Similarities and differences in Direct Action in the Nordic countries – the case of marine insurance

Published 27 november, 2025

By former Justice of the Supreme Court of Sweden, professor, jur.dr. Svante O. Johansson

Direct actions are usually referred to when a party has the right to make a claim directly against its debtor's debtor. In connection with liability insurance, direct action exists if the injured party can make a claim not only against the party that caused the damage, but also directly against the insurer. Such actions have become common in the courts over the past thirty years. Marine insurance often brings to the fore the different countries' systems for direct actions. In this article the concept of direct action is examined from a Nordic law perspective. At first, the questions of law and jurisdiction are examined, which involve also European union law. Thereafter, the two legs of direct action – the claim for damages and the right to compensation under the insurance contract – are discussed. The main question is if the insurer has a right to raise the same objections against the injured party as against the policy-holder who caused the damage. The conclusion is that the statutory rules on direct action are shattered in the Nordic countries and should be formulated in a more uniform manner.

This article has previously been published in Swedish as "Om likheter och olikheter vid direktkrav i nordisk sjöförsäkring" in Paula Bäckdén, Anders Leissner and Mattias Widlund (eds.), Vänbok till Svenska Sjörättsföreningen · utgiven i samband med 75-årsdagen för bildandet av Sjörättsföreningen i Göteborg den 15 april 1948, Stockholm: Jure (2023) Svenska Sjörättsföreningens skriftserie nr 84, pp. 149–171.

1. Introduction

Direct actions against liability insurers have become commonplace in maritime law over the past thirty years. Marine insurance often brings to the fore the different countries' systems for direct actions, and it is therefore natural that these should receive special attention.[1] This article examines the similarities and differences in the concept of direct action in the Nordic countries. Apart from compulsory liability insurance, direct action in maritime contexts usually arise under Protection & Indemnity (P&I) insurance. Such insurance is considered to be a liability insurance. Shipowners often cooperate in so-called P&I clubs, which handle shipowners' insurance on a mutual basis. Corresponding forms of insurance also exist for land-based transporters.

This presentation focuses on the similarities and differences in Nordic law. This is partly because three P&I clubs have their main operations here.[2] The laws of other countries will also be discussed to some extent. Many clubs operate from other countries, particularly the United Kingdom.

Direct action is a legal concept that can be said to involve considerable legal complexity. This applies even within the same national legal system. If one begins to make comparisons between different national legal systems, the complexity increases. To some extent, this is due to the fact that different legal systems have taken different approaches to the right of direct action. When examining direct action, the regulations require consideration of both national rules on jurisdiction and substantive rules on direct action, which makes the complexity almost insurmountable. It is therefore appropriate to begin with a brief description of what direct action generally entail.

2. Key points in direct action

2.1 The idea behind direct action

In legal literature, direct actions are usually referred to when a party has the right to make a claim directly against its debtor's debtor.[3] With regard to a liability insurance contract, it can be said that a direct action exists if the injured party can make a claim not only

1 Of course, direct action also arise in other contractual relationships, such as purchase contracts, sub-transport contracts and commission, but these are not discussed here.

2 Sveriges Ångfartygs Assurans Förening in Sweden and Gard and Skuld in Norway.

3 See on direct action in general Laila Zackariasson, Direktkrav – Om rätt att hitta anspråk mot gäldenärens gäldenär [Direct claim – On the right to make a claim against the debtor's debt], Iustus Förlag 1999 p. 30 et seq. and Vibe Ulfbeck, Kontrakters relativitet – Det direkte ansvar i formueretten [Relativity of contracts – Direct liability in property law], GAD Jura 2000 p. 130 et seq., Amund Bjøranger Tørum, Direktekrav – Særlig ved kjøp, tilvirkning og entreprise [Direct requirements – Particularly for purchases, manufacturing and construction contracts], Universitetsforlaget 2006 *passim,* Stefan Lindskog, Betalning – Om kongruent infriande av penningskulder och andra betalningsrättsliga frågor [Payment – On congruent fulfilment of monetary obligations and other payment law issues], 3rd ed. 2022, section 4.4, Torgny Håstad, Köprätt och annan kontraktsrätt [Sales law and other contract law], Iustus Förlag 2025, section 17.2.8 and Oskar Mossberg, Avtalets räckvidd I – Om avtals tredjemansverkningar, särskilt vid tredjemansavtal och direktkrav [Scope of the Agreement I – On the third-party effects of contracts, particularly in third-party contracts and direct claims], Iustus Förlag 2022 *passim.* With regard to direct action in insurance Hans Jacob Bull, Tredjemansdekninger i forsikringsforhold [Third-party coverage in insurance matters], Oslo 1988, is particularly significant, as is Jessica van der Sluijs, Direktkravsrätt vid ansvarsförsäkring [Direct claim rights in liability insurance], Jure Förlag 2006, 2 ed. 2025. For developments in Sweden under the 1927 Insurance Contracts Act (SFAL), see Svante O. Johansson, Direktkrav, sjöförsäkring och en ny försäkringsavtalslag [Direct requirements, marine insurance and a new Insurance Contracts Act], Svensk Juristtidning (SvJT) 1996, p. 726 et seq.

against the party that caused the damage, but also directly against the insurer. Such a right can be constructed in various ways.

The provisions of the Nordic insurance contract laws from the beginning of the last century were based on the assumption that the injured party has no independent right to direct action against the insurance company, but only a so-called derived right.[4] This right was intended to ensure that the insurance company was obliged to pay compensation on account of the insured party's liability for damages actually benefited the injured party.[5] According to the main rule, the insured party was not entitled to receive any compensation beyond what he or she had paid to the injured party. As a consequence of this, in the event of the insured person's bankruptcy, the injured party was entitled to have the insured person's claim against the insurance company transferred to him or her by the estate. The starting point for the regulation was that the insurance company was entitled to raise the same objections to the injured party's claim as it had raised against the insured person. This also became the arrangement with the transfer technique, through which the legislator intended to ensure that the insurance compensation would benefit the injured party instead of the bankruptcy estate of the party causing the damage (cf. Sec. 27 of the Promissory Notes Act[6]).

The corresponding regulation in the current Nordic insurance contract laws is formulated a bit differently. However, as in previous laws, it aims to ensure that compensation which the insurance company is obliged to pay on account of the insured party's liability for damages actually benefits the injured party. However, the Nordic countries have taken different approaches in this regard.

2.2 The basic elements in direct action

Although the direct action is constructed in different ways, a number of basic elements can be identified that must be discussed in order to determine the possibility of a direct action. In this context, it is appropriate to distinguish between procedural and substantive issues.

First, a position must be taken on jurisdiction. This requires not only an examination of the question of jurisdiction, but also a decision on which country's law is applicable. Only after a decision has been made on whether direct action is permitted under the law of the country of the court, including its choice of law rules, can the substantive aspects of the right to direct action be examined.

A number of issues also need to be considered with regard to substantive law. Firstly, the legal regulations governing insurance contracts often contain provisions on whether and how the direct action can be enforced. These regulations may stipulate that certain requirements must be met. One such requirement is, for example, that the party causing the damage has gone bankrupt or otherwise become insolvent. In many countries, this has been established as a requirement, and it is in such situations that the injured party actually needs to assert their claim directly against the insurer. In other countries, the direct action has been formulated as an unconditional or independent right for the injured party.

Secondly, the injured party is obliged to assert its claim for damages. This is self-evident; the injured party cannot make a claim against the insurer without proving that the party responsible for the damage (who is also the policyholder) is liable to pay compensation. Here, the insurer may have the right to raise the same objections against the injured party as against the policyholder who caused the damage. In this context, questions of choice of law will of course also arise.

Thirdly, the insurance contract may impose certain requirements for insurance compensation to be paid to the injured party. What is interesting in this context is whether the insurer can raise the same objections under the insurance against the injured party as against the policyholder. Different countries have different substantive laws on direct action, and the choice of law is therefore of great importance.

3. Direct actions in a few different states

3.1 Introduction

In order to properly understand what is meant by a direct action being permissible, it is necessary to examine the regulations of different countries regarding direct action in insurance relationships. Against this background, such a general survey is presented here. It is not intended to be exhaustive in terms of either the selection of countries or depth, but it provides a picture of how different direct action rules are formulated.

3.2 The Nordic countries

Under *Swedish* law, the injured party has the option of directing their claim for damages directly to the insurer under certain conditions.[7] These conditions are set out in Ch. 9, Sec. 7 of the SFAL.[8] The section states that, in the case of liability insurance, the injured party may direct a claim for compensation under the insurance contract directly to the insurer *if* the insured is required by law or other statute to have liability insurance covering the damage, *if* bankruptcy has been declared or a reconstruction plan under the law (2022:964) on corporate reconstruction has been established for the insured, *or if* the insured is a legal entity that has been dissolved.

In situations that do not concern compulsory insurance, Ch. 9, Sec. 7, first paragraph, item 2 of the SFAL stipulates that the injured party may direct actions for compensation under the insurance contract directly to the insurance company. The injured party's

4 See Sec. 95 of the 1927 SFAL.

5 Cf. Nytt Juridiskt Arkiv (NJA) II 1927 p. 504 f. and Jan Hellner, Försäkringsrätt [Insurance Law], 2nd ed. Lund 1965, p. 424. See also The Swedish Supreme Court case *Cremona* NJA 2017 p. 601.

6 Act (1936:81) on promissory notes.

7 See the legal situation and practice in Sweden at the time of the 1927 SFAL, *Fullwoodcession* NJA 1993 p. 222, *Malo* ND 1994 p. 28 (Disp.) *Simone* NJA 1994 p. 556 (= ND 1994 p. 43, cf. ND 1990 p. 16 [Gothenburg] and ND 1992 p. 32 [HVS]), *Sydfjord* ND 1995 p. 26 (HVS), *Degerö* ND 1996 p. 1 (HVS), cf. ND 1991 p. 20 (Gothenburg), *Ibercargo* ND 1998 p. 57 (Svea) and *Para Bravo* ND 1999 p. 38 (Disp.). For an overview of the rules, see e.g., Zackariasson, op. cit. p. 222, and Svante O. Johansson, "Third Party Claim under Marine Insurance – the Swedish Approach", Marius 247, 1999 p. 157 et seq.

8 Insurance Contracts Act (2005:104).

right does not therefore need to be confirmed by a formal assignment of claim, as was required under the 1927 Act; the right of direct actions gives the injured party both a substantive right to the claim and the associated payment authorisation. Nevertheless, the starting point is as stated by the Supreme Court in *Cremona* NJA 2017 p. 601, that the injured party may assert the insured party's right under the insurance contract in the same way as if he had acquired the right from the insured party and that the insurance company, for its part, may in principle raise the same objections against the injured party as against the insured party.[9] The right of direct action in the Insurance Contracts Act is thus in principle derived from the insured person's right.

The main rule regarding the right of direct action in the event of the insured party's bankruptcy can thus be described as meaning that the injured party is neither in a better nor a worse position than the insured party. He or she is entitled to the insurance compensation granted to the insured party under the contract, no more and no less, unless otherwise provided by law or the terms of the contract. According to Sec. 27 of the Promissory Notes Act, an acquirer of a claim cannot obtain a better right than the transferor had. This could lead to problems for the acquirer, as he or she must comply with the provisions set out in the insurance contract. This may involve certain amounts having to be paid, certain notifications having to be given, or similar. The acquirer is rarely able to comply with these provisions. For this reason, the courts in Sweden have been reluctant to uphold such provisions in insurance contracts against injured parties.

The legal situation in Sweden can be summarised, perhaps somewhat exaggeratedly, as follows: the right granted to the injured party by the Insurance Contracts Act to make a direct action against the insurer must not be rendered illusory. This means that terms in the insurance contract that impose obligations on the injured party that he or she cannot fulfil will not be given effect in relation to such a claim.

In addition to Sweden, the right to direct action is also permitted in the other Nordic countries. The greatest similarity to the Swedish rules is found in *Finnish* law, where, according to Sec. 67 of the Finnish Insurance Contracts Act (FFAL), a right to direct action has been introduced in certain cases.[10] In general voluntary liability insurance, the injured party has the right to claim compensation directly from the insurer under the insurance contract, *if* the insured has been declared bankrupt or is otherwise insolvent, *or if* the liability insurance has been mentioned in connection with the marketing of the insured's business activities.

According to Sec. 3, third paragraph, of the FFAL, the parties to the insurance contract may agree to waive this right by including various clauses in the insurance contract.[11] However, it appears unclear whether so-called pay-to-be-paid and judgment clauses[12] would also be effective against injured parties.

Norwegian law has introduced a clear, unconditional and independent right of direct action. This is set out in Sec. 7-6 and 7-8 of the Norwegian Insurance Contracts Act (NFAL).[13] The provisions codify previous practice in Norwegian courts.[14] Direct action is thus enshrined in Norwegian law. The main rule states, in short, that if liability insurance covers the insured party's liability for compensation, the injured party may claim compensation directly from the insurer. In the case of liability insurance for larger commercial enterprises, certain special rules apply (Sec. 7-8). These mean that the insurer becomes liable to the injured party if compensation is paid to the insurer without the injured party having their claim covered. In the event of the policyholder's insolvency, the injured party always has the right to make a claim directly against the insurer.

Icelandic law has drawn inspiration from Norwegian law. The rules in Sec 44 and 46 of the Icelandic Insurance Contracts Act (IFAL) have been formulated in a manner that is largely identical to the Norwegian rules. Thus, there is also an unconditional and independent right of direct action.

Danish law also gives the injured party a statutory right of direct action, corresponding to that which existed earlier in Sweden, set out in Sec. 95, first paragraph, of the Danish Insurance Contracts Act (DFAL).[16] Once the tortfeasor's liability for compensation has been established and the amount of compensation determined, the injured party assumes the rights of the policyholder. In practice, based on the preparatory work of the Act[17] , it has been concluded that direct action is permitted.[18]

Recently, the right to direct action has been extended.[19] The second paragraph of the section states that the injured party also assumes the rights of the policyholder if the injured party's claim is covered by the policyholder's insolvency in the form of bankruptcy, compulsory composition or debt restructuring. Thus, the extended right granted to the injured party in the event of insolvency is also expressly a right derived from the party causing the damage.

9 Cf. Government Bill 2003/04:150 Ny försäkringsavtalslag [A new Insurance Contracts Act] p. 228 et seq. and 479 et seq.

10 Insurance Contracts Act 28.6.1994/543.

11 Cf. Peter Sandell, "Third Party Claim under Marine Insurance – the Finnish Approach", Marius 247, 1999 p. 175 et seq. and Panu Karhu, "The injured party's right of direct action under the Finnish insurance contracts act", Marius 335 SIMPLY (2005).

12 See section 4.5.

13 Act of 16 June 1989 No. 69 on insurance contracts.

14 *Skogholm* ND 1954 p. 445 (NH) (= Rt. 1954 p. 1002), see also Hans Jacob Bull op cit. *passim.*
Insurance Contracts Act published in Stjórnartíðindi No. 30/2004.

16 Act 1930 No. 129 on insurance contracts.

17 Draft Act on Insurance Contracts 1925 p. 135 et seq.

18 See case law Ugeskrift for Retsvæsen (UfR) 2001 p. 1285 (H) and UfR 2001 p. 1303 (H). Cf. also Per Vestergaard Pedersen "Skadelidtes direkte krav mod skadevolderens ansvarsforsikringsselskab" [The injured party's direct claim against the liable party's liability insurance company], UfR 1999 p. 214 et seq.

19 See Report No. 1423/2002 with proposals for an Insurance Contracts Act. In addition, the Ministry of Justice has presented bill no. L 169/2002-03. For more information on these proposals, see Per Vestergaard Pedersen, "Skadelidtes direkte krav mod skadevolderens ansvarsforsikringsselskab – seneste retspraksis og ændringsforslagene" [The injured party's direct action against the liable party's liability insurance company – recent case law and proposed amendments], UfR 2003 p. 173 et seq.

This may have consequences for the injured party's chances of obtaining compensation for their claim.

3.3 Some other countries

On the continent, direct action is generally accepted. *France* is often cited as an example of a country that has fully implemented direct action. The rules governing insurance contracts can be found in Art. L. 124-3 Code de Assurance,[20] which states that the insurer may not pay any part of the compensation to anyone other than the injured party as long as the latter has not received compensation from elsewhere. The direct action has been constructed on this basis. However, it should be noted that French law also imposes certain requirements. In the case of marine insurance law, these are set out in L. 173-23 and L. 173-24 de Assurances Maritimes.[21] In practice, these rules have been interpreted to mean that direct action also is permitted in marine insurance.[22]

In *England*, there has for long been an established practice regarding direct action. This means that the rules in the Third Parties (Rights against Insurers) Act 1930 also apply also to to marine insurance, i.e. P&I insurance, in the same way as to other liability insurance.[23] There is therefore also a right to direct action under liability insurance for transport operations.

However, this right of direct action may be set aside by agreement between the parties to the insurance contract.[24] Since the terms and conditions of P&I clubs often set out extensive conditions for compensation to be paid, the possibility of direct action is severely limited. In English practice, it has thus been accepted that such conditions are upheld by the insurance company even against an injured third party.

An important exception to the general rule that direct action is accepted in marine insurance can be found *in Germany*.[25] According to Sec. 115 of the Versicherungsvertragsgesetz (VVG),[26] there are limited opportunities for injured parties to make claims directly against the insurer in the case of compulsory insurance. However, these provisions do not apply to transport insurance. Nor do the rules appear to be applicable by analogy to such insurance.[27] The insurance rules applicable to transport insurance are Sec. 130–141 Handelsgesetzbuch (HGB), but these sections do not include any right of direct action. Direct action therefore do not exist in transport insurance in Germany.

In light of the examples given, it can be concluded that direct action is generally permitted in most European countries.[28] However, there are certain restrictions in that some countries remove this right in certain types of insurances and some countries allow the right of direct action to be limited by clauses that require the injured party to take measures that he or she cannot possibly fulfil.

4. Jurisdiction and direct action

4.1 Introduction

The jurisdiction of the Member States of the European Union is by large motivated by harmonisation efforts.[29] The rules on court jurisdiction and the enforcement of judgments in civil and commercial matters are set out in a number of different legal instruments. This presentation will refer to the Brussels system of jurisdiction, which refers to these legal instruments as a whole.[30]

The problems encountered by lawyers when applying direct action under the Brussels system are a mixture of procedural law and substantive law. This mixture stems from the design of the system. It establishes special rules of jurisdiction for direct actioons, which stipulate that a national court has jurisdiction in such an action under liability insurance – according to a number of listed courts, e.g. in the policyholder's place of residence – if such a direct action by the injured party is permitted.[31]

4.2 The rules on jurisdiction in the Nordic countries are based on EU law

Jurisdiction in a dispute concerning a direct action under liability insurance is regulated in the Brussels system. The rules are set out in a special section of the system that exclusively regulate insurance disputes. It is thus separate from the general rules of jurisdiction in the system, and the rules for insurance disputes are, as a starting point, mandatory and exclusive. Furthermore, the rules on jurisdic-

20 Law of 13 July 1930 Code de Assurance.

21 Loi 67-522, 3 July 1967 sur les Assurances Maritimes, which forms Title VII, Book 1$^{(er)}$ of the Code de Assurance.

22 Hans Jacob Bull, op. cit. p. 111, with further references.

23 *The Allobrogia* [1979] 1 Lloyd's Rep. 190.

24 In the case of *The Fanti and the Padre Island* (1990) 2 Lloyd's Rep. 191, a pay-to-be-paid clause was upheld, and in *The Bradley* (1989) 1 Lloyd's Rep. 465, a judgment clause was upheld under English law.

25 It appears that the Netherlands and Germany are the only exceptions among European countries.

26 Versicherungsvertragsgesetz (Gesetz über den Versicherungsvertrag) vom 23. November 2007 BGBl. I S. 2631 zuletzt geändert durch Gestz vom 16. December 2022 BGBl. I S. 2023.

27 Carl Ritter, Das Recht der Seeversicherung, De Gruyter 1953 pp. 494 and 1006.

28 The preparatory work for the Brussels Convention *OJ* 1979 C 59 p. 32 footnote 4 states that direct action in Germany and the Netherlands are only permitted under compulsory motor vehicle liability insurance. In other countries, direct action appears to be generally accepted, as can be seen from the aforementioned preparatory work.

29 The issue of jurisdiction has been discussed by Svante O. Johansson in "Jurisdiction in direct action under liability insurance", New and old perspectives on transport law 2003 p. 146 et seq.

30 References to the Brussels system primarily refer to Council Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation), Council Decision 2009/430/EC of 27 November 2009 on the conclusion of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Lugano on 30 October 2007 (the Lugano Convention), which was updated in 2015 and is sometimes referred to as the Lugano II Convention. The idea is that the various legal acts should lead to the same substantive result.

31 The rules are set out in Art. 11(2) of the Lugano Convention and Art. 13(2) of Brussels I.

tion for insurance are generally regulated and are therefore not specifically designed for transport insurance.[32]

Jurisdiction in insurance disputes for courts in *Norway* and *Iceland* is governed by the Lugano Convention, while for courts in *Denmark*, *Finland* and *Sweden* it is governed by Brussels I. Art. 10–16 of Brussels I and Art. 8–14 of the Lugano Convention contain certain provisions that mean that an insurer can be sued in a handful of different forums. The first is, of course, the insurer's domicile forum. This option corresponds to the general rule on jurisdiction in the defendant's place of residence. The forum can, of course, also be chosen by the parties in insurance disputes. A second possibility, and this is the major difference from the general rules, is that the plaintiff can bring an action against the insurance company in the place where the policyholder, the insured or other beneficiary is domiciled.[33] Furthermore, a liability insurer may be sued in the place where the damage occurred, i.e. *lex loci delicti.* In addition to these forums, there are a number of other forums, such as co-insurance and insurance branches, which the claimant can choose from if he or she wishes to sue the insurer.

The rules dealing with direct action refers to the listed forums. They are set out in Art. 11.2 of the Lugano Convention and Art. 13.2 of Brussels I. The first paragraph of these articles states that, in matters relating to liability insurance proceedings against the insurer may, if the law of the court state so permits, be brought in the court where the injured party has brought proceedings against the insured. This rule presupposes that the tortfeasor still exists and can be sued.

The rule on jurisdiction for direct actions is set out in the second paragraph of the aforementioned articles and is worded as follows.[34]

The provisions of Art. 10, 11 and 12 (and 8–10 respectively) apply if the injured party brings an action directly against the insurer, if such direct action is permitted.

At first glance, the regulation appears relatively simple. However, in order to determine whether a country's court has jurisdiction over a direct actions, it is necessary to navigate the many twists and turns of the regulation. This must be done in several steps to avoid running aground.

The first step is to determine which law should be applied to decide whether direct action is permitted. The rules of the Brussels system are not very helpful in this regard. Instead, one must turn to other rules of private international law. In this context, it should be noted that a direct action consists of two parts. One part concerns damages and the other part concerns insurance. The question therefore arises as to whether it is the applicable law in the damages issue or in the insurance issue that is decisive.

The second step consists of a discussion of the phrase that direct action must be "permitted" in the law of court seized. In order to determine this, it is necessary to consider the law that should be applied. This requires knowledge of the regulations governing direct action in different countries. In this context, it is also necessary to consider whether permissibility should be assessed on the basis of a general consideration of the rules in the applicable law or whether the question should be decided on the basis of the individual case.

Another issue that should be examined in this context is whether clauses in the insurance terms and conditions affect the jurisdiction of a direct action. Is it possible to stipulate a certain jurisdiction or a certain choice of law or even arbitration in the insurance contract and thus influence the rules on jurisdiction? (See further section 4.5.)

The final step is to introduce a relatively recent phenomenon in private international law, namely what are commonly referred to as internationally mandatory rules. This term usually refers to rules in *lex fori* that are mandatory regardless of the rules that may exist in the law which is applicable according to the choice of law rules. If the rules on direct action were to be considered mandatory in nature, the question of the "permissibility" of the direct action or choice of law clauses would become irrelevant. One would simply follow the mandatory rule in *lex fori.*

4.3 Which country's law is applicable?

When determining which country's law is applicable in order to decide whether direct action is permissible, various alternatives may be considered. Firstly, there is the law of the State of the court seized, i.e. *lex fori*. Secondly, it is conceivable that the law of the country designated by the choice of law rules of the country of the seized court should apply. This question cannot be answered on the basis of the text of the articles in the Brussels system. From a Nordic perspective, the question of applicable law is somewhat complicated because the different countries are affiliated with different regimes for determining applicable law.

In *Denmark,* the Rome Convention[35] applies, which regulates the applicable law in contractual obligations. However, this is only applicable to a limited extent to insurance contracts, which are then governed by the EU Insurance Directive. The directives also lack rules on the choice of law for direct action. For Danish law, therefore, national choice of law rules determines which country's law is applicable to a direct action.

Since neither *Norway* nor *Iceland* has acceded to the Rome Convention, national rules also govern the choice of law in direct actions in those countries.

The preparatory work for the Brussels Convention states, with regard to the choice of law in direct action, that it is not *lex fori* that should be applied when determining the jurisdiction in such

32 The rules on jurisdiction in insurance disputes were a novelty within the Community when they were introduced. The reason given for special rules in insurance disputes was to protect the weaker party, a reason that is very difficult to apply to transport insurance. See Peter Schlosser in *OJ C* 1979/59 p. 114.

33 This rule has been tested in the case of *Barbro* NJA 2000 p. 3 (= ND 2000 p. 1), where a Norwegian insurance company was found to be liable to answer before the Stockholm District Court, where the plaintiff shipping company was domiciled.

34 See Articles 13.2 and 11.2 of the Brussels I and Lugano Conventions respectively.

35 The Convention of 19 June 1980 on the law applicable to contractual obligations (the Rome Convention).

an claim.[36] This has also long been confirmed by the Norwegian Supreme Court.[37]

In Leros Strength Rt. 2002 p. 180 (cf. ND 2000 p. 235 [Karmsund]), the Norwegian state had a claim against a shipping company for oil spill clean-up along the Norwegian coast. The shipping company owned the vessel "Leros Strength", which had sunk, resulting in oil damage. The state sued the English P&I Club in the Norwegian courts for NOK 4.6 million. The case was referred back by the Supreme Court to the lower court because the latter had not taken into account the Norwegian rules on choice of law. See also the statements in Stolt Commitment I HR-2018-869-A, where the case was referred back to the lower court.

From the Norwegian cases, it can be concluded that if an international P&I club is sued by an injured party in, e.g. Bergen, this does not mean that the court there also has jurisdiction simply because direct action is permitted in Norway. When the use of *lex fori* is rejected, the prescribed procedure under the Brussels system is to allow the admissibility of the direct action and thus also the jurisdiction in such cases is to be decided by the court in the country where the action is brought.[38] It should be noted that Norwegian law does not have any choice of law rule built into the direct action rule in Sec. 7-6 NFAL.[39]

The case of Stolt Commitment I HR-2018-869-A concerned jurisdiction in "direct actions against a Norwegian liability insurer following a collision in foreign waters between foreign-registered ships, where the owners and operators of both ships are foreign companies". The Supreme Court concluded that there was no choice of law rule in the substantive rules on direct actions in Section 7-6 NFAL.

The application of the choice of law rules gives rise to two possible solutions. As mentioned above, a direct action consists of two relationships, and the applicable law in each relationship may vary. The first is the law governing the claim for damages between the injured party and the party causing the damage, i.e. either in tort or in contract. The second is the law governing the insurance claim between the tortfeasor/policyholder and the insurer. If the focus is on the claim for damages, either *lex loci delicti* or *lex contractus* will apply, depending on whether the claim is based on a contractual or non-contractual basis.[40] If, on the other hand, the focus is on the insurance claim, the law of the insurance contract shall apply to determine whether a claim is admissible. It is therefore important to be clear which of the two alternatives is invoked.

The problem is that neither the conventions nor the regulation in the Brussels system provide any guidance on which legal relationship that should form the basis for determining the choice of law. The preparatory work for the Brussels system is also unclear on this issue, as it does not provide any definite position. The preparatory work does state that it is the choice of law rules of the country of the court seized that are decisive. However, it goes on to say that it can be either the law of the place where the damage occurred, the law of the contract, the law of the insurance contract or *lex fori.*[41] The matter must be decided on the basis of the choice of law rules of the country of the court seized.[42]

If the first element of the direct action is chosen, i.e. the claim for damages, this means that the choice of law regarding the claim for damages is relied upon. This may seem natural, as it is the right of the injured party that is at issue. This also seems to be the reasoning in most of the Member States of the Brussels system.[43] This approach has also been chosen when the direct action has been discussed in other contexts, including in relation to traffic accidents.[44]

If, on the other hand, the emphasis is placed on the second element of the direct action, i.e. insurance coverage, it is inevitably the law of that contract that will govern the admissibility of the direct action. It should be noted that English law takes the view that the insurance relationship is decisive.[45]

In the case of Stolt Commitment II HR-2020-1328-A, it was clear that Norwegian law applied to the legal relationship between the injured party and the P&I club. The question in that case was therefore whether the rules of the Norwegian Insurance Contracts Act on direct acions should be understood to mean that direct actions are generally permitted in Norway.

In *Finland* and *Sweden,* the applicable law for contractual obligations is governed by Rome I.[46] However, that regulation does not contain any rules on the applicable law of direct actions. Such rules do exist for Finnish and Swedish law in Rome II.[47] According to Art. 18 of Rome II, it is clear that direct actions are permitted under either tort law or insurance law. The question of the permissibility

36 Paul Jenard in *OJ* 1979 C 59 p. 32.

37 Some courts in the Nordic countries have not taken note of this peculiarity in the rules of jurisdiction in direct actions. Instead, they seem to apply *lex fori* without making any choice of law. This was the case in the lower courts in the leading Norwegian case *Leros Strength* Rt. 2002 p. 180 (cf. ND 2000 p. 235 [Karmsund]). This was also the case in the Danish case *Securitas Bremer Case* ND 2001 p. 94 (VL).

38 I will disregard for the time being what impact the internationally binding rules may have on the choice of law. See further on this in section 4.6.

39 This is clearly stated by Paul Jenard in *OJ* 1979 C 59 p. 32, note 4, who argues that the phrase "if such direct action is permitted" has been used to ensure that the examination also covers the choice of law rules in the country of the court seized. The same opinion is expressed in the case *Leros Strength* Rt. 2002 p. 180 (NH), cf. Stein Rognlien, Luganokonvensjonen [The Lugano Convention] Gyldendal 1993 p. 169.

40 For claims for passenger injury or cargo damage, it is therefore the law of the contract of carriage that is decisive.

41 See *OJ* 1979 C 59 p. 32 in footnote 4.

42 See Paul Jenard, in *OJ* 1979 C 59 p. 32 in footnote 4.

43 See, for example, Lennart Pålsson & Michael Hellner, The Brussels I Regulation together with the Brussels and Lugano Conventions, 11 November 2016 JUNO para. 85 *in fine* and Peter Arnt Nielsen, International Private and Procedural Law*,* 1997 p. 183.

44 Art. 9 of the Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents and its preparatory works.

45 Kay P., Civil Jurisdiction and Enforcement of Foreign Judgments*,* Abingdon 1987 p. 809 and Dicey & Morris, The Conflicts of Laws*,* Sweet & Maxwell Ltd, 13th ed., 2nd vol. 2000 pp. 368 and 1527-8. See also Macey, "Insolvency at sea", Lloyd's Maritime and Commercial Law Quarterly (*LMCLQ)* 1995 p. 34 et seq.

46 Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I).

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

of direct action is therefore simpler if the action is brought in Finland or Sweden than if it is brought in other Nordic countries. The choice of law rules in Art. 18 of Rome II interacts with the rules on jurisdiction in Art. 13.2 of Brussels I, according to which an injured party may bring a direct action against the insurer in, inter alia, the forum where the harmful event occurred or the forum of the claimant's own domicile, provided that national laws permit direct actions.[48]

4.4 When direct actions are permitted

After identifying the law applicable to the direct action in a procedural sense, it must be determined whether the direct action is permitted under that law, i.e. whether direct actions are permitted under *lex causae*. As shown in the previous section,[49] the scope of such actions varies between countries. It is primarily the possibility of success with such actions that varies. It is against this background that one must ask what is actually meant by the requirement in the Brussels system that a direct action is permissible. This problem, which goes beyond the purely comparative, can be analysed at different levels. Firstly, one can imagine that direct actions should be permissible at a general level. Secondly, it is conceivable that direct actions should be permitted on the basis of an individual assessment of all the circumstances of the individual case.

If one chooses to analyse the right of direct action from a general level, the following examples can be given of how to reason in order to determine whether such actions are permissible. In Germany, direct actions are permissible under compulsory motor vehicle insurance. There are specific provisions for this in statutory law.[50] However, direct actions are not permitted under marine insurance, as explained earlier in this paper.[51] If the individual model is used, the court must examine the substantive law in the individual case. Only after such an examination can the court take a position on the specific case.

Which of the different methods should be applied, the general or the individual, is not clarified in any case law concerning the Brussels system from the Court of Justice of the European Union, but the issue has been dealt with by Nordic courts.

In the aforementioned Leros Strength,[52] *the parties had argued this issue from different starting points. Under English law, it is not possible to succeed a direct action under the rules that applied in the case, as these included a pay-to-be-paid clause. Under Norwegian law, however, direct actions are permitted even in such cases. However, the Supreme Court did not take a position on this issue because the argument had not been raised in the lower court. The case was remanded, but the parties settled before a judgment was handed down.*

The issue was finally examined in the case *Stolt Commitment II* HR-2020-1328-A.

The case concerned jurisdiction in a direct action against a Norwegian P&I club following a collision in foreign waters between foreign vessels, where the owners and operators were foreign companies. In this case, it was clear that Norwegian law applied to the legal relationship between the injured party and the club. The question in the Norwegian case was whether the rules of the Norwegian Insurance Contracts Act on direct actions should be understood to mean that direct actions are generally permitted in Norway (cf. Section 7-6 FAL and 11.2 Lugano Convention). The majority of the Supreme Court stated that an interpretation involving a fairly detailed assessment of substantive issues was not appropriate for determining the question of jurisdiction. The question should therefore be decided on the basis of a general approach.

In that case, the Supreme Court concluded that there were good grounds for interpreting the Lugano Convention in such a way that, in order to determine the question of jurisdiction, it did not engage in interpretations of what valid exceptions to the provisions of the law the insurance contract might have. The court overturned the lower court's ruling on the grounds that it had based its decision on an individual approach.

In my opinion, the arguments put forward by the Supreme Court are valid. It is hardly acceptable that a court should be forced to take a position on the merits of the case in order to decide the question of jurisdiction. This would shift the focus and certainty of the proceedings too much. Nor can it be the intention that the rules on direct actions should lead to changes in the question of jurisdiction. The individual approach inevitably has the consequence of completely disrupting the rules on jurisdiction, as jurisdiction might not exist anywhere.[53]

4.5 Certain clauses relevant to the question of jurisdiction

Insurance contracts often contain clauses intended to influence jurisdiction. These are also generally invoked in disputes to avoid jurisdiction in a particular state. There is therefore reason to touch on them here.

In member states of the European Union, it is generally accepted that the parties themselves should be able to agree on which country's law should apply to their relationship, known as *choice of law clauses*. This is also the principle according to Rome I and the Rome Convention.

The parties have thus been given certain opportunities to choose the applicable law for their obligations under an insurance contract. Despite the explicit regulation on the subject, it can be difficult to determine whether such a choice of law should also be given significance for the injured party.

These issues were addressed in the case of Securitas Bremer ND 2001 p. 94 (VL). The German carrier Hübner undertook to transport television sets for a company called Sherridon from Hamburg to Moscow. However, Hübner did not carry out the transport itself but contracted the Danish company Controlo, which also carried

48 It should be noted that the provision only concerns the right to direct action itself. The content of the direct action, i.e. what it covers and how the claim for compensation is calculated, is another matter. However, it should qualify as a contractual claim against the insurance company, since the scope of the insurer's obligations must in any case be determined in accordance with the law applicable to the insurance contract.

49 See Ch. 3.

50 The examples are taken from *OJ* 1979 C 59 p. 32 in footnote 3.

51 See Sec. 3.3.

52 Rt. 2002 p. 180.

53 Svante O. Johansson, "Jurisdiction in direct actions under liability insurance", New and old perspectives on transport law, 2003 p. 159.

out the transport. However, the television sets disappeared in Russia. Sherridon claimed compensation for cargo damage from Hübner at the Landgericht Hamburg. This claim was upheld. Hübner sought recourse against Controlo in a Danish court. However, Controlo went bankrupt. Due to the bankruptcy, Hübner sought recourse against Controlo's German liability insurer, Securitas Bremer. However, this took place before a Danish court where the policyholder, Controlo, was domiciled.[54] *Upon objection from Securitas Bremer, the Vestre Landsret found that the company had not shown that the choice of law clause in the insurance contract, which designated German law (where direct action are not possible in cases such as the one at hand), should not be applied to Controlo. The court then applied Danish law.*[55]

An important issue regarding the choice of law should be noted here. In the *Securitas Bremen* case,[56] only the choice of law under the insurance contract was discussed. It can be questioned if this really is the relevant agreement when it comes to the choice of law in direct actions?

In my opinion, which is in line with the general view in Europe,[57] it is not the choice of law rules in the insurance contract that are decisive. Instead, it is the applicable law in relation to the claim for damages that should be used.

This is also how the Danish Supreme Court handled the case in *Sea Endeavour I* ND 2017 p. 445 (= UfR 2017. 461 H).

The case concerned damage caused by a Swedish transport company that had taken out P&I insurance for a bareboat chartered tugboat transporting sugar beets on a barge. At a port facility, the vessel caused damage to the port of Assens. The Swedish company went bankrupt, and the English club was ultimately sued directly before the Danish courts. After a jurisdiction clause was rejected (see below), the choice of law became decisive for whether jurisdiction existed in Denmark. In this regard, the Supreme Court stated that the damage occurred in Denmark as a result of actions taken there. The injured party was located in Denmark. Even though the manager was located in England and English law had been agreed for the insurance contract, the court concluded that the claim was most closely connected to Denmark.

The Supreme Court concluded, based on an overall assessment – reminiscent of the *Irma Mignon* formula from the Norwegian case Rt. 1923 II p. 58 – that the case had its closest connection to Denmark. Danish courts therefore had jurisdiction to decide the dispute.

Of course, the choice of law in the insurance contract may be relevant later in the process. This choice of law must be taken into account, for example, when determining the claim in substance. In this assessment, it may therefore turn out that the injured party's claim cannot be successful.[58]

Various rules in the Brussels system stipulate that the parties may, in principle, refer a case to the court they consider most appropriate for resolving a private law dispute. If the parties thus decide that the dispute should be adjudicated to a specific court, that court shall also be considered to have exclusive jurisdiction to hear the dispute, unless otherwise specified in the agreement. These rules are set out in Art. 23 of Brussels I.

In the case of insurance contracts, the mentioned freedom to refer a dispute is restricted. In order to protect the weaker party, the Regulation stipulates that prorogation may only take place under certain limited conditions. These are set out in Article 14 of Brussels I. The rules are designed so that the parties may deviate from them and prorogate only in cases where the insurance covers certain specifically listed risks. The listed risks include loss or damage to seagoing ships or aircraft, cargo carried by such ships, liability, except for damage to passengers, resulting from the use or operation of such ships. For P&I insurance at sea, which covers liability for cargo damage, it is therefore possible to prorogate disputes under the insurance.[59] For insurance other than those covering risks during transport by sea and air, however, it is not possible to prorogate disputes under liability insurance.

The question then is whether a prorogation clause can have effect against the injured party.[60] The matter has now been decided by the Court of Justice of the European Union.

In the case of Assens Havn, C-368/16, EU3:C:2017:546, the Court has put its foot down. The Court had already had occasion to point out that prorogation in relation to insurance disputes is strictly limited in order to protect the economically weaker party. The Court noted that, compared to a policyholder who has not expressly agreed to a prorogation clause – which was the case in Société financière et industrielle du Peloux, C-112/03, EU:C:2005:280 – a third party who has suffered an insured loss is even further removed from the contractual relationship in which such a clause was agreed. A prorogation agreement between an insurer and a policyholder cannot therefore be enforced against a person who has suffered an insured loss and who wishes to bring an action directly against the insurer before the court of the place where the harmful event occurred or before the court of the place where the insurer is domiciled.

The court concluded that the Brussels system should be interpreted as meaning that an injured party who has brought a direct action against the insurer of the party causing the damage is not bound by a prorogation agreement concluded between the insurer and the policyholder causing the damage.

It is well known that *arbitration clauses* are included in the rules of P&I clubs. There may therefore be reason to touch upon such clauses, even though they lie somewhat outside the rules of jurisdiction in the Brussels system, which expressly state that the rules of jurisdiction shall not apply to arbitration proceedings.[61] The rules of this system are therefore not applicable if a valid arbitration clause has been agreed between the parties.

54 According to Art. 8(2) of the Brussels Convention, only the court of the place where the policyholder is domiciled has jurisdiction.

55 See Sec 4.3 on the risks of applying *lex fori* directly once it has been established that the parties have not concluded a choice of law agreement.

56 ND 2001 p. 94 (VL).

57 See what has been stated above about Rome II.

58 It should be noted here that internationally binding rules may play a role in the assessment, see Sec. 4.6.

59 In the club rules that exist, prorogation is not normal. Instead, arbitration clauses are used, and I will discuss such clauses in the next section.

60 It has already been argued at an early stage that the parties to an insurance contract cannot, with effect for the injured party, refer the dispute to a court in such a way that the right of direct action under Art. 11.2 of Brussels I disappears, see, for example, Pålsson & Hellner, op. cit. para. 188.

61 See Art. 1.2 (d) Brussels I and Art. 1.2 (d) of the Lugano Convention.

For a P&I club, it is advantageous to have all its claims tried at its place of domicile. Policyholders may be domiciled in different parts of the world, and there may be conflicting interpretations as to whether the courts of different countries should try the club rules. This is also the reason why arbitration has been provided for in the clubs' rules.

However, the real question in connection with direct actions is whether the injured party should be considered bound by an arbitration clause agreed between the parties to the insurance contract. Normally, in all countries, an arbitration clause is binding only on the parties who have agreed to settle the dispute in such proceedings. However, in countries where direct actions are structured as a right transferred from the policyholder to the injured party (e.g. England, Denmark and Sweden), it is questionable whether the arbitration clause should also apply to the injured party. After all, the injured party cannot have better rights than the transferor.[62]

Previously, the question of the scope of the arbitration clause in direct action has been dealt with in slightly different ways in different countries. In some places, it has not been accepted that the injured party should be bound by the clause.[63] In other countries, including England and Wales, this has been accepted.[64]

In Scandinavian law, the issue has not yet been tested by the courts. However, it appears that previous case law, now reinforced by the case law of the Court of Justice of the European Union regarding prorogation agreements, indicates that the courts would not accept that injured parties should be bound by an arbitration clause in an insurance contract. In my opinion, there are also good reasons for this.

If arbitration clauses were to be upheld, there is reason to suspect that the injured party's rights could become illusory. The courts have not accepted this in the past. Furthermore, it can be noted that arbitration clauses, like prorogation agreements, can deprive injured parties of their right to direct action. It has been pointed out above that prorogation agreements with this effect are not upheld. The same can of course be said of arbitration clauses. Finally, there are statements in the literature to the effect that arbitration clauses should not be upheld against injured parties.[65]

4.6 Internationally binding rules

One final issue must be addressed in connection with the question of jurisdiction in disputes under liability insurance. This is the mandatory nature of the rules. It is clear that the rules are mandatory in legal systems where they cannot be waived by the parties.[66] In such countries, the question arises as to whether the rules should also apply in cases where the law of another country, which does not allow direct actions, is designated under the choice of law rules.

The application of the law of one's own country can be achieved in two different ways. The traditional way is to apply the *ordre public* test. A rule in the law designated by the international choice of law rules may be in such obvious conflict with the rules of *lex fori* that the designated rule is not applied by the courts.

The second way of limiting the use of foreign law is more straightforward. Here, no choice of law is made before deciding to apply *lex fori.* Instead, the question is asked which of the mandatory rules are such that they should be applied regardless of which law is otherwise applicable to the matter.[67] This explains the language used when referring to the rules in *lex fori* as internationally mandatory.[68]

Arguments can be found in Scandinavian law that suggest that the direct-action rules should have this internationally mandatory character. One such argument is that the preparatory work[69] for the Norwegian Act on Applicable Law in Insurance Matters[70] states that the Norwegian rules on direct actions are mandatory in this way. Furthermore, it can be argued that rulings from Sweden and Denmark indicate that the courts perceive the direct-action rules as internationally binding. Against this background, I am inclined to conclude that it appears that the direct-action rules should be considered internationally mandatory to the extent that they are binding in national law.[71]

62 In a frequently used phrase, it is said that the injured party steps into the shoes of the insured, however uncomfortable they may be.

63 A somewhat distant example is Puerto Rico, where it has not been accepted that the injured party should be bound by an arbitration clause, see *Ocean Eagle* 1974 AMC 1629.

64 See *The Padre Island* [1984] 2 Lloyd's Rep. 408.

65 Hans Jacob Bull, "Direct action under P&I insurance", P&I insurance 1999 p. 167.

66 Arbitration clauses in marine insurance agreements have been accepted primarily in England, *The Padre Island* [1984] 2 Lloyd's Rep. 408, and in Finland, *Fartyget Corbière* ND 2007 p. 80 (FH), which, however, appears to be based on a misunderstanding of the content of Norwegian law.

67 Michael Bogdan, "The 1980 EC Convention on the Law Applicable to Contractual Obligations – Comments on the Swedish Position", Tidsskrift For Rettsvitenskap (TfR) 1982 p. 35.

68 The rules are also referred to as règles d'application immédiate, lois de police, Eingriffsnormen or positive ordre public. For further information on this phenomenon, see Maarit Jäntereä-Jareborg, "Internationellt tvingande civilrättsregler, fastighetsförmedling och konsumenter – några reflexioner" [Internationally binding civil law rules, real estate brokerage and consumers – some reflections], SvJT 1995 p. 374 et seq. Marie Larsson, Cross-border consumer protection – particularly within the EU, chapter 8, and Henrik Bull, The internal market for services and capital – Import of financial services 2002, chapter 1.5.6.

69 Ot. prp. 72 (1991-92) Om lov om lovvalg i forsikring, lov om gjennomføring i norsk rett av EØS-avtalens vedlegg V punkt 2 om fri bevegelighet for arbeidstakere m v innenfor EØS og lov om endringer i enkelte lover som følge av EØS-avtalen [Government Bill about the Act on Choice of Law in Insurance, the Act on the Implementation in Norwegian Law of Annex V, point 2, of the EEA Agreement on the free movement of workers, etc. within the EEA, and the Act on Amendments to Certain Acts as a Result of the EEA Agreement], p. 66 et seq.

70 Act of 27 November 1992 No. 111 on the choice of law in insurance.

71 See Henrik Bull, op. cit. p. 429. For a slightly different view, see Giuditta Cordero Moss, "Erstatningsrett, kontraktsrett og internationalt preseptoriske regler – illustrert ved skadelidtes krav mot forsikringsselskapet", in Kirsti Strøm Bull – Viggo Hagstrøm – Steinar Tjomsland (eds.), Bonus Pater Familias: Festskrift til Peter Lødrup 70 år, Gyldendal Norsk Forlag Oslo 2002 pp. 461–474.

If the above conclusion is accepted, one may ask how the internationally mandatory rules affect the question of jurisdiction in direct actions. To illustrate this, statements in the *Leros Strength* case[72] may serve as guidance. The Supreme Court held that the Court of Appeal had erred in not making a choice of law but instead testing jurisdiction against the background of a balancing test under Norwegian law. In its referral decision, however, the Supreme Court noted that the preparatory work for the Act on Choice of Law in Insurance Disputes had stated that the direct action under Norwegian law was such a mandatory rule that it should be applied regardless of which rule would otherwise apply. What could the court have meant by this?

As far as I understand, the statement can only mean that the lower court, to which the case was referred back, must take these rules into account when deciding on the question of jurisdiction. The statement from the Supreme Court must therefore be understood to mean that the direct-action rules are indeed mandatory under Norwegian law.

5. Substantive issues concerning direct actions

5.1 Introduction

With regard to substantive law concerning direct action, three main questions arise. The first is, of course, whether the injured party has any right at all to make a direct action against the policyholder. The next question is how the content of the direct action is affected by the insurer's objections to the claim for damages. Can the insurer raise the same objections against the injured party as the policyholder who caused the damage could have raised? Finally, the third question is whether the insurance contract sets out requirements for insurance compensation to be paid. The interesting question here is whether the insurer can raise the same objections under the insurance policy against the injured party as against the policyholder. Different countries have different substantive laws on direct actions, and the choice of law is therefore of great importance.

5.2 The injured party may make a claim directly against the insurer

As stated above,[73] Nordic laws allow the injured party to make a claim directly against the insurance company. Although the legal situation differs somewhat between the Nordic countries, direct actions are permitted in certain situations. The injured party's right does not therefore need to be confirmed by a formal assignment of claim; the right of direct action gives the injured party a substantive right to the claim.

In addition, there may be various clauses in the insurance contract that specify additional conditions for insurance compensation to be paid. How objections based on these clauses are to be dealt with has been considered in Norwegian law not to concern the insurance relationship and therefore does not affect the possibility of direct actions.[74]

One such clause is the so-called pay to be paid clause. Such clauses states that insurance compensation cannot be paid until the policyholder has in turn paid compensation to the injured party. In the event of the policyholder's bankruptcy, this means that insurance compensation will never be paid out. The question is whether such a clause can be successfully invoked against an injured party.[75] In case law, such clauses have been rejected in relation to the injured party under the older insurance contract laws.[76] Even under today's insurance contract laws, it is clear that clauses of this kind cannot be invoked against the injured party.[77]

A similar clause is the so-called assignment clause. This means that the claim may not be transferred. These should be treated in the same way as pay-first clauses.[78]

Another example of such a condition is that the damages must be determined in a certain way in order for compensation to be paid (known as judgment clauses[79]). If the injured party instigate a direct action due to the insured party's bankruptcy or because the insured party is now a dissolved legal entity, there may be no practical possibility of fulfilling the condition. They have therefore not been considered to apply to the injured party.[80]

It is not easy to predict how far the courts will go in rejecting clauses in insurance contracts. Looking at older case law, it can be seen that the starting point in legal cases is that the right of direct action must not be rendered illusory by the clauses.[81] It is reasonable to assume that this starting point will also serve as the basis for assessment in the future. Clauses of this kind should therefore not be regarded as grounds for insurance law objections that can be raised against the injured party in the event of a direct action.

5.3 Objections relating to the claim for damages

Liability insurance covers the liability for damages that may be imposed on the policyholder. This is such an obvious statement that it hardly needs to be substantiated. In *Norwegian* and *Icelandic* law, however, it has been expressly stated in the regula-

72 Rt. 2002 p. 180 (NH).

73 See Sec. 3.2.

74 NOU 1987:24 Lov om avtaler om skadeforsikring (skadeforsikringsloven) [Act on Contracts for Non-life Insurance (Non-life Insurance Act)] p. 159 and Hans Jacob Bull, Forsikringsrett [Insurance Law], Universitetsforlaget 2008 p. 548.

75 See in particular *Skogholm* ND 1954 p. 445 (NH) (= Rt. 1954 p. 1002) and *Degerö* ND 1996 p. 1 (HVS).

76 Vibe Ulfbeck, "Modern Tort Law and Direct Actions Under the Scandinavian Insurance Acts", Scandinavian Studies in Law 41, p. 521 et seq., argues that it is a misconception that it is the mandatory nature of the rules that invalidates the clauses. Instead, it is the subjective effects of the contract that render the clause ineffective against injured parties who have been granted a direct right of claim. As the legal situation now stands, this is of course due to the fact that the direct action applies generally, and certain clauses do not affect the action.

77 The situation may be different in Finland, where there are clear statements in the preparatory work that pay-first clauses cannot be set aside, prop. 114/93 p. 66, cf. Karhu op cit. p. 229.

78 *Degerö* ND 1996 p. 1 (HVS).

79 This is clear from Danish law and was evident in previous Swedish law, which referred to "outstanding amounts".

80 See *Fullwoodcession* NJA 1993 p. 222, *Simone* NJA 1994 p. 556 (= ND 1994 p. 43, cf. ND 1990 p. 16 [Gothenburg] and ND 1992 p. 32 [HVS]) and *Degerö* ND 1996 p. 1 (HVS).

81 See also Svante O. Johansson, SvJT 1996 p. 726 et seq. on older case law.

tions governing direct actions (see Sec. 7-6, fourth para., first sentence, NFAL and Sec. 44, fourth para., first sentence, IFAL). The insurer therefore has the opportunity to raise objections in the damages case against the injured party in essentially the same way as the party causing the damage could have done. In order for the insurer to be required to pay compensation, the claim for damages must therefore be investigated.

Liability for damages can be examined in the dispute between the injured party and the insurer. In any case, this applies if the direct actions is based on insolvency.[82]

This was already clarified for Swedish law by the Supreme Court's ruling in the Fullwood case (NJA 1993 p. 222) that the claim for damages could just as well be clarified in the case concerning direct action. There has therefore been no change on this point, as the wording regarding an outstanding amount in the old law does not imply any real requirement for a right of direct action.

In the same way as the party causing the damage, the insurer can claim that there is no liability for damages. This position can be based on the lack of a basis for liability, as well as on a lack of causality.

The insurer may further argue that he or she is only partially liable for compensation due to limitations in liability for damages. These limitations may be based on provisions in law, e.g. the shipowner's limited liability under Ch. 9 or 10 of the Maritime Code, or on contractual limitations. In addition to this category of objections, the injured party's contribution to the damage may also be invoked. Furthermore, objections relating to notice or limitation periods may also be raised. If the injured party has failed to fulfil his or her obligations in any of these respects, the insurer has the same opportunity as the party causing the damage to invoke this against the injured party's claim.

In practice, the type of objection that the insurer can raise concerning the claim for damages rarely causes any problems in a case regarding direct action.

5.4 Objections relating to the insurance contract

5.4.1 Regulations differ in the Nordic countries

With regard to the insurer's right to raise objections concerning the insurance relationship, the pattern is more fragmented. The rules themselves differ considerably.

In *Finnish* and *Swedish* law, the regulation (Ch. 9, Sec. 7 of the SFAL and Sec. 67 of the FFAL) is based on the injured party being able to make a claim directly against the insurer for compensation "in accordance with the insurance contract". The starting point is that the injured party has the same rights as the party causing the damage. The insurer therefore has, in principle, the opportunity to raise all the objections that could have been raised against the policyholder.

Objections regarding delayed or non-payment of premiums are therefore permitted. Failure to pay premiums means, as a general rule, that the insurance is invalid and that compensation under the insurance is therefore not payable. This applies regardless of whether it is the policyholder or the injured party who is claiming compensation. Furthermore, an objection may be raised against the injured party, in the same way as against the policyholder, on the grounds that the insurance does not cover the claim in question or that the claim exceeds the sum insured. In principle, the insurer may also raise an objection on the grounds that there has been a breach of the so-called ancillary obligations, i.e. the risk disclosure and duty of care obligations,[83] although there may be exceptions here and there.

In *Danish* law, the right of direct action in Sec. 95 DFAL is based on the injured party entering into the rights of the insured. This applies regardless of whether the claim has been established or is based on bankruptcy, compulsory composition or debt restructuring. The injured party thus steps into the shoes of the insured.

Norwegian and *Icelandic* law contain explicit rules on the right of objection. According to these (Sec. 7-6, fourth paragraph, second sentence NFAL and gr. 44, fourth paragraph, second sentence IFAL), the starting point is clear: the insurer can raise the same objection against the injured party as he or she could have raised against the insured. If some specific risk is excluded from the insurance, the injured party cannot, of course, receive compensation either. However, an important exception to this rule is made in the final part of the rule, which stipulates that objections cannot be raised if "the objections relate to the insured's circumstances after the insured event has occurred". What is meant by the exception is primarily objections that the insured person did not attempt to limit the damage or did not report the insured event to the insurer. These objections are therefore not applicable in relation to a third party.

5.4.2 An example of reporting a claim

To illustrate the different countries' rules on the right of objection, the following example be given where the outcome differs depending on which country's law is applied.

Example: *The ship Sydfjord sank with its cargo while sailing off Skagen. The owner of the shipping company, who was also the ship's captain, died. After the shipping company was declared bankrupt and the claim was transferred, the cargo owner demanded compensation for the cargo damage directly from the insurer. One of the objections raised by the insurer was that the policyholder had not reported the damage to the insurer in accordance with the insurance contract (which may be considered to be gross negligence).*

The example concerns a duty to give notice of an insured event as stipulated in the insurance contract.

If *Swedish* law were to apply, the insured would have to comply with any insurance terms and conditions regarding notice of insurance claims within a certain period of time or with any terms and conditions or instructions from the company to cooperate in the investigation. According to Ch. 7, Sec. 2 of the SFAL, compensation to the injured party in liability insurance cannot be recovered on the grounds of the insured's negligence. Instead, the company may reclaim a reasonable amount from the insured. If the compensation has not yet been paid, full compensation should be paid to the injured party, in the event that they are entitled to a direct action, and then part of it can be recovered from the negligent insured. The objection that the obligation to give notice has not been fulfilled would not hold under this approach.

82 Danish law may possibly deviate somewhat in cases where the direct action is not based on insolvency; in such cases, the claim for damages must be established.

83 Karhu op. cit. p. 227.

With regard to insurance to companies, the legal situation appears to be different in the *Cremona* NJA 2017 p. 601 (SH) case. In that case, the court found that the legislature did not take a position on the legal situation when an explicit exemption for compulsory liability insurance was introduced in Ch. 8, Sec. 20, fourth para., of the SFAL.[84] This was interpreted to mean that no corresponding limitation of the effects of a limitation period applies in the case of direct action on other grounds.[85]

A similar line of reasoning appears to be relevant in *Finnish* law as well.

In *Danish* law, the injured party "enters into" the claim both when the liability for damages has been established and when the party causing the damage has been declared bankrupt or similar. The same rules apply as for the policyholder, however inconvenient they may be. The objection from the insurer is then likely to stand.

If *Norwegian* or *Icelandic* law is to be applied, the outcome will be the opposite. The objection concerns the insured party's circumstances after the insured event. Such objections are invalid, as previously stated.

6. Limitation period

A special issue in direct actions concern the insurer's objection regarding limitation period. An insurance claim becomes time-barred after a certain period of time, either under general rules of limitation or under special rules of insurance law. It should be noted here that certain Nordic countries have introduced special rules on limitation periods for direct action that limit the insurer's right to object to the limitation period for the right to insurance compensation. Only a few examples will be given here to illustrate the level of complexity.

In *Swedish* law, the starting point with regard to direct action in the event of the insured party's bankruptcy is that the injured party is neither better nor worse off than the insured party. The injured party is entitled to the insurance compensation that the agreement gives the insured party who caused the damage – neither more, nor less – unless otherwise provided by law or the terms of the agreement.[86]

Anyone who wants insurance compensation or other insurance protection must, according to Ch. 7, Sec. 4 and Ch. 8, Sec. 20 of the SFAL, bring an action within ten years from the date on which the circumstance entitling them to such protection under the insurance contract occurred. If the person who wants insurance cover has submitted the claim to the insurance company within this period, the deadline for bringing an action is always at least six months from the date on which the company has declared that it has taken a final position on the claim. If no action is brought in accordance with this section, the right to insurance cover is lost.

Similar rules appear to apply in *Finnish* law.[87] However, according to Sec. 74 of the FFAL, a three-year limitation period applies. Legal action concerning the insurer's compensation decision or other decision affecting the position of the policyholder, the insured or any other person entitled to compensation must be brought within three years of the party receiving written notification of the insurer's decision and this time limit. Otherwise, the right to bring an action is lost. It is unclear whether a person entitled to compensation has an independent timelimit, but the wording of the law suggests that this may be the case.

Under *Norwegian* law, with which *Icelandic* law is largely consistent, the insurer's liability in the event of the policyholder's insolvency is subject to the same rules as those applicable to the insured party's liability for compensation (Sec. 8-6, second para., NFAL and Agr. 52, second para., IFAL). Claims for insurance compensation are time-barred within a period of three years. The period runs from the end of the year in which the insured became aware of the circumstances giving rise to the claim (see the first paragraph of the provisions), but it may be extended in certain situations.

The insurer can therefore successfully object to a direct action unless the injured party has taken measures that have interrupted the limitation period for the claim for damages. If it is the insurance claim that has become time-barred, the starting point is that the direct action is not time-barred. An exception probably applies in situations where the insurance claim becomes time-barred before the direct action arises, e.g. through bankruptcy.[88]

In Norwegian law, the rules in the court cases Rt. 1999 p. 7 and HR-2020-257-A (57) *Mineral Libin* have been interpreted to mean that the limitation period for the direct action runs as a separate period of time. Furthermore, it is clear from the aforementioned court cases that the injured party's measures to interrupt the limitation period against the party causing the damage do not interrupt the limitation period vis-à-vis the insurer. Whether the injured party can benefit from the party causing the damage's measures to interrupt the limitation period against the policyholder was not up for assessment in either case.

Under *Danish* law, the general rule is that the limitation period is three years. The period starts from the date on which the creditor could demand payment of the debt (see Sec. 2, first para., and Sec. 3, first para., of the Limitation Act). However, according to Sec. 29, fourth para., of the DFAL, an additional period applies if the injured party has a claim against the insurance company before the limitation period expires. The additional period is one year from the date of occurrence. If a claim has been noticed to the insurer, the claim shall become time-barred in accordance with the fifth paragraph at the earliest one year after the insurer has refused to pay compensation. Here, the rules, in UfR 2022.1812 H, have been interpreted to mean that the injured party takes the place of the party causing the damage in relation to the insurance company, also with regard to the limitation period. [89]

84 See Government Bill 2012/13:168 Preskription och information i försäkringssammanhang [Limitation periods and information in insurance contexts] p. 37 and 62.

85 Cf. Bertil Bengtsson, Försäkringsavtalsrätt [Insurance Contract Law] Norstedts Juridik, 4th. ed. 2019 p. 435 et seq. and Bertil Bengtsson, Ny lagstiftning om försäkringspreskription [New legislation on insurance limitation periods], SvJT 2014 p. 539 et seq.

86 See *Cremona* NJA 2017 p. 601 p. 10 and 15.

87 Cf. Karhu op. cit. p. 236, who nevertheless concludes that it is difficult to maintain the view that the injured party should be bound by the same limitation periods as the policyholder.

88 Bull op. cit. p. 645.

89 Cf. also UfR 2017.1787 H and UfR 2018.1506 H.

As can be seen from this brief presentation, the situation in the Nordic countries is particularly heterogeneous when it comes to the limitation period for direct action. This is mainly due to the distinction between independent and derived direct actions, as described above, which varies in the rules of the different countries.

7. Conclusions

The study shows that the rules on direct action in marine insurance differ in some important respects. This is probably due to the fact that the Nordic countries have made different assessments of the protection needed by injured third parties. One thing is clear, however. Direct actions cause some confusion in the insurance context. It is therefore important to have a well-thought-out regulatory structure. This can hardly be said to be the case in all the Nordic countries. It might be worth considering whether the right of direct action should be formulated in a more uniform manner in order to avoid misunderstandings and complicated questions regarding jurisdiction.

Whether there are grounds for further safeguarding the position of the injured party is a matter of legal policy. If this is deemed necessary, it should be done by making the rights of the injured party more independent of the rights of the insured party. The right of direct action should then not be linked to any conditions on the part of the insured, and the right of objection must be formulated in such a way that it does not render the direct action illusory.