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The Legal Regime of Direct Action in France and the Netherlands: A Comparative Overview

Across Europe, the legal framework for direct action against liability insurers is far from uniform. French and Dutch law both expressly allow injured parties to bring a direct action against the insurer. Italian and English law, by contrast, do not recognize a general direct action in liability insurance matters, although statutory exceptions exist.

In this article, we compare the mechanism of direct action under French law and Dutch law.

The mechanism of direct action

In broad terms, this mechanism allows the injured party to seek compensation directly from the liability insurer of the person responsible for the damage, rather than having to act only against the insured. Its underlying purpose is to facilitate the effective compensation of victims by allowing them to claim directly from the insurer, within the limits of the insurance policy, instead of depending solely on the liable insured's ability or willingness to pay.

Under Dutch law, a distinction should be made between the so-called "direct action" (*directe actie*) and the injured party's "own right" (*eigen recht*). The direct action is laid down in Article 7:954(1) of the Dutch Civil Code (DCC). This provision states, in essence, that if an insured has notified its liability insurer of the occurrence of a loss, an injured party who has suffered damage as a result of death or bodily injury may claim payment directly from the liability insurer. This merely constitutes a derivative entitlement bases on the insured's rights under the policy. The injured party's "own right" must be distinguished from this direct action. This right follows from Article 6 of the Dutch Motor Insurance Liability Act (*Wet aansprakelijkheidsverzekering motorrijtuigen*), which provides that an injured party has an independent right of action against the motor liability insurer for damage for which the insured motor vehicle gives rise to liability. Unlike Article 7:954(1) DCC, this right is not limited to death or bodily injury but also extends to property damage. However, as already follows from the foregoing, this direct right is limited to motor vehicle liability insurance.

Under French law, case law early on allowed victims of the insured to bring a direct action against the insured's liability insurer. Now, article L.124-3 of the Insurance Code provides that: "*The insurer may not pay all or part of the amount owed by it to anyone other than the injured third party until such third party has been compensated, up to the amount of said sum, for the financial consequences of the harmful event that gave rise to the insured's liability*." This provision is a matter of public policy. To the oppositive to Dutch law, direct action is not limited under French law for death or bodily injury. A third party can act directly against the insured of the liable person even if he "only" suffered a financial loss. Furthermore, this is no distinction under French law regarding the "direct action" and the "own right" relating to motor accident.

Existence of a direct action and applicable law to the direct action pursuant to private international law

Before examining the regime governing direct action under each legal system, it is first necessary to determine the law applicable to such action. Indeed, where a dispute involves an international element, the law applicable to the direct action may vary.

Under French private international law, this requires two distinct points of analysis: first, whether a direct action is available; and secondly, where such an action is available, the law governing its legal regime.

The availability of a direct action

As regards the availability of a direct action, the applicable law depends on the nature of the insured's liability.

If the insured's liability is non-contractual, Article 18 of the Rome II Regulation requires consideration of two laws: the law applicable to the non-contractual obligation and the law applicable to the insurance contract. Accordingly, the injured party may bring a direct action against the insurer if either of these laws allows such action. Under Dutch law, the position is the same for non-contractual claims, given that Article 18 of the Rome II Regulation also applies in the Netherlands as a Member State of the European Union.

In contractual matters, the position is different, since the Rome I Regulation does not contain an equivalent provision. French case law has therefore adopted a similar approach to that of Article 18 of the Rome II Regulation. In this context, two laws must also be considered: the law applicable to the underlying contract and the law applicable to the insurance contract. A direct action will be available if either of these laws allows it.

In the Dutch legal literature, it has been argued that the question whether a direct action is available in a contractual context should be governed by the law applicable to the insurance contract. Others, however, take the view that – as under French law – not only the law governing the insurance contract, but also the law applicable to the contract between the injured party and the liable party may be relevant in determining whether the injured party has a direct action against the liability insurer.

Furthermore, under Dutch law, where the case concerns a traffic accident within the meaning of the Hague Convention on the Law Applicable to Traffic Accidents, the Convention applies instead of Article 18 Rome II, since Article 28 Rome II gives precedence to that Convention. Article 9 of the Convention provides that injured parties have a direct claim for compensation against the insurer of the liable party if such a right exists under the law applicable pursuant to Articles 3, 4 or 5 of the Convention – namely, the law of the State of registration or the law of the State in whose territory the accident occurred. If neither of those laws provides for a direct claim, such a right may still be exercised if it is granted by the law governing the insurance contract, pursuant to Article 9(3) of the Convention.

Applicable law to the direct action

Once a direct action is available, the law applicable to its legal regime must be assessed separately.

Pursuant to French law, the legal regime of the direct action is governed by the law applicable to the insurance contract. This includes, in particular, the scope of the injured party's rights against the insurer, the extent of cover, limitation periods and the defenses that may be raised by the insurer. A similar approach applies under Dutch law.

Regime of the direct action

If the above rules lead to the conclusion that French law governs both to the availability of the direct action and its legal regime, then the victim may bring a direct action against the insurer.

However, this action must be brought within the limits of the insurance contract, as the injured party is seeking performance of that contract in place of the liable insured. Consequently, the insurer may invoke against the third-party victim the same defenses it could invoke against its insured under Article L.112-6 of the Insurance Code, except for any forfeiture of cover resulting from a contractual breach by the insured occurring after the loss, pursuant to Article R 124-1 of the same code.

As regards the conditions for bringing such an action, the liability of the insured must, in principle, be established. However, the Cour de cassation has adopted a more flexible approach, holding that the injured party may bring a direct action against the insurer even where the insured's liability debt has been extinguished by set-off (Civ. 1st, 25 May 1992, No. 89-17.045).

It is not necessary under French law, to name the insured as a defendant. Indeed, the Court of Cassation ultimately established the autonomy of the direct action from the liability claim against the insured, thereby abandoning this requirement through a reversal of case law on November 7, 2000 (Civ. 1st, November 7, 2000, No. 97-22582).

However, this new solution is not without its challenges. First, the absence of such a claim could undermine the adversarial principle. If the insured's presence appears necessary to resolve the dispute, the parties—particularly the insurer— may request that the insured be joined to the proceedings, or the court may order it. Otherwise, the insured may file a third-party appeal if the decision is prejudicial to him or her.

Joining the insured as a party to the action remains necessary to make the decision enforceable against him on the merits. Thus, the judge may order this during the proceedings. In some cases, joining the liable insured as a party is unnecessary, particularly when the existence of the claim for damages and its amount have already been definitively established by a court ruling against the insured.

In fact, the judgment rendered constitutes the occurrence of the risk covered by the contract, unless there is fraud, an admission, or collusion with the victim (First Civil Chamber, June 12, 1968). Furthermore, naming the insured as a defendant is also unnecessary if the insurer has acknowledged the insured's liability.

Furthermore, in interim proceedings, joining the insured is not necessary, since such proceedings do not result in a decision having res judicata effect on the merits.

In other cases, it is impossible to name the insured as a defendant, particularly due to rules governing subject-matter jurisdiction. If the civil court hearing the direct-action lacks jurisdiction to rule on liability, it must stay the proceedings so that the competent court can determine the amount of damages.

If Dutch insurance law applies, the applicable regime differs substantially from the French regime. As briefly noted above, it is important in this respect to distinguish carefully between the type of damage involved.

Where an injured party has suffered damage as a result of death or bodily injury outside the context of motor traffic, that party is, in principle, entitled to bring a direct action against the liability insurer of the liable party. A condition for such direct action is that the liable party has notified the loss to its liability insurer. This requirement safeguards the insured's ability to compensate the injured party outside the scope of the insurance policy, thereby avoiding any impact on the policy. Notification by a person other than the insured or the policyholder is possible only in the event of bankruptcy, by the trustee in bankruptcy, or, following the death of the insured or policyholder, by his or her heirs.

It is essential to emphasize that the direct action is available only in cases involving bodily injury or death. In cases of property damage or pure economic loss, no direct action exists under Article 7:954 DCC.

It is also important to explain that the injured party does not have an independent right against the insurer, but only a right derived from the insured's right against its insurer. No separate legal relationship therefore arises between the insurer and the injured party. In practical terms, this means that the insurer may invoke against the injured party all coverage defences that it could also have invoked against its own insured.

Finally, it should be noted that, where an injured party brings proceedings against a liability insurer, Article 7:954(6) DCC requires that the insured itself also be joined in those proceedings.

In addition to the direct action, Dutch insurance law also recognises the so-called independent right under Article 6 of the Motor Insurance Liability Act. This right is vested in those who have suffered damage that qualifies for compensation under that Act, which, in short, concerns damage arising from motor traffic accidents. Unlike in the case of the direct action, the injured party does not enforce the insured's claim against its liability insurer (*ius agendi*) but has an independent claim for damages against the insurer in its own right.

The protection afforded to the injured party lies primarily in the fact that the insurer may not invoke nullity, defences or forfeiture against the injured party. Nor does intentional misrepresentation of the insurer by the injured third party, whether in connection with the claim for damages or with the conclusion of the insurance contract, result in forfeiture of the right of the injured party.

Where the insurer has been required to pay compensation even though it was not obliged to do so under the terms of the insurance policy, the insurer is, in principle, entitled to recover the amount paid from its own policyholder or insured. However, recourse against an insured who is not the policyholder is possible only if that insured could not in good faith have assumed that his or her liability would be covered by insurance.

The importance of the applicable law

The comparison between France and the Netherlands shows that "direct action" is not a uniform concept. While both systems seek, in their own way, to strengthen the position of the injured party, they do so through markedly different legal techniques. French law offers a broad and autonomous route against the insurer; Dutch law, by contrast, takes a narrower approach: the derived direct action is confined to claims involving death or bodily injury.

In cross-border disputes, these differences matter. The applicable law may not merely determine how a claim is brought – it may determine whether the injured party has a route to the insurer at all.

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