Prerequisites for the Victim's Direct Claim Against a Liability Insurer According to the Finnish Insurance Contract Act

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1 Introduction

Liability insurance is insurance against liability for damages. Therefore, it is not the victim but the tortfeasor who is entitled to the insurance money, unless the victim is entitled to a direct claim for compensation against the insurer. From the victim's point of view, a direct claim would usually be an easier and quicker way to get the money than dealing with the tortfeasor. In some jurisdictions, the victim has a general right of direct action against the liability insurer, whereas in others this right is provided for only in certain situations.[1] Every EU Member State provides for a direct claim either in any case or at least in some situations.[2] Outside the EU, Norway should be mentioned as a country with general right of direct action.[3]

The first Finnish Insurance Contract Act (*vakuutussopimuslaki*, 132/1933) was drafted based on co-operation between Finland, Sweden, Norway and Denmark.[4] This law did not provide the victim with a direct claim against the insurer.[5] However, according to § 95 of the Finnish Act – as well as of the Swedish Act – the insured was, without the consent of the victim, entitled to the insurance money only up to the amount he had paid to the victim. If, nevertheless, the insurer had paid to the insured and the victim was not able to get the money from the insured, the insurer would be liable to pay the victim up to the amount it had paid to the insured. There was also a special provision concerning bankruptcy.[6]

When the present Insurance Contract Act (*vakuutussopimuslaki* 543/1994, hereafter the ICA) was drafted, the question of a general direct claim was discussed. Although the important role of liability insurance and of direct claim was recognized and the Norwegian general direct claim was taken into account, the principle of privity of contract and several practical problems linked with

1 *See, e.g.* Basedow, Jürgen – Birds, John – Clarke, Malcolm – Cousy, Herman – Heiss, Helmut – Loacker, Leander (eds), *Principles of European Insurance Contract Law (PEICL)*, Otto Schmidt, Köln 2016, pp. 301–303.

2 *See, e.g.* Fenyves, Attila – Kissling, Christa – Perner, Stefan – Rubin, Daniel (eds), *Compulsory Liability Insurance from a European Perspective*, De Gruyter, Berlin/Boston 2016: Country Reports and Comparative Report, Question 19 a, Könkkölä, Justus, *Vastuuvakuutus vahingonkorvausriidassa*, Talentum, Helsinki 2009, pp. 81–82, PEICL note 1 pp. 301–303, van der Sluijs, Jessika, *Direktkravsrätt vid ansvarsförsäkring*, Jure, Stockholm 2006.

3 Lov om forsikringsavtaler, 1989 nr 69, § 7-6.

4 Lag om försäkringsavtal 1927:77 (Sweden), forsikringsavtaleloven 1930 nr 20 (Norway) and lov om forsikringsaftaler 1930 nr. 129 (Denmark).

5 This is explicitly stated in the government proposal for the ICA, Hallituksen esitys Eduskunnalle vakuutussopimuslaiksi ja laeiksi eräiden siihen liittyvien lakien muuttamisesta 114/1993 (hereafter HE 114/1993), p. 18.

6 *Häyhä* considers even this to be a direct claim, Häyhä, Juha, *Sopimus, laki ja vakuutustoiminta*, Suomalainen Lakimiesyhdistys, Helsinki 1996, p. 355. As for Sweden, according to *van der Sluijs*, the starting point was that there was no right of direct action, van der Sluijs note 2 p. 112.

direct claim were seen as more weighty.[7] Therefore, the basic rule, even according to the present Insurance Contract Act, is that the victim does not have a direct claim and that it is the insured who is entitled to the insurance money. However, according to § 67 ICA, three exceptions exist: 1) the insurance policy was taken out pursuant to laws or regulations issued by the authorities; 2) the insured has been declared bankrupt or is otherwise insolvent; or 3) the liability insurance has been mentioned in marketing efforts launched to promote the insured's business.[8] The preparatory works do not include any reasoning for the choice of these particular situations. In the jurisprudence several reasons have been mentioned: the intention to protect the trust to the existence of a liability insurance[9] and mainly practical reasons[10]. It is worth noticing that § 67 ICA is still in force in its original wording.

In the following the prerequisites of a direct claim based on the ICA are explored. Thus, voluntary transfer of contractual rights falls outside the scope of this paper. The ICA is applicable to both individual and group insurance[11], but certain provisions, § 67 ICA among them, are not applicable to such a group insurance contract which covers merely a temporary visit to an agreed place or participation in operations that last for a maximum of one month (§ 4). As for terminology, the tortfeasor is called the insured irrespective of whether he is also the policyholder.

I will start by examining the criteria for a direct claim according to the ICA. Then follows a comparison of these criteria to the corresponding prerequisites in the Principles of European Insurance Contract Law (PEICL), published by an academic working group called the Project Group for the Restatement of European Insurance Contract Law (REICL). The first version of the PEICL were published in 2009, and the second, expanded edition in 2016. The PEICL are intended to be an optional instrument, not a 28th (or 27th) regime but a second domestic regime in the EU Member States. Despite the name of the Project

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7 The working party proposition for Non-Life Insurance Contract Act: Ehdotus vahinkovakuutuslaiksi, Työryhmän mietintö, Oikeusministeriön lainvalmisteluosaston julkaisu 3/1988 (hereafter Ehdotus 3/1988), pp. 121–123 and the dissenting opinion of *Jorma Heikkilä* from the Ministry of Social Affairs and Health Insurance Department, HE 114/1993 note 5 p. 18.

8 An official version of the Act both in Finnish and in Swedish, as well as an unofficial translation into English, are available in Finlex, *see*, https://www.finlex.fi/en/. Finlex is an online database of up-to-date legislative and other judicial information on Finland; it is owned by the Ministry of Justice. In this text this translation is used except that, instead of 'general liability insurance', the briefer phrase 'liability insurance' is used.

9 Häyhä, Juha, *Vakuutussopimus ja kolmas*, in Halila, Heikki – Hemmo, Mika – Sisula-Tulokas, Lena (eds), Juhlajulkaisu Esko Hoppu 1935–15/1–2005 pp. 134–147, Suomalainen Lakimiesyhdistys, Helsinki 2005, p. 142.

10 Hemmo, Mika, *Vahingonkorvauksen sovittelu ja moderni korvausoikeus*, Suomalainen Lakimiesyhdistys, Helsinki 1996, pp. 133–134.

11 According to § 2, group insurance refers to insurance policies which cover or may cover members of the group mentioned in the underlying contract (group insurance contract). For the purposes of the ICA, insurance policies offered to groups under arrangements where the premium or any part of it is payable by the insured (self-funded group insurance) are considered individual policies.

Group, the PEICL are not a 'Restatement' in the American sense of the word, that is, a description of current law, but a set of norms forming a coherent whole for the future, compiled by selecting existing national solutions and by developing new ones. Therefore, they provide a current basis for a short comparison.

After the comparison I will also look at the position of the victim, the tortfeasor and the insurer, also bearing in mind the PEICL. As the importance of a direct claim depends on whether the contracting parties are allowed to deviate from the provision imposing it, the question of the peremptory nature of § 67 ICA also needs to be discussed.

2 The Three Prerequisites According to § 67 ICA

2.1 Compulsory Liability Insurance

According to § 67 ICA, the victim enjoys direct claim when the insurance policy was taken out pursuant to laws or regulations issued by the authorities. An example of the latter is § 16 Assembly Act (*kokoontumislaki*, 530/1999): if the arrangement of the event may cause damage to persons or property, the police may order it to be a prerequisite of the arrangement of the event that the arranger has adequate liability insurance coverage for possible damages.[12] Justification for a direct claim in these situations is obvious: as the legislator or an authority has considered liability insurance necessary to protect the victim, the victim should have a real possibility to make use of this insurance irrespective of the will of the tortfeasor.[13]

Compulsory liability insurance is often required in activities in which personal injuries are common (traffic, patient injuries), catastrophic loss is possible (nuclear plants) or risks are high (environmental damage, transportation). In consultation services, too, considerable damage is possible (insurance brokers, licensed counsels, joint building consultants). With the aim of protecting the victim in mind, liability insurance is often required as a prerequisite for certain lines of business or activity: for example, in addition to those mentioned above, various kinds of assessment bodies, authorised bodies or inspection bodies related to the safety of certain products.[14]

Although it is not mentioned in the law itself or its preparatory works, the phrase 'insurance policy taken out pursuant to laws or regulations issued by the authorities', as used in § 67 ICA, is usually considered to be the definition of

12 The predecessor of this provision was also mentioned in the HE 114/1993 note 5 p. 66.

13 This was particularly mentioned in the preparatory works of the ICA, *see*, Ehdotus 3/1988 note 7 p. 124.

14 For more information *see*, Norio-Timonen, Jaana, *Country Report: Finland*, in Fenyves, Attila – Kissling, Christa – Perner, Stefan – Rubin, Daniel (eds), Compulsory Liability Insurance from a European Perspective, De Gruyter, Berlin/Boston 2016, pp. 113–136.

compulsory liability insurance.[15] However, the wording of the government proposal for the current Insurance Contract Act has given rise to a certain lack of clarity as regards the meaning of and difference between 'compulsory' (*pakollinen*) and 'statutory' (*lakisääteinen*) insurance.[16] There are namely two types of legal rules that set out a duty to take out liability insurance: Firstly, there are rules which merely set out the duty without regulating the insurance in detail. Secondly, there are rules which, in addition to the insurance requirement, also contain detailed provisions on the contents of the insurance and the position of the insured and even of the victim (e.g. environmental insurance, motor liability insurance, patient insurance). The latter type of insurance is usually called 'statutory', a term which has been added to § 1 (426/2010) ICA, although without any definition.[17]

Differentiation between compulsory and statutory liability insurance is not only of academic interest but also important, because statutory lines of insurance, with some exceptions, are not subject to the general Insurance Contract Act but to special legislation concerning each line of statutory insurance.[18] Although § 67 ICA is not applicable to these lines of insurance, a direct claim may still be available for the victim based on the special legislation regulating the respective line of insurance.[19] As the ICA mainly deals with rights and obligations of the insurer, the policyholder, the insured and other persons related to an insurance contract, liability insurance with even detailed regulation on its contents should not be considered statutory if the rights and obligations of the persons related to the insurance are not also regulated. On the other hand, the danger of compulsory insurance becoming statutory and therefore unintentionally falling outside the scope of the ICA should always be kept in mind when regulating a certain line of liability insurance. As this paper deals with direct claims according to the ICA, statutory lines of liability insurance fall outside its scope.

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15 Hoppu, Esko – Hemmo, Mika, *Vakuutusoikeus*, WSOYpro, Helsinki 2006, p. 7, Häyhä note 6 p. 354.

16 *See, e.g.* HE 114/1993 note 5 p. 21 and 66, Hoppu and Hemmo note 15 p. 20, Karhu, Panu, *The injured party's right of direct action under the Finnish insurance contracts act, With particular reference to transport liability insurance*, in Scandinavian Institute of Maritime Law Yearbook SIMPLY (2005) pp. 199–266, pp. 212–216, Könkkölä note 2 pp. 12–13.

17 Hallituksen esitys Eduskunnalle laeiksi vakuutussopimuslain ja eräiden siihen liittyvien lakien muuttamisesta 63/2009 (government proposal for amendments to the Insurance Contract Act), p. 15, Hoppu and Hemmo note 15 pp. 19–21, Ijäs, Hannu, *Obligatoriska ansvarsförsäkringar populära hos lagstiftaren i Finland*, Nordisk Försäkringstidskrift 4/1999 pp. 332–334, p. 332, af Hällström, Esbjörn – Ijäs, Hannu – Laasonen, Jussi, *Vastuuvakuutus* (3rd rev. edn), Finva, Helsinki 2014, p. 168.

18 According to § 1 (467/2016) para. 2 ICA, insurance policies written under the Patient Injuries Act (585/86) and the Environmental Impairment Liability Insurance Act (81/1998) are governed by this Act, unless otherwise provided in these acts. According to para. 3, only certain provisions of the ICA are applicable to motor insurance, and these provisions do not include ICA 67 §.

19 *See*, Workers' Compensation Act § 112 (*työtapaturma- ja ammattitautilaki*, 459/2015), Environmental Impairment Liability Insurance Act § 17 (*laki ympäristövahinkovakuutuksesta*, 81/1998), Motor Liability Insurance Act § 60 (*liikennevakuutuslaki*, 460/2016), Patient Injuries Act § 10 (*potilasvahinkolaki*, 585/1986).

The question of whether a certain line of liability insurance is compulsory in the sense of § 67 ICA or voluntary is rarely discussed. A somewhat unclear issue is whether liability insurance should be considered compulsory only when it is the sole form of fulfilling the insurance requirement. This interpretation is adopted by Finance Finland (FFI), (*Finanssiala ry*), the representative of Finnish financial sector businesses.[20] The very limited literature dealing with different forms of compulsory insurance seems to support a somewhat different view, namely that the decisive factor is that the requirement is 'insurance or other arrangement' and not a more general 'financial guarantee'.[21] Both opinions have their merits: the wording of § 67 ICA seems to support the opinion of FFI, whereas the latter is more victim-friendly.

According to § 67 ICA, the insurance requirement must be based on law, that is, on either private or public law. According to § 80 Constitution of Finland (*Suomen perustuslaki*, 731/1999), the principles governing the rights and obligations of private individuals shall be governed by laws enacted by the Parliament. Thus, I agree with *Karhu*, according to whom 'law' should be understood as meaning parliamentary acts and not subsidiary legislation.[22]

An insurance requirement in the sense of § 67 ICA cannot be based on judge-made law or on a contractual agreement. Therefore, for example, the Employees' Group Life Assurance, based on an agreement of the central labour market organisations, is not compulsory in the sense of § 67 ICA, although the liability to take out this insurance applies to all employers whose binding collective agreement, or in whose field a valid general national collective agreement, contains provisions on group life insurance.

Based on the wording of § 67 ICA, it should be clear that if the duty to take out a liability insurance is not based directly on law but on statutes of a professional or other self-governing body, the insurance is not compulsory. Despite that fact, the liability insurance of advocates is often considered to be compulsory insurance.[23] According to § 1 Advocates Act (*laki asianajajista*, 496/1958), advocates must be members of the Finnish Bar Association, which is a public corporation. The by-laws of the Bar Association must be ratified by a decision of the Ministry of Justice (§ 2). The obligation to take out liability insurance is not based on the Advocates Act or the ratified by-laws but on the Code of Conduct adopted by the Finnish Bar Association.[24] In *Könkkölä's*

20 This is based on discussions with the personnel of FFI.

21 Af Hällström, Ijäs and Laasonen note 17 pp. 168–174, Lehtipuro, Katriina – Luukkonen, Irene – Mäntyniemi, Lea – Raulos, Ville – Santavirta, Pia, *Vakuutuslainsäädäntö* (4th rev. edn), Finva, Helsinki 2010, pp. 131–132. According to my understanding, this is also the opinion of *Hoppu* and *Hemmo*, *see*, Hoppu and Hemmo note 15 pp. 19–21.

22 Karhu note 16 p. 206.

23 Hoppu and Hemmo note 15 p. 315, af Hällström, Ijäs and Laasonen note 17 pp. 168–169 and, a bit hesitantly, also Könkkölä note 2 p. 84. For the opposite opinion *see*, Karhu note 16 p. 215. Lehtipuro et al. note 21 pp. 131–132 do not explicitly express their view, but this insurance is not included in their list of compulsory liability insurances.

24 The obligation is based on § 11.7 Code of Conduct for Lawyers adopted by the Finnish Bar Association (*Hyvää asianajajatapaa koskevat ohjeet*, 15.1.2009, as amended 8.6.2012). *See*

opinion, considering the liability insurance of advocates a compulsory insurance could be justified by the fact that the regulation on advocates is largely based on self-regulation in order to safeguard the advocates' independence.[25] One could also refer to the position of the Bar Association as a public corporation. To consider this insurance compulsory in the meaning of § 67 ICA is nowadays more justified because now also a professionally acting licensed counsel has a law-based requirement of sufficient liability insurance to cover financial loss.[26]

2.2 Insolvency of the Insured

The second situation in which the victim has a direct claim arises when the insured has been declared bankrupt or is otherwise insolvent. *De facto* insolvency is not enough, but the insolvency must be officially confirmed. Also, an approved restructuring programme or a confirmed payment schedule prove the insolvency if the claim for damages in this procedure has not been confirmed as to be paid.[27] It is irrelevant whether the insolvency procedure is related to the claim for damages on hand. However, the procedure must be recent enough to give an up-to-date picture of the current economic situation of the tortfeasor.[28]

As the insolvency must be officially confirmed, it is not enough that the insured tortfeasor is not willing to pay or that the claim for damages is large either absolutely or when taking into account the (supposed) economic situation of the tortfeasor. Thus, it is not possible to gain a direct claim just by demanding a large compensation. However, the victim can, if necessary, acquire a direct claim by suing the tortfeasor: If the tortfeasor does not pay the sum ordered to be paid, the victim can claim that sum in debt recovery procedure. If the execution attempt is not successful, the tortfeasor has in this way been proven to be insolvent as required in § 67 ICA.

It should be noted that, unlike the Swedish ICA (Sec. 9 § 7), the Finnish ICA does not mention the possibility that the tortfeasor has ceased to exist. Thus, it is not clear whether § 67 ICA is applicable in such a situation. Based on the purpose of the direct claim, *Könkkölä* finds it would be strange if § 67 were not applicable.[29] As long as the non-existence is based on insolvency, § 67 ICA should and could be applicable.

In theory, this prerequisite is very important, as it allows the victim to get in the form of insurance money what he would not be able to get from the insolvent

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also Guidelines on the Liability Insurance of a Lawyer (*Asianajajan vastuuvakuutusta koskevat ohjeet*, 11.6.1982, as amended 23.5.1997, 11.1.2001, 15.1.2009, 15.1.2015).

25 Könkkölä note 2 p. 84.

26 § 8 Act on Licensed Counsels (*laki luvan saaneista oikeudenkäyntiavustajista*, 715/2011).

27 Hoppu and Hemmo note 15 p. 323 and, a bit hesitantly, also Häyhä note 6 p. 353. *See*, Restructuring of Enterprises Act (*laki yrityksen saneerauksesta*, 47/1993) and Act on the Adjustment of the Debts of a Private Individual (*laki yksityishenkilön velkajärjestelystä*, 57/1993).

28 HE 114/1993 note 5 p. 66.

29 Könkkölä note 2 p. 86. Of the same opinion, Karhu note 16 p. 217.

tortfeasor as damages. In practice, however, an insolvent tortfeasor probably is most willing to make use of his liability insurance.

2.3 Insurance has been Mentioned in Marketing Efforts

The third case in which the victim has a direct claim is when the liability insurance has been mentioned in marketing efforts launched to promote the insured's business.[30] Thus, this criterion allows the insured to create a right of direct action for its customers. The reason for this rule is that the victim's position should be in line with his understanding, brought about by marketing efforts, of a more secure position because of the liability insurance.[31] This has to do with the idea of marketing liability, *i.e.* the entrepreneur's responsibility for information given to the customer, so that the information becomes part of the contract.[32]

'Marketing efforts' are to be understood broadly and in line with Section 1 § 1 of the Consumer Protection Act (*kuluttajansuojalaki*, 38/1978).[33] Thus, they include supply, selling, advertising and other forms of sales promotion but also oral information given during the negotiations for an agreement.[34] It is enough that the injured had the possibility to get the information, and it is not necessary that he actually did.[35] Despite the reference in the preparatory works to the Consumer Protection Act, the right of direct action based on marketing efforts is by no means limited to situations where the injured is a consumer.

For example, if product liability insurance taken out by a producer or importer of a certain product has been mentioned when marketing that product, the victim has a direct claim against the insurer based on that liability insurance.[36] Thus, contractual relationship between the insured and the victim is not required. In addition, the provision is applicable not only to the marketing efforts of the insured itself. For example, if an insurer delivers its leaflets to the audience of a sports event or rock concert and the leaflets include mention of the liability insurance taken out by the organiser of that event on behalf of the audience, this

30 According to Könkkölä note 2 p. 86, this criterion is unique in Europe.

31 Ehdotus 3/1988 note 7 p. 125.

32 About marketing liability *see, e.g.* André, Mathias, *Marknadsföringsansvar – Om förutsättningarna för marknadsrättsligt och civilrättsligt ansvar för marknadsföringen*, Norstedts, Stockholm 1984.

33 HE 114/1993 note 5 pp. 29, 66.

34 Hallituksen esitys Eduskunnalle kuluttajansuojalainsäädännöksi 8/1977 (government proposal for consumer protection legislation), p. 23, HE 114/1993 note 5 p. 29. *See* also Ehdotus 3/1988 note 7 pp. 250–251 and Castrén, Martti, *Vahingonkärsijän suorasta korvausoikeudesta vastuuvakuutuksessa erityisesti ns. markkinointitilannetta (vakuutussopimuslain 67 §:n 1 momentin 3 kohta) silmällä pitäen*, in Halila, Heikki – Hemmo, Mika – Sisula-Tulokas, Lena (eds), Juhlajulkaisu Esko Hoppu 1935–15/1–2005 pp. 16–25, Suomalainen Lakimiesyhdistys, Helsinki 2005.

35 Ehdotus 3/1998 note 7 p. 251.

36 HE 114/1993 note 5 p. 66.

will, according to the preparatory works, be enough to give the members of the audience a direct claim against the insurer.[37] One could, though, argue that this is a case of marketing efforts launched to promote not so much the insured's business as that of the insurer.

According to *Karhu*, who does not consider the advocates' liability insurance compulsory in the sense of § 67 ICA, an advocate's client could perhaps have a direct claim based on the mention of the insurance on the webpages of the Finnish Bar Association. The same would also apply to other situations in which insurance was mentioned on the webpages of a representative of a certain line of business.[38] This seems to be both an innovative and more in line with § 67 ICA's way of justifying a direct claim for the clients of advocates.

It is important to notice that the right of direct action is available only when the liability insurance has been mentioned as part of the marketing efforts launched to promote the insured's business. Thus, the provision is not applicable to non-business situations, even if the liability insurance had been mentioned before the conclusion of a contract. Neither does it apply if the contracting parties have agreed on taking liability insurance or if such insurance has been a prerequisite for the contract.

3 ICA § 67 in Comparison to the PEICL

According to the Principles of European Insurance Contract Law, too, the main rule is that the victim does not have a general right of direct action against the insurer. Considering the social dimension of liability insurance, that is, the interests of the victim, as well as trying to find a compromise between different solutions in the EU Member States, the drafters of the PEICL have included a list of cases in which a direct claim is available.[39] According to para. 1 of Article 15:101 (Direct Claims and Defences) of the PEICL, the victim shall be entitled to a direct claim for compensation against the insurer under the insurance contract, provided that

(a) the insurance is compulsory, or

(b) the policyholder or insured is insolvent, or

(c) the policyholder or insured has been liquidated or wound up, or

(d) the victim has suffered personal injury, or

(e) the law governing the liability provides for a direct claim.

The first requirement of § 67 ICA is close to para. 1(a). According to Art. 1:202, 'compulsory insurance' means an insurance which is taken out in pursuance of

37 Ehdotus 3/1988 note 7 pp. 250–251, HE 114/1993 note 5 p. 66.

38 Karhu note 16 p. 220.

39 PEICL note 1 pp. 301–302.

an obligation to insure imposed by laws or regulations. It differs from § 67 ICA in that it does not seem to include regulations by authorities in individual cases.

Para. 1(b) deals with insolvency. The comments concentrate on bankruptcy.[40] Thus, the Finnish counterpart of this provision seems to be broader in the sense that any other kind of insolvency is sufficient to allow a direct claim. The case covered by para. 1(c), in which the insured has been liquidated or wound up, is not included in the Finnish law. As stated above, it is not clear to what extent the insolvency criterion also covers cases of liquidation and winding up.

The situations covered by para. 1(d), in which the victim has suffered personal injury, consist of a large variety of different cases, some extremely severe, others not. In practice, some of the personal injury cases also fall in other categories of direct claim. But as a category of its own, this socially very well-founded group is not included in the Finnish law.

On the other hand, the 'marketing cases' are not included in the PEICL. As mentioned above, the reasoning behind this category is not so much social concern as the idea of the victim being allowed to rely on the position promised to him by the marketing information.

Para. 1(e) grants a direct claim when it is provided for under the law governing the liability. This has to do with Article 18 of the Rome II Regulation (864/2007)[41], according to which the person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

4 The Position of the Victim, the Tortfeasor and the Insurer

In order to make use of the right of direct claim, the victim should be able to find out whether the injuring party who inflicted damage upon him has liability insurance and, if so, which the insurer is. When the ICA was drafted, this information issue was mentioned as an obstacle to a general right of direct action.[42] Apart from information arrangements specific to certain insurance lines, there is no general body where this information would be available, nor is there any general provision that would oblige an insured, a policyholder or an insurer to provide information on the existence and contents of a certain liability insurance policy. On the contrary, based on the Insurance Companies Act (*vakuutusyhtiölaki*, 521/2008) provision on professional secrecy (Sec. 30 § 1), insurers may not disclose whether a certain tortfeasor has liability insurance with that company.[43] On paper, this seems to be an obstacle to taking advantage of the right of direct action. In practice, however, problems seem to be rare.

40 PEICL note 1 pp. 302–303.

41 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

42 HE 114/1993 note 5 p. 18.

43 *See* also Hemmo note 10 p. 133. According to *Karhu* (note 16 p. 222), the insured must be obliged to give information about the liability insurance and the insurer, and the insurer

> According to PEICL Article 15:102 (Information Duties) para. 1, upon request by the victim, the policyholder and the insured shall provide the information needed for making a direct claim. This information duty is not limited to the mere existence of a liability insurance but covers also other information needed, taking into account the circumstances of each individual case, such as information on the insured sums and the scope of cover.[44]

The ICA does not include any provisions on the question of whether the tortfeasor's obligation to pay damages should or could be settled before the victim can use his right of direct action. In my opinion, the victim can use his right of direct action after a legally valid judgement on the tort liability as well as when the whole existence of tortfeasor's liability is not yet clear.[45]

Direct claims do not have any impact on the contents of the insurance cover, so the insurance money is payable according to the insurance contract. Thus, the insurance cover may be reduced or even refused if the insured (or policyholder, if not an insured himself) has neglected his information duties to the insurer.[46] However, if the insured a) has caused the insured event, b) has not complied with the precautionary guidelines or c) has neglected his duty of salvage, the insurer is liable to pay damages to the injured party, which term here refers to any natural person entitled to compensation in respect of any loss or injury covered by the insurance. These damages cover the portion that the injured party has not been able to claim from the insured. However, this liability applies only in cases of the insured's gross negligence or violation of a so-called alcohol provision.[47] According to the preparatory works, it is not enough that the insured is not willing to pay, but insolvency of the insured is required, and if the requirements for direct claim of § 67 ICA are fulfilled, a direct claim is available.[48] It is not quite clear whether the requirements for this 'additional cover' are the same as for direct claim based on insolvency.[49]

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should be obliged to say whether it is the insurer of a named tortfeasor. He mentions that, although these obligations are not based on the wording of the legislation, they are necessary for the victim to be able to exercise the right of direct action.

44 PEICL note 1 p. 305.

45 This was the decision of the Supreme Court in KKO 1988:118, although the decision was based on the ICA of 1933. Of the same opinion, Karhu note 16 p. 219 and, slightly hesitantly, also Könkkölä note 2 pp. 92–93.

46 §§ 22–23, 26 ICA, Hoppu and Hemmo note 15 p. 324, Könkkölä note 2 p. 97.

47 §§ 30, 31, 32 ICA, Hoppu and Hemmo note 15 pp. 324–326, Könkkölä note 2 pp. 89–91. 'Alcohol provision' according to § 30 para. 3 of ICA: The terms and conditions of a non-life insurance policy may include a provision to the effect that any compensation due to the insured may be reduced or refused, if use of alcohol or narcotics by the insured has affected the occurrence of an insured event. The terms and conditions of a voluntary motor vehicle insurance policy may include provisions on how use of alcohol, narcotics or other intoxicants affects compensation paid under the insurance as provided in § 48 of the Motor Liability Insurance Act.

48 HE 114/1993 note 5 p. 45.

49 *See*, Könkkölä note 2 pp. 89–91.

> According to PEICL Article 15:101 para. 2 as against the victim, the insurer may raise defences available under the insurance contract unless prohibited by specific provisions making the insurance compulsory. However, the insurer is not entitled to raise any defence based upon the conduct of the policyholder and/or the insured after the loss.[50]

From the point of view of the victim, it is also important to notice that both the time limit for making his claim (§ 73 ICA) and the period for filing his suit (§ 74 ICA) are independent from the possible actions of the insured.[51]

Direct claims do not have to be handled entirely only between the insurer and the victim. According to § 67 para. 2 ICA, if a direct claim is made to the insurer, the insurer shall inform the insured of the claim without undue delay and reserve an opportunity for the insured to give further information on the occurrence of the insured event. This opportunity is important, as the question is about the existence and amount of the tortfeasor's obligation to pay damages, on the one hand, and the application of the insurance policy terms and their possible exclusions, on the other.

The insured shall also be notified of the subsequent processing of the claim. This applies, for example, to an insurer's decision on the claim (§ 67 para. 2).[52] If the claim referred is processed in court or another place of competent jurisdiction, the insured shall be reserved an opportunity to be heard (§ 68 para. 2). However, the insured is by no means obliged to take part in the process.[53]

> According to PEICL Article 15:102 para. 2, the insurer shall notify the policyholder in writing of any direct claim made against it without undue delay and, at the latest, within two weeks following receipt of the claim. If the insurer breaches this obligation, a payment to or acknowledgement of debt towards the victim shall not affect the rights of the policyholder.[54] Thus, both the insurer's information duty and the sanction of its breach are clear.
>
> Unlike the Finnish ICA, the PEICL also set information requirements for the policyholder: According to PEICL Article 15:102 para. 3, if the policyholder fails to provide the insurer with information about the insured event within one month of receiving notice in accordance with para. 2, the policyholder is deemed to agree to a direct settlement of the claim by the insurer. This rule also applies to insureds who have actually received such notice in time.[55]

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50 *See*, PEICL note 1 p. 304.

51 Karhu note 16 pp. 235–236, Könkkölä note 2 pp. 83, 96.

52 HE 114/1993 note 5 p. 66.

53 HE 114/1993 note 5 p. 67.

54 *See*, PEICL note 1 p. 305.

55 *See*, PEICL note 1 p. 306.

If the insurer accepts a claim made by the victim, such acceptance is not binding on the insured (§ 67 para. 3 ICA). Thus, the insured does not have to pay the deductible or the amount exceeding the sum insured on the basis that, according to the insurer, the liability exists. If the victim wants to have a judgement on the tort issue as well, it would be wise to sue not only the insurer but also the tortfeasor.[56] On the other hand, an agreement between the tortfeasor and the victim is not binding on the insurer.[57] If, despite the liability insurance, the tortfeasor has compensated the victim, the victim's right to the insurance money devolves to the insurer.[58]

> According to PEICL Article 15:103 (Discharge), the payment of insurance money to the policyholder or insured, as the case may be, will only discharge the insurer from its obligation towards the victim if the victim
>
> (a) has waived his direct claim or
>
> (b) has not notified the insurer about his intention to make a direct claim within four weeks of receiving the insurer's request in writing.[59]

In cases where the right of direct action against the insurer does not exist, it remains for the insured tortfeasor to decide whether he wants to use his liability insurance.[60] If not, then there is nothing the victim can do against the insurer. And, even if the insured decides to use his liability insurance, it is legally the tortfeasor-insured itself who is entitled to the insurance money. However, in practice the interests of the victim are taken into account so that the insurer usually pays the insurance money directly to the victim if he has not yet been compensated by the tortfeasor.[61] From the point of view of the victim, it is very important that, even if he does not have a direct claim, the insurer shall, according to § 68 ICA, dispatch a notice of its decision on a claim for compensation made under liability insurance to the injured party. The injured party is then, in addition to and separately from the insured, entitled to take legal action against the insurer on account of the decision or refer the case to the Consumer Disputes Board, the Insurance Complaints Board or another similar body if the case otherwise falls under the responsibilities of such other body.

56 HE 114/1993 note 5 p. 67.

57 HE 114/1993 note 5 p. 66.

58 HE 114/1993 note 5 p. 65.

59 *See*, PEICL note 1 p. 306–307.

60 According to Könkkölä note 2 p. 87, the tortfeasor is obviously allowed to cancel the notification of claim until the insurer has decided on the claim.

61 Af Hällström, Ijäs and Laasonen note 17 pp. 112–113.

5 Is § 67 ICA of Peremptory Nature?

To understand the effect of § 67 ICA, it is important to discuss the question of the extent to which § 67 ICA is of peremptory nature. The peremptory nature of the ICA is dealt with in § 3 (426/2010) ICA, which reads as follows:

> Any terms or conditions of an insurance contract that deviate from the provisions of this Act to the detriment of an insured person or a person entitled to compensation or benefits other than the policyholder shall be null and void.
>
> Any terms or conditions of an insurance contract that deviate from the provisions of this Act to the detriment of the policyholder shall be null and void if the policyholder is a consumer or another natural person or legal person that in terms of the nature and scope of its business or other activities or other circumstances can be compared to a consumer as a party to the contract signed with the insurer. What is provided in this Subsection is not applied to group insurance contracts.
>
> The provisions contained in Subsections 1 and 2 are not applied to credit and suretyship insurance, marine or cargo insurance taken out by businesses, or insurance taken out by businesses to insure aircraft.

The first question relating to the peremptory nature of the ICA is whether the policyholder and the insurer can limit the rights of the victim. In cases mentioned in § 67 ICA, the victim is 'a person entitled to compensation' according to § 3 para. 1, and therefore, deviations of the Act to his detriment are null and void. This is also stated in the preparatory works of the Act.[62] Thus, it is not possible to limit the scope of a direct claim or otherwise weaken the position of the victim.[63] But if § 67 is not applicable, the victim is not 'a person entitled to compensation' and, therefore, the peremptory nature of the ICA does not seem to protect him in any way. Despite that fact, I would be willing to consider it impossible to limit the victim's right according to § 68, that is, the right of appeal against an insurer's decision on a claim under liability insurance.[64]

The second question is whether the policyholder and the insurer are allowed to broaden the scope of direct claims with the effect that this agreement would be binding towards an insured other than the policyholder himself. From the victim's point of view, such a broadening would, of course, be most welcome, but what about an insured other than the policyholder? As an insured other than the policyholder is protected by the peremptory nature of the ICA, deviations of the Act to his detriment are null and void. The decisive issue, therefore, is whether broadening the scope of direct claim would be to the detriment of an insured. As direct claims are contrary to the insured's right to have control over

62 HE 114/1993 note 5 p. 23.

63 Clearly, this includes all the provisions dealing directly with the position of the victim. On the other hand, it should be possible to deviate from provisions that have an indirect impact on the victim's position. Of the same opinion, Könkkölä note 2 p. 98. *See* also Norio-Timonen, Jaana, *Vakuutuskorvaukset ja vanhentuminen*, Lakimies 4/2011 pp. 627–648, pp. 630–631.

64 Of the same opinion, Könkkölä note 2 p. 98. *See* also Norio-Timonen note 62 pp. 644–645.

the liability insurance basically protecting his own rights, broadening the scope of direct claim would, in my opinion, be such a deviation and therefore null and void.

And the third question concerns the position of the policyholder. Although it is often the policyholder himself who is the sole insured or at least one of the insureds, it is also possible that the policyholder is not insured at all. This is the case, for example, when a company has taken D&O (Directors' and Officers' Liability) insurance for its directors. If the directors then cause damage to the company, the company does not, in the role of policyholder, have any general right of direct action, but its rights are limited according to § 67 ICA. Therefore, if a general right of direct action is to be advocated, the possible justification cannot be based on the provisions of the ICA but on something else, mainly on general contract law principles.

6 Conclusions

The existence of and prerequisites for a victim's direct claim are one of the core issues concerning liability insurance. Insurance contract law is not harmonised in the European Union, and uniform approaches cannot be found either in Scandinavia or more generally in different national legislation throughout Europe. In this paper the Principles of European Insurance Contract Law have been used as a modern example of a direct claim provision.

When compared to the Principles of European Insurance Contract Law, § 67 of the Finnish ICA is similar as far as compulsory lines of liability insurance as well as insolvency of the insured are concerned. One could argue that these two prerequisites are the most important from the point of view of the victim. A logical extension to the ICA would be providing direct claim for the situation in which the insured has been liquidated or, for whatever reason, wound up.

The direct claim provision gives rise to several questions, such as what exactly the definition of compulsory liability insurance is in comparison to voluntary insurance, on the one hand, and statutory insurance, on the other, or to what extent § 67 is peremptory by nature. A striking shortcoming concerning the regulation of direct claims is that there is no information duty in favor of the victim. This has not, however, turned out to be a major practical problem.

The provision on direct claims is still in force in its original form. The Supreme Court has not given any rulings related to § 67 ICA, and the literature on direct claims and their prerequisites is very limited. These facts indicate that our more-than-twenty-years-old provision has fulfilled its purpose fairly well.