described as such. The 2010 Act does not provide a definition of “court”. In Watson (n 7), it was held that an employment tribunal was a “court” within the meaning of section s 2(6) of the Act. [↑](#footnote-ref-44)
45. The Group is constituted of the following Clubs described in abbreviated form – Brittania Steamship; London Steam-Ship; North of England; Shipowners’ Mutual; Standard Steamship; Steamship Mutual; United Kingdom Mutual; West of England. See Hazelwood (n 19). [↑](#footnote-ref-45)
46. See, for example, P & I Rules 2020 – 2021 of The North of England P & I Association Ltd, Section 8, Rules 49 and 51. [↑](#footnote-ref-46)
47. Hazelwood (n 19) ch 17. [↑](#footnote-ref-47)
48. With regard to the three Scandinavian Clubs direct right of action is available under the Insurance Contracts Act 1930, s.95. [↑](#footnote-ref-48)
49. Third Parties (Rights against Insurers) Act 2010 (as amended) S.1. Hereafter the ‘2010 Act’. [↑](#footnote-ref-49)
50. The 2010 Act did not come into force until 1 August 2016, after it had been amended by the Insurance Act 2015 s.20 and Schedule 2, in relation to the insured persons to whom the 2010 Act applies. The delay had been incurred and amendment made necessary because the 2010 Act failed to keep abreast of developments in insolvency and corporate law. [↑](#footnote-ref-50)
51. The 2010 Act is based on a joint Report of the Law Commission for England & Wales and the Law Commission for Scotland, Third Parties-Rights against Insurers (Law Com No 272) (Scot Law Com No 184) Cm 5217, se/2001/134. (Hereafter referred to as the “Law Commission Report or lcr”). The lcr was preceded by the Third Parties (Rights against Insurers) Act 1930 Consultation Paper (1998) Law Com No 152, Scot Law Com No 104 (Hereafter “Consultation Paper”). [↑](#footnote-ref-51)
52. The Fanti and The Padre Island [1989] 1 Lloyd’s Rep 239, 247 per Bingham LJ. Approved on appeal by Lord Goff of Chieveley [1991] 2 AC 1, 38. [↑](#footnote-ref-52)
53. Third Parties Act, Ss 4 – 6. [↑](#footnote-ref-53)
54. Third Parties Act, S. 6(1)(b). [↑](#footnote-ref-54)
55. S.1 (5)(b) and s.19 confer the power to amend the meaning of “relevant person” by secondary legislation. This device permits the ambit of the Act to be changed to meet continuing developments without the need to seek an amendment to the Act or introduce new legislation. [↑](#footnote-ref-55)
56. 2010 Act, S.1. [↑](#footnote-ref-56)
57. 2010 Act, S.18. [↑](#footnote-ref-57)
58. 2010 Act, S.15. [↑](#footnote-ref-58)
59. See infra. [↑](#footnote-ref-59)
60. 2010 Act, S. 1(4). [↑](#footnote-ref-60)
61. 2010 Act, S. 16. [↑](#footnote-ref-61)
62. The contrary was the case under the 1930 Act which was interpreted as not relating to liabilities voluntarily incurred by the insured; see Tarbuck v Avon Insurance plc [2001] 2 All E R 503; New Zealand Forest Products Ltd v New Zealand Insurance Co Ltd [1997] 1 wlr 1237. [↑](#footnote-ref-62)
63. 2010 Act, S. 1(1) & (2). [↑](#footnote-ref-63)
64. lc Report, paras 3.23 – 3.24 et seq. [↑](#footnote-ref-64)
65. 2010 Act, S 1(2). [↑](#footnote-ref-65)
66. It is clear that the Act applies to P & I insurance. See generally, Insurance Contracts and Insurance Market, Ch. 3, in Insurance and The Law of Obligations, R. Merkin and J. Steele (2013, oup, UK). [↑](#footnote-ref-66)
67. lcr (n 63) para 1.1. [↑](#footnote-ref-67)
68. Alluding to “the insured” of whatever legal status. [↑](#footnote-ref-68)
69. Post Office v Norwich Union Fire Insurance Society Ltd [1967] 2 qb 363, 374; [1962] 1 Lloyd’s Rep 216, 219. The statement was endorsed as “unassailably correct” by Lord Brandon in Bradley v Eagle Star Insurance Co Ltd (hl) 1989 a.c. 957; [1989] 1 Lloyd’s Rep 465. [↑](#footnote-ref-69)
70. Nigel Upchurch Associate v Aldridge Estates Investment Co Ltd [1993] 1 Lloyd’s Rep 535; Jackson v Greenfield [1998] bpir 699, 709; Sea Voyager v Bielecki [1999] 1 All E R 628, 645. [↑](#footnote-ref-70)
71. lcr(n 63), paras 3.23 – 3.24. [↑](#footnote-ref-71)
72. As specified in s.1(4). See also Jackson v Greenfield [1998] bpir 699, 709. [↑](#footnote-ref-72)
73. lcr (n 63), para 3.36. [↑](#footnote-ref-73)
74. See infra para 2.3.6. [↑](#footnote-ref-74)
75. 2010 Act, s.8. [↑](#footnote-ref-75)
76. Marine Insurance Act 1906 s 17 as amended by the Insurance Act 2015 s. 14; Insurance Act 2015, Part 2, ss. 2 – 8, and Sch 1. [↑](#footnote-ref-76)
77. With regard to “promissory warranties and representations” the default powers for breach are set out in the Insurance Act 2015, Part 3, ss 9 – 11 and Sch 1, Part 1. [↑](#footnote-ref-77)
78. 2010 Act, S. 3(3). [↑](#footnote-ref-78)
79. See infra. [↑](#footnote-ref-79)
80. The same position prevailed under the 1930 Act; see The Vainqueur Jose [1979] 1 Lloyd’s Rep 557; Pioneer Concrete (UK) Ltd v National Employers’ Mutual General Insurance [1985] 2 all e r 395; Centre Reinsurance International Co v Curzon Insurance Ltd [2004] 2 All E R (Comm) 28. [↑](#footnote-ref-80)
81. 2010 Act, S.10. [↑](#footnote-ref-81)
82. 2010 Act, S. 14(1). [↑](#footnote-ref-82)
83. 2010 Act, S. 9(1) & (2). [↑](#footnote-ref-83)
84. As was the case under the 1930 Act, see The Vainqueur Jose [1979] 1 Lloyd’s Rep 557. [↑](#footnote-ref-84)
85. 2010 Act, S. 9(3). [↑](#footnote-ref-85)
86. 2010 Act, S. 9(4). [↑](#footnote-ref-86)
87. 2010 Act, S. 9(5). [↑](#footnote-ref-87)
88. As defined in the Marine Insurance Act 1906 s.1. [↑](#footnote-ref-88)
89. 2010 Act S. 9(6). Personal injury includes any disease and any impairment of a person’s physical or mental condition, 2010 Act s. 9(7). [↑](#footnote-ref-89)
90. The Fanti and The Padre Island [1991] 2 ac 1. [↑](#footnote-ref-90)
91. The Clubs in the International Group of P &I Clubs had ceased to rely on the condition in the case of death and personal injury claims. [↑](#footnote-ref-91)
92. For a sceptical response to the practice of P & I Clubs, see Mance, Insolvency at Sea [1995] lmclq 34. [↑](#footnote-ref-92)
93. Post Office v Norwich Union Fire Insurance Society Ltd [1967] 2 qb 363; Bradley v Eagle Star [1989] 1 Lloyd’s Rep 465; Sea Voyager Maritime Inc. v Bielecki [1999] Lloyd’s Rep ir 356; Thornton Springer v NEM Insurance Co Ltd and others [2000] 2 All er 489; William McIlroy (Swindon) Ltd v Quinn Insurance Ltd [2012] 1 All er (Comm) 241. [↑](#footnote-ref-93)
94. Bradley v Eagle Star Insurance Co Ltd [1989] 1 ac 957. [↑](#footnote-ref-94)
95. When insurers are perceived as *dominus litis* they may become liable for costs, see Travelers Insurance Co Ltd v XYZ [2019] uksc 48; [2019] Lloyd’s Rep ir 683. [↑](#footnote-ref-95)
96. 2010 Act S. 1(1) & (2). [↑](#footnote-ref-96)
97. In Palliser Ltd v Fate Ltd and Others [2019] ewhc 43(qb), [2019] Lloyd’s Rep ir 341, an insured landlord settled a negligence claim by a lessee after which the landlord went into liquidation. Under the settlement judgement was entered against the landlord with damages to be assessed. The claim was thereafter allowed to continue but as a claim under the 2010 Act. [↑](#footnote-ref-97)
98. 2010 Act S.12 (4). [↑](#footnote-ref-98)
99. 2010 Act S.2(1). [↑](#footnote-ref-99)
100. 2010 Act S.2(2). [↑](#footnote-ref-100)
101. 2010 Act S.2(3) is something missing here in the bracket or is it just one blankspace too many? [↑](#footnote-ref-101)
102. 2010 Act S.2(4) subject to s. 12(1); s. 2(5). [↑](#footnote-ref-102)
103. 2010 Act S.1(2) whereunder the ‘rights of the relevant person’ under the insurance contract are transferred and those rights will be defined, in part, taking into account defences available as against the insolvent assured. [↑](#footnote-ref-103)
104. 2010 Act S. 2(6). [↑](#footnote-ref-104)
105. 2010 Act S.2(10). [↑](#footnote-ref-105)
106. 2010 Act S.2(9). This was also the case under the 1930 Act: see Freshwater v Western Australia Assurance Co Ltd [1933] 1kb 515; Cunningham v Anglian Insurance Co Ltd 1934 slt 273. [↑](#footnote-ref-106)
107. Civil Procedure Rules (cpr). [↑](#footnote-ref-107)
108. 2010 Act S. 2(7). [↑](#footnote-ref-108)
109. 2010 Act S.2(8). [↑](#footnote-ref-109)
110. 2010 Act S.2(7). [↑](#footnote-ref-110)
111. 2010 Act S.12(4)(a). [↑](#footnote-ref-111)
112. 2010 Act S.12(4)(a). See supra for the “establishment” of liability. [↑](#footnote-ref-112)
113. 2010 Act S.12(1) & (2). Ss(4) defined when an action is no longer in progress. [↑](#footnote-ref-113)
114. By contrast, there is such a provision in relation to the disclosure of information under the 2010 Act. [↑](#footnote-ref-114)
115. [1989] 1 Lloyd’s Rep 265 (ca). [↑](#footnote-ref-115)
116. [2020] csoh 3, [2020] Lloyd’s Rep ir 265 (Court of Session (Outer House)). [↑](#footnote-ref-116)
117. There are some exceptions. Under the Insolvency Act 1986, s.155, the third party may apply for an order to inspect the books and papers of a company in the course of a winding up, a process which could unearth an insurance policy. Insurers may also be required to divulge information relating to liability insurance under ‘A Code of Practice for Tracing Employers’ Liability Insurance Policies’ (Department of Environment, Transport and the Regions (“detr”), October 1999). [↑](#footnote-ref-117)
118. cpr (n 107), Part 31.6. [↑](#footnote-ref-118)
119. For an application under the 1930 Act, see Peel Port Shareholder Finance Co Ltd v Dornoch Ltd [2017] ewhc 876 (tcc); [2017] Lloyd’s Rep ir 374. [↑](#footnote-ref-119)
120. The Practice Direction – Pre-Action Conduct and Protocol applies when the dispute is not within one of the many Protocols that have been formulated for named disputes. [↑](#footnote-ref-120)
121. Mance, Insolvency at Sea [1995] lmclq 34, 43, “True a plaintiff must normally take his defendant as he finds him. But the key to the 1930 Act is to recognise the fundamental difference between an insolvent defendant and other defendants. First the insolvent defendant is and is known to be unable to pay. Secondly, despite his own insolvency, his insurers can and will often make the task of establishing liability against him extremely onerous”. [↑](#footnote-ref-121)
122. Bradley v Eagle Star Insurance Co Ltd [1989] ac 957; Woolwich Building Society v Taylor [1995] 1 bclc 132; Mance (n 121), 34. [↑](#footnote-ref-122)
123. 1930 Act s.2(2). [↑](#footnote-ref-123)
124. ibid s. 2(1). [↑](#footnote-ref-124)
125. 2010 Act S. 11 and Sch1. [↑](#footnote-ref-125)
126. The cpr regulates the procedure to be followed by parties to civil litigation in the senior civil courts of England and Wales. [↑](#footnote-ref-126)
127. lcr par 4.21–22. [↑](#footnote-ref-127)
128. Sch1 par 5. [↑](#footnote-ref-128)
129. Sch 1 par 6. [↑](#footnote-ref-129)
130. cpr 31.16(3)(a) and (b); Burns v Shuttlehurst Ltd [19]1 wlr 1449, Bermuda International Ltd v KPMG (a Firm) The Times (14 March 2001). [↑](#footnote-ref-130)
131. 2010 Act (n 48) S. 9(4). [↑](#footnote-ref-131)
132. Sch1 par 2(4). [↑](#footnote-ref-132)
133. Sch 1 paras 1(1) & (2. [↑](#footnote-ref-133)
134. Sch 1 par 1(3). [↑](#footnote-ref-134)
135. Sch 1 par 1(3). [↑](#footnote-ref-135)
136. The required details of court proceedings are the name of the court; case number; contents of all documents served or orders made and their contents: and of arbitral proceedings. The name of arbitrator; contents of all documents served or orders made and their contents – para 1(4). [↑](#footnote-ref-136)
137. Whether there is such a limit will appear from an examination of the terms of the insurance contract, and the further disclosure of payments already made, if any, will reveal the residual value of the insurance proceeds. [↑](#footnote-ref-137)
138. If the insurance proceeds are made the subject of a fixed charge this will reduce the value of the proceeds, possibly to zero; Siebe Gorman v Barclays Bank [1979] 2 Lloyd’s Report 142. [↑](#footnote-ref-138)
139. Sch1 par 1(6). [↑](#footnote-ref-139)
140. Sch 1 par 2(1). [↑](#footnote-ref-140)
141. Sch 1 par 7(a). [↑](#footnote-ref-141)
142. Sch 1 pat 7(b). [↑](#footnote-ref-142)
143. Sch 1 par 2(2). [↑](#footnote-ref-143)
144. Sch 1 par 2(3). [↑](#footnote-ref-144)
145. The punishment is discretionary with a range of possible penalties which may extend, in extreme circumstances, to imprisonment. [↑](#footnote-ref-145)
146. Sch 1 par 3(4) & (5). [↑](#footnote-ref-146)
147. Sch 1 par 3(1). [↑](#footnote-ref-147)
148. Sch 1 par 3(2). [↑](#footnote-ref-148)
149. Sch 1 par 3(3). [↑](#footnote-ref-149)
150. Sch 1 par 4(1). [↑](#footnote-ref-150)
151. Sch 1 par 4(3). [↑](#footnote-ref-151)
152. Sch 1 par 4(4). [↑](#footnote-ref-152)
153. Implemented by the UK in the Merchant Shipping Act 1995, Chapter iii, titled ‘Liability for Oil Pollution’. [↑](#footnote-ref-153)
154. ibid. The Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (1992 Fund Convention) is omitted because it does not establish a liability regime in the sense adopted in the text. [↑](#footnote-ref-154)
155. In the member States of the EU, the Athens Convention is given effect to by Regulation (ec) 392/2009. [↑](#footnote-ref-155)
156. Incorporated into UK law by the Merchant Shipping Act 1995, Part 9A. The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 2010 (hns Convention 2010) is not included because it is not yet in force. [↑](#footnote-ref-156)
157. clc art vii; Bunker Convention art 7; Athens Convention art 4bis; Wreck Convention art 12. [↑](#footnote-ref-157)
158. clc 92 art vii.i. [↑](#footnote-ref-158)
159. clc 92 art v and vii.1. [↑](#footnote-ref-159)
160. clc 92 art v.2 and vii.1. [↑](#footnote-ref-160)
161. clc 92 art vii.2. [↑](#footnote-ref-161)
162. clc 92 art vii 2 & 4; Bunker Convention art 7.2 & 5; Athens Convention art 4bis.2 & 5; Wrecks Convention art 12. 2. & 5. [↑](#footnote-ref-162)
163. Merchant Shipping Act 1995 s.165(5), is the relevant statutory provision relating to the clc 92 and Bunker Convention); s. 255P relates to the Wrecks Convention ibid. [↑](#footnote-ref-163)
164. clc 92 art vii.8; Bunkers Convention art 7.10; Athens Convention art 4bis.10; Wrecks Convention art 12.10. [↑](#footnote-ref-164)
165. Ibid. [↑](#footnote-ref-165)
166. The Hari Bhum (No 1) [2005] 1 Lloyd’s Rep 67(ca); The London Steam Ship Owners Mutual Insurance Association Ltd v The Kingdom of Span and Another (The Prestige)(No 2)[2015]ewca Civ 333, [2015] 2 Lloyd’s Rep 33(ca); The Prestige (No 3) [2020] ewhc 1582(Comm), [2020] Lloyd’s Rep ir 413. [↑](#footnote-ref-166)
167. clc 92 art vii.8. [↑](#footnote-ref-167)
168. msa 1995 s.165(1). [↑](#footnote-ref-168)
169. *Teal Assurance co Ltd v W R Berkley Insurance (Europe) Ltd and Another)* [2013] uksc 57, [2014] Lloyd’s Rep ir 56. [↑](#footnote-ref-169)
170. *The Fanti and The Padre Island* [1990] 2 Lloyd’s Rep 191 (hl) [1990] 2 All er 705(hl) and more recently in *The London Steam-Ship Owners’ Mutual Insurance Association Ltd v The Kingdom of Spain (The Prestige) (No 3)* [2020] ewhc 1582(Comm), [2020] Lloyd’s Rep ir 413. [↑](#footnote-ref-170)
171. clc 92 Art vii(8). [↑](#footnote-ref-171)
172. Ibid. [↑](#footnote-ref-172)
173. Ibid. [↑](#footnote-ref-173)
174. This concept of ‘wilful misconduct’ has been extensively examined in the context of the law of marine insurance: see Arnould, Law of Marine Insurance and Average 19th edn, ed. Jonathan Gilman qc et al, at [22.56]. [↑](#footnote-ref-174)
175. clc 92 Art vii(8). [↑](#footnote-ref-175)