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Global Practice Guides

Insurance Litigation

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Chambers Global Practice Guides

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INTRODUCTION

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Kennedys is a global law firm with expertise in dispute resolution and advisory services, and over 2,400 people in 22 countries around the world. The firm handles both contentious and non-contentious matters and provides a range of specialist legal services, including corporate and commercial advice, but with a particular focus on defending insurance and liability claims. Defendant claims work is at the heart of Kennedys' practice, and accounts for more than half of the firm's business. This is a global practice with unsurpassed capabilities and expertise that can deal with any type of claim in any country, from high-volume or catastrophic personal injury claims, to settling the largest multibillion-pound property, casualty, financial lines, marine or aviation claims.

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INTRODUCTION

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Insurance Litigation: A Global Overview

In this Chambers guide, we again define insurance litigation to include disputes to which insurers or reinsurers are directly party, such as coverage disputes, but also disputes in which they are not named but have a financial interest as indemnifiers of one or more parties. The guide thus once more not only addresses the laws governing insurance contracts, but extends to issues such as how litigation is funded and other relevant aspects of insurance-related dispute resolution in each jurisdiction. Arbitration remains highly relevant, as many insurance contracts include arbitration clauses – meaning that coverage disputes are often resolved by one or more arbitrators, affording parties privacy and avoiding precedents being set. It follows that the relevance of any discussion of case law is limited to understanding what is actually happening in terms of dispute outcomes.

Long-term issues

The world continues to move on from the COVID-19 pandemic although a legacy of claims remains in multiple jurisdictions. As predicted in previous editions, the rise of "environmental, social and governance" (ESG) issues continues to preoccupy insurers who, like their insureds, are increasingly subject to climate-related disclosure obligations to regulators. Environmental claims arising from per- and polyfluoroalkyl substances (PFAS), often referred to as "forever chemicals", have made headlines in both North America and Europe. In the past year there has been a rise in substantial employment liability compensation paid by financial institutions in the UK and that trend looks set to continue. The increase in cyber exposures appeared to have temporarily abated as certain bad actors were, at least for a time, thought to have been diverted by the war in Ukraine. However, the long-term trend remains, with major insureds increasingly recognising cyber exposures as among the biggest threats to their businesses.

More generally, innovation through the use of technology is poised to continue transforming the insurance industry and the businesses that it serves, facilitating growth and furthering broader ESG-related objectives. There have also been significant regulatory developments in relation to data protection and AI. The EU is implementing collective redress reforms that may, over time, significantly increase class action exposures in the EU. Finally, inflation and claims inflation remain significant concerns for insurers as they continue to drive up the overall cost of claims and make accurate reserving more challenging.

INTRODUCTION

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What next for insurance litigation?

As presaged in our comments last year, the war in Ukraine has, perhaps inevitably, given rise to substantial and complex insurance claims and has caused severe disruption to supply chains. This is sometimes linked by commentators to a wider discussion about whether globalisation is ending. The shifts in position witnessed in the US approach to trade and manufacturing – an approach which underpinned much of the post-WW2 global economic order – have coincided with visible trade falling from recent historic highs as a share of global output. However, in contrast, digital trade, boosted significantly by the pandemic, clearly continues to grow unabated. With it, the provision of legal services and insurance will continue to become more technology driven and potentially more remote from the end-customer. It remains to be seen what the long term implications will be for our reliance on courts and tribunals to resolve disputes. In the short term, at least, it seems that claims against insureds, and coverage litigation are unlikely to abate.

Conclusion

As we always emphasise, for all the global trends we may observe, most disputes are local and the rules and forums in which they are resolved vary considerably. For that reason above all, a guide such as this will hopefully be useful to those interested in insurance and the disputes in which it inevitably becomes implicated.

BRAZIL

Law and Practice

Contributed by:
Carlos Harten and Leonardo Cocentino
Queiroz Cavalcanti Advocacia

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Queiroz Cavalcanti Advocacia (QCA) is a law firm that applies law as a tool to offer business solutions, through management, innovation and professional excellence. Its team of specialists brings together both technical knowledge and experience of working on key challenges for clients. The firm has more than 800 lawyers and supports staff working on a full-service basis. It is especially recognised for its work in civil litigation, advising multinational companies from all segments of the economy, especially insurance, banking, automotive, beverage, large retailers and civil construction.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

Sources of Insurance Law

The law

Insurance law is structured from a normative complex, involving several areas of the law. There is a plurality of laws governing the resolution of disputes involving insurance – both by private law rules (civil, consumer and commercial) and by public law rules (administrative and constitutional).

It can be said that the sources of insurance law are articulated around two poles.

- Institutional insurance law, which deals with the regulation and supervision of business insurance operations, has Decree-law 73/1966 as its main source, which regulates the national system of private insurance and insurance operations in the country. Furthermore, a series of regulatory administrative rules issued by the National Council of Private Insurance (CNSP) and the National Superintendence of Private Insurance (SUSEP) apply.
- Substantive insurance law, which deals with the legal relationship of the insurance contract. The main source of substantive insurance law is the Brazilian Civil Code (Articles 757–802). Also, depending on the nature of the insurance contract, consumer law (Brazilian Consumer Defence Code) and commercial law may apply.

The Brazilian General Data Protection Law (GDPL) also applies to insurance law.

For reinsurance and retrocession, Complementary Law No 126/2007 establishes the main rules.

Furthermore, the recent Brazilian Law No 14,430/2022 is also applicable to the regulation of risk securitisation by special purpose insurance companies, through the issuance of "insurance risk letters".

Finally, insurance contracts can also be governed by several special laws, such as those providing for mandatory insurance for personal injury caused by motor vehicles on land or marine vessels or their cargo, or for health insurance.

Usage and custom

In addition to legal and administrative rules, usage and custom are a source of insurance law, playing an important role in eliminating gaps.

Case law

Case law also stands out as a source of insurance law, especially given the active role of the Brazilian Superior Court of Justice (STJ) both in the editing of precedents and in decisions issued at appeal stage (eg, 278, 529, 537, 610), without disregarding the issuance of legal opinions in non-constitutional matters, which are binding for all present and future disputes on the same topic. The same holds true for the Brazilian Supreme Court (STF) when formulating theses applicable to cases with general repercussion (eg, 2011), declaring the (un)constitutionality of norms, and formulating legal precedents. The STF integrates the system of mandatory precedents, the decisions in Incidents of Resolution of Repetitive Demands (where a "pilot case" is (i) selected to be representative of an entire class of cases raising similar issues and (ii) will set mandatory parameters for those other cases) and Incidents of Assumption of Competence (a similar legal figure), which may have effects throughout the Brazilian territory.

The National System of Private Insurance (SUSEP and CNSP)

In view of the economic and social function of insurance, the sector is extensively regulated by the state.

The National Council of Private Insurance (CNSP) is the body responsible for establishing the guidelines and norms of the private insurance policy. The Superintendence of Private Insurance (SUSEP) is the limb of the Brazilian federal public administration responsible for authorising, controlling and supervising the insurance, open private pension, capitalisation and reinsurance markets in Brazil.

Between 2019 and 2022, SUSEP underwent changes, with the adoption of liberal guidelines and the declaration of the objective of simplifying the normative structure, fostering innovation, increasing competition between insurance companies, and reducing premiums for insurance consumers.

Among the regulations already published, those worth highlighting include:

- CNSP Resolution 451/2022, which regulates reinsurance assignment and acceptance operations and their intermediation, co-insurance operations, transactions in foreign currency and insurance polices contracted abroad;
- CNSP Resolution 439/2022 and Circular SUSEP 672/2022, which outline the general features regarding coverage in personal insurance policies;
- Circular SUSEP 670/2022, which establishes the criteria that insurance companies must observe when implementing stop loss insurance operations, and which aims to ensure the operational stability of the insured parties in relation to the commitments undertaken by them towards the users;
- Circular SUSEP 666/2022, which provides for sustainability requirements to be observed by insurance companies, open supplementary pension entities (EAPCs), capitalisation companies and local reinsurers;
- CNSP Resolution 447/2022, which establishes the applicable rules for home insurance;
- Circular SUSEP 621/2021, which provides the operating rules and criteria for damage insurance coverage;

- CNSP Resolution 407/2021, which provides the principles and general characteristics for the preparation and marketing of damage insurance contracts to cover major risks (it is important to note that the legality of this Regulation is being discussed in the Brazilian Supreme Court in a direct action for the declaration of unconstitutionality No 7.074/DF);
- Circular SUSEP 637/2021, which provides for liability insurance; and
- CNSP Resolution 388/2020, which establishes the segmentation of insurance companies, capitalisation companies, local reinsurers and EAPCs for the purpose of proportional application of prudential regulation.

It is crucial to emphasise, however, that since 2023, the Brazilian federal government has been under the administration of a more interventionist political party, potentially leading to alterations in the previously embraced liberal policies.

Nevertheless, the new head of SUSEP has reassured market players that the goal of the new administration is "to ensure a trustworthy environment among policyholders, insurers, and reinsurers".

1.2 Litigation Process and Rules on Limitation

Jurisdiction in Brazil

The resolution of disputes involving insurance contracts can occur through state jurisdiction, arbitration or mediation. There are also administrative state bodies, especially in relation to insurance involving consumers, such as the Consumer Defence and Protection Programme (commonly known in Brazil by its Portuguese initials–PROCON) and the consumidor.gov online platform, which oversees a significant historical volume of dispute resolution cases in contractual matters.

Furthermore, it is worth noting the existence of private online platforms designed for the resolution of consumer complaints against companies, such as ReclameAqui.com.br. These platforms can address disputes involving insurance contracts in a parallel manner and without the need for state intervention.

1.3 Alternative Dispute Resolution (ADR)

Among the most popular means of extrajudicial conflict resolution, the best known are arbitration, conciliation, negotiation and mediation. With a sluggish and crowded judiciary, ADR has been greatly stimulated by the state itself as a way of changing the litigious culture currently in place in the country.

With the implementation of the "multidoor courthouse" concept, through Resolution CNJ 125/2010, and the reform of the Brazilian Civil Procedure Code (2015), mediation and conciliation gained prominence. These alternative means of dispute resolution have come to represent an initial stage of the judicial process. Law No 13.140/15, on mediation, and the new public acquisition law (Brazilian Law No 14,133/2021) also encourage the adoption of ADR methods in public procurement.

According to figures released by the National Council of Justice, in 2021, 3,114,462 judgments ratifying agreements were issued, referring to all kinds of disputes.

Arbitration is another way to resolve disputes involving insurance and/or reinsurance contracts, as it can deal with disputes involving extremely complex and technical property rights. In Brazil, however, its use has been quite restricted,

considering the total number of insurance conflicts. SUSEP is encouraging the adoption of arbitration clauses, especially in relation to major risk insurance.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Jurisdiction and Choice of Law

With regard to insurance contracts, there is a specific rule in Article 19 of Complementary Law No 126/2007 which provides that mandatory insurance and non-mandatory insurance contracts entered into by a natural person, resident in the country, or by a legal entity domiciled in Brazil to guarantee risks in the country shall be exclusively executed in Brazil.

This rule of Complementary Law No 126/2007 can be interpreted together with Article 9 Section 1 of Decree-Law No 4.657/42, which provides that "if the obligation is intended to be performed in Brazil and depending on an essential form, it shall be observed".

Thus, in the case of insurance contracts entered into with residents in Brazil, Brazilian law shall be observed. Except for the exceptions of Article 20 of Complementary Law 126/2007, which establishes that, exceptionally, it is possible for natural persons residing in the country or legal entities domiciled in the national territory to contract insurance abroad in some specific situations. Recently, the CNSP issued Resolution No 451/2022, which restricts the acquisition of insurance abroad by individuals residing in the country. Therefore, the insurance contract is usually interpreted in accordance with Brazilian law.

The Brazilian jurisdiction is applicable when the insurance company is domiciled in Brazil or if the obligations shall be performed in the country. Therefore, disputes involving domestic insurance are generally resolved in Brazil, through the Brazilian courts.

Arbitration

There may be some controversy regarding the choice of arbitration for the solution of disputes arising from risks located in the national territory.

According to the Brazilian Arbitration Law (L.9307/96), in addition to choosing the place and arbitration body, the parties can also choose the law applicable to the contract, defining the rules that will regulate the resolution of the dispute.

However, the choice of applicable law must always observe the principle of public policy as a limitation on contractual freedom. For example, Article 1 of the Brazilian Consumer Defence Code expressly states that this is a rule of public policy. In this way, it is possible to choose arbitration as the means for resolution of insurance disputes, but the law to be applied by the arbitrator would still be Brazilian law, except for cases specifically excluded by the national legislation.

2.2 Enforcement of Foreign Judgments

Foreign decisions can be enforced once they are ratified by the STJ, pursuant to Article 105 I (i) of the Brazilian Federal Constitution.

It is important to emphasise that there is no analysis of the merits of the decision by the STJ, and the examination is restricted to formal aspects, especially procedure and the validity of the legal act.

Once ratified, the sentence will produce the same effects as a sentence given in Brazil.

2.3 Unique Features of Litigation Procedure

National legal proceedings tend to be quite slow, given that the judicial system has over 100 million cases pending. Besides this, the court system is complex, with innumerable appeals against many types of decisions. There is an excessive formal rigour employed around case law, especially for procedural issues, and it is not uncommon for cases to be annulled due to formal defects at the beginning, or even at an advanced stage.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Although arbitration could be a preferable means for the resolution of disputes involving insurance and reinsurance contracts, since these are commonly disputes involving extremely complex and technical property rights, in Brazil its use is still extremely restricted; it is limited, as a rule, to a few cases of major risk insurance.

In cases that do not involve adhesion contracts or non-consumer relationships, it is necessary to apply the provisions of arbitration law.

Resolution 407/2021 of the CNSP, which deals with the elaboration and commercialisation of damage insurance contracts for the coverage of major risks, also provides the following.

"The parties involved must formally agree and define, in the contractual conditions of the insurance agreement, whether they will use mediation, arbitration or other means of dispute resolution. When an arbitration agreement is signed, the arbitration clause and the arbitration agreement must be written in a clear and objective manner, preferably providing for the arbitration chamber freely chosen by the parties."

Article 18 of the Arbitration Law expressly determines that the arbitration award is unappealable, meaning there is no appeal capable of overturning an arbitration award on the merits. There is the possibility, however, of submitting a request for clarification, which will not have a modificatory effect.

Not infrequently, however, cases that were initiated or resolved in arbitration chambers have their awards challenged before the Brazilian courts, which prolongs the resolution of the conflict for years. Discussions taken to the judiciary include, for example, the mandatory nature of an arbitration, the applicable law, procedural nullity or even the partiality of arbitrators.

3.2 The New York Convention

In Brazil, the domestic arbitration award is immediately effective in the legal system, being considered an enforceable judicial instrument.

After the ratification of the New York Convention, through Decree 4311/2002, foreign arbitral awards, in accordance with the provisions of Article 105 I (i) of the Federal Constitution, must be ratified by the STJ so that they can be enforced in any state of the federation before the courts.

The Brazilian Arbitration Law (9307/96) establishes that the foreign arbitral award will be recognised or enforced in Brazil in accordance

with international treaties effective in the domestic legal system and, in the absence of such treaties, strictly in accordance with the terms of Brazilian arbitration law.

With the ratification of international treaties, such as the New York Convention, Brazil endorses the legal recognition of the effects of arbitration clauses and provisions, as well as the principles of recognition of the validity of the foreign arbitral award.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Arbitration and the Insurance Contract

In March 2022, the STJ (REsp 1,962,113/RJ) settled the issue considering that the choice of forum clause entered into between the author of the damage and the insured cannot be enforced against the subrogated insurance company in a regressive action in which it claims reimbursement of the amount paid to the insured.

Institutional and Ad Hoc Arbitration

In Brazil, arbitration can be developed in two different ways: institutional arbitration or ad hoc arbitration. Both are private; however, the first refers to an institution, formally established, which will be responsible for managing the stages and procedures of the arbitration. Jurisdiction, however, rests with the arbitrator, with the institution acting as secretary. In ad hoc arbitration, the parties appoint the arbitrator, who is totally independent and unrelated to any institution.

Please see **3.1 Enforcement of Arbitration Provisions in Commercial Contracts** for a detailed breakdown of the use of arbitration in Brazil.

4. Coverage Disputes

4.1 Implied Terms

Extension of Coverage

Many disputes involving insurance contracts arise from a misunderstanding of the extent of the coverage defined in the general contracting conditions. The insurance company must provide the insured or the policyholder with information and technical clarifications regarding the scope and extent of the risks guaranteed, whether arising from the duty of good faith or from the insurance company's expertise in the insurance technique. Article 54, Section 4 of the Brazilian Consumer Code (CDC), which is applicable to mass insurance contracts, provides that clauses that imply limitation of consumer rights must be written with prominence, allowing their immediate and easy understanding. Articles 46 and 47 of the Brazilian Consumer Code (CDC) also state that the contract will not bind the consumer if they have not been provided prior access to its terms or if the general conditions are formulated in a way that obstructs the comprehension of their meaning and extent. As a result, clauses are to be construed in a manner that is more advantageous to the consumer.

Article 423 of the Brazilian Civil Code (CCB) also expressly provides that the interpretative doubt must be resolved in a manner favourable to the insured.

The judiciary has resolved such issues by examining the sufficient fulfilment of the insured's right to information for the frustration of the insured's legitimate expectation of obtaining contractual protection. For example, in a settled understanding, the STJ found that emotional distress damages would be covered by the guarantee of personal damages.

4.2 Rights of Insurers

Risk Disclosure

The acceptance of insurance proposals by the insurance company is optional, pursuant to Article 766 of the CCB. Circular SUSEP 642/2021 establishes that the insurance company may refuse the insurance proposal as long as this discretion is not exercised with abuse and justifying the reasons that led to such refusal.

The insurance company needs to know precisely the objective and subjective circumstances of the state of the risk proposed by the insured so that it can decide whether or not to underwrite it and under what conditions, especially regarding the premium. Article 766 of the CCB establishes that the insured must declare, prior to the formation of the contract, in a complete and truthful way, the state of the risk. The insured will be subject to the penalty of losing the right to the guarantee if it is proven that they made this declaration falsely. Brazilian courts have limited the loss of guarantee to cases of false declaration in which the insured's bad faith is duly demonstrated.

The CCB adopts the model of open declaration by the proponent, although the typical practice in the insurance industry is declaration through answering forms prepared by insurance companies, identifying the circumstances that needs to be known by the insurer to give its consent.

Upon receipt of the proposal, the insurance company, in addition to rejecting it in whole or in part, may carry out a prior inspection of the risk or request additional information or documents, such as health examinations of the insured.

The insurance company may also condition the acceptance of the proposal on the implementation of risk containment measures, such as the installation of trackers in vehicles in the event of transport insurance, or the installation of extinguishers and sprinklers for fire insurance.

4.3 Significant Trends in Policy Coverage Disputes

In the last 12 months, important judicial decisions have been issued that could extinguish historical controversies or, on the contrary, stimulate an expansion of the judicialisation of the insurance contract:

- REsp 1,874,811/SC – the Second Chamber of the STJ ruled, within the context of repetitive appeals, that, in group life insurance contracts, the duty to provide information to insurers rests with the group manager (eg, the employer) rather than the insurance company.
- REsp 1,926,477/SP – the Third Chamber of the STJ ruled that in directors' and officers' (D&O) liability insurance, the provisions of the Brazilian Consumer Code (CDC) do not apply, as the purpose differs from that of a property insurance. This is because D&O insurance aims to cover the risk of potential negligent wrongful acts committed by executives during their management of a company. As the policy's acquisition encourages more adventurous management, which would not occur if personal liability of executives were possible, the company is not the ultimate beneficiary of the insurance but rather employs it as a tool for its operations.
- EREsp 1,889,704/SP – the Second Chamber of the STJ found, in a controversial decision, that, as a rule, the list of procedures and events established by the National Health Agency (ANS) is exhaustive, and health insurance companies are not obliged to cover treatments and procedures not on this list.

In response to the controversial decision of the STJ, Brazilian Law No 14,454/2022 was published, which determined that health insurance companies may be required to guarantee health treatments that are not on the ANS list.

- REsp 1,303,374/ES – the Second Section of the STJ decided that the statute of limitations must be one year for the exercise of any claim by the insured against the insurance company (and vice versa) based on alleged breach of duties (primary, secondary or annexes) derived from the insurance contract.
- REsp 1,999,624/PR – the Second Chamber of the STJ confirmed the binding legal precedent No 620, in which it established that an insurance company cannot withdraw a guarantee for personal insurance for an event that occurred while the insured person was in a state of drunkenness.

4.4 Resolution of Insurance Coverage Disputes

The resolution of disputes involving the insurance contract can occur through state jurisdiction, arbitration and mediation, or through administrative state bodies formed especially for insurance involving consumers, such as PROCONs and the consumidor.gov online platform.

Most disputes involving insurance contracts are still resolved by the judiciary, especially disputes involving mass insurance (eg, vehicle, life and health). This is because, in this type of contract, the arbitration clause inserted in the insurance policy is not binding on the insured, unless they initiate the arbitration or accept the procedure in a specific document after the dispute has been established. In major risk insurance and reinsurance, the provision of an arbitration clause is more frequent.

4.5 Position if Insured Party Is Viewed as a Consumer

The Insurance Code and the Brazilian Consumer Defence Code (CDC)

If the insured is a consumer, their relationship will be regulated by the CCB and the CDC, a consumer protection microsystem based on the Constitution. For a "consumer" insurance relationship, it is only necessary for the insured to be the final recipient of the service, unlike a professional insured whose insurance contract is only an input in their chain of service provision or production of a good.

Among the CDC principles that apply to insurance contracts are vulnerability protection, good faith, balance and harmony in consumer relations; all of these are listed in Article 4 of the CDC, which establishes consumer protection guidelines.

In terms of contracts, it is worth noting the rules on offer and advertising, abusive practices, pre-contractual duties of conduct, interpretation of the contract in a more favourable way for the consumer, control of nullity of abusive clauses, and review of disproportionate or excessively onerous clauses. Finally, in procedural matters, there is a determination to reverse the burden of proof in favour of the consumer, once specific requirements are met.

4.6 Third-Party Enforcement of Insurance Contracts

Although there is no express legal provision in this regard, the STJ case law (binding legal precedent 529) has settled the understanding that in cases of optional civil liability insurance, the third-party victim of the insured can present a claim directly against the insurance company, provided that it does so jointly with the insured in a necessary joinder of defendants.

The third-party beneficiary of the insurance contract, as in the life insurance contract, may present a claim directly against the insurance company, by means such as the executive method.

4.7 The Concept of Bad Faith

Article 422 of the CCB provides in a general clause that the contracting parties are obliged to keep, both in the execution and in the conclusion of the contract, the principles of honesty and good faith. In a particular and specific form for the insurance contract, Article 765 of the CCB establishes that "the insured and the insurance company are obliged to keep the strictest good faith and truthfulness in the conclusion and execution of the contract, both with respect to the object and the circumstances and statements concerning it".

There is, however, no legal concept of good or bad faith behaviour, and they are indeterminate but determinable legal concepts. Brazilian case law has always examined conduct on a case-by-case basis, bearing in mind not only the conduct of the contracting parties, but the reasonably expected behaviour of the counterparty. In situations in which it is possible to identify the intention to obtain unjust enrichment, or in which an intentionally untruthful statement has been made, the courts tend not to accept that the conduct was done by malice (eg, Article 766 of the CCB). On the other hand, negligence, the unjustified and unreasonable lack of care of the parties, is usually not accepted as a contractual breach of good faith. In turn, the intention to increase the risk is considered by a considerable part of the doctrine as an intentional act and therefore not conceptualised as being in good faith (Article 768 of the CCB).

4.8 Penalties for Late Payment of Claims

In personal insurance, for example, SUSEP Circular No 667/2022 provides for a maximum period of 30 days for the settlement of the claim, which begins with the delivery, by the insured or the interested third party, of all the basic documents provided for in the contractual conditions, and may be suspended if additional documents are required, and resumed after their delivery.

In the same sense, regarding damage insurance, Article 43 Sections 1 and 2 of SUSEP Circular No 621/2021 establishes a period of 30 days, counted from the delivery of all documents and with the possibility of suspension, if additional documents are required.

Despite the determination, especially in major risk insurance, the term is usually exceeded for several examinations that may be necessary during the adjustment or settlement of claims. If there is unjustifiable delay on the part of the insurance company in fulfilling its obligation to indemnify, it will be required to pay a conventional fine, in addition to monetary adjustments and legal interest (Article 772 of the CCB).

The effects of late payment include the obligation of the insurance company to indemnify what the insured has lost (emerging damages), as well as reasonably expected loss of profits (Article 402 of the CCB). It is not uncommon for the insurance company, in judicial proceedings, to be condemned to pay emotional distress damages in favour of the insured, if it has been demonstrated that the delay or refusal of compensation was not legitimate.

4.9 Representations Made by Brokers

Decree Law 73/66 establishes that the insurance broker is the legally authorised intermediary to

raise and promote insurance contracts between insurance companies and individuals or legal entities. Law 4594/64, recently reformed by the Brazilian Law No 14,430/2022, regulates the profession and establishes the various attributions of the insurance broker, including identifying the interest to be guaranteed, recommending the type of contract and the insurance company to be hired.

The law does not establish which party would be represented by the insurance broker. In local practice, it is possible to identify situations in which the insurance broker is positioned as a representative of one or the other party presenting insurance proposals, making or receiving communications between the insured and the insurance company, presenting a declaration of risk status or carrying out a claim notice.

Case law mostly recognises the insurance broker as a representative of the insurance company (STJ–EResp No 1,825,716/SC), although there are precedents that considered statements by insurance brokers as made by the insured (STJ–REsp 1,363,735/SP), when, for example, they sign personal statements of health.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Delegated underwriting and claims handling authority arrangements are not common in Brazil.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

Recently, SUSEP reformed the civil liability insurance regulation (SUSEP Circular 637/2021) which includes several types, such as D&O, environmental, professional and cyber-risks.

In all these modalities, if there is a claim by third parties for damages allegedly caused by the insured, there is the possibility of contracting a guarantee for costs arising from the administrative or judicial defence of the insured, such as the payment of attorney's fees, lawsuit costs, expert charges and court guarantees.

For D&O insurance, SUSEP Circular 637/2021 now indicates as basic coverage the payment by the insurance company of court costs, costs arising from arbitration proceedings, legal fees, expenses with expertise. On the other hand, the aforementioned circular determined the inclusion of a clause in the contracts providing for the insurance company's right to reimbursement in cases where the damage caused to third parties is the result of intentional illicit acts, or in which the insured recognises the illegality of their conduct, determined at the end of the investigation or judicial process.

In terms of insurance against cyber-risks, in addition to the costs of defending against supervisory bodies or customers who are victims of data leakage, it is possible to contract a guarantee to support the costs necessary to recover/repair this data.

In any case, the insurance company is responsible for the costs of salvaging the claim (Article 771 of the CCB), to avoid it or to lessen its severity, which can be agreed to be carried out by reimbursement or in advance.

5.2 Likely Changes in the Future

Civil liability insurance has been growing consistently in Brazil and is expected to continue to grow.

There are five categories in the civil liability branch of insurance: general replacement cost (RC), professional RC, D&O, environmental risks and cyber-risks.

D&O insurance, for example, in a recent survey, was present in 16.8% of Brazilian companies. The index is ten percentage points higher than in the 2018–19 biennium. Among the factors contributing to this growth are a stricter punitive legal environment, relevant changes in legislation (eg, the anti-corruption law), recent changes in the business environment generated by the pandemic and the fact that many companies are going public and entering more regulated environments.. However, it is worth noting that, given the recent scandal of accounting inconsistencies at Brazilian retail chain Lojas Americanas, a more rigorous assessment by insurers is expected regarding requests for new policies and renewals, along with an increase in premiums.

Civil liability insurance for cyber-risks, which also includes coverage for the defence of policyholders, has grown 27.2% in the first semester of 2023 if compared to the first semester of 2022. The growth is mainly due to the growth of cyber-attacks, which increases the claim rate, the value of premiums and the need for companies to be careful in underwriting new risks.

5.3 Trends in the Cost or Complexity of Litigation

Legal liabilities are subject to yearly inflation adjustment, plus 12% interest on late payments, counted from the date of summons of the insurance company to respond to the claim. Additionally, in a recent decision, the Special Panel of the STJ while judging the REsp 1,820,963/SP, within the procedure for repetitive appeals, recognised that any deposit made as a guarantee during the course of a lawsuit does not exempt the debtor from paying late charges. When the funds are actually transferred to the creditor, the remaining balance in the judicial account should be deducted from the final amount owed.

Despite the high inflation in Brazil, with projections showing that it will reach 4.9% in the 2023 fiscal year, legal liabilities have grown substantially in cost, with the lapse of term functioning as an important factor in the economic analysis of the decision on how insurance companies should conduct the actions proposed against them or against their insured.

For this reason, some insurance companies are reviewing their assessment criteria for reported claims, modifying some positions that may encourage judicialisation or promoting settlements in lawsuits with low expectation of a favourable final decision.

5.4 Protection Against Costs Risks

In Brazil, it is possible to contract a guarantee for defence costs in a judicial or administrative action that the insured needs to respond to the insured risk. The insured, however, will exclusively direct their defence, according to the strategy that seems most appropriate, through lawyers that they freely choose, although specialist professionals may be suggested by the insurance companies themselves.

According to the provisions of Circular SUSEP 637/2021, in the contractual conditions of RC insurance, there must be express mention of:

- the legal personality of the contracting parties (individuals or legal entities);
- the possibility of free choice or the use of referenced professionals by the insured, in

the event that coverage for defence costs is sold; and
- the insurance company's right to reimbursement for amounts advanced to the insured or to the policyholder, in cases of commercialised coverage for defence costs, when the damages caused to third parties have resulted from intentional illicit acts.

For D&O insurance, the policyholders can freely choose their respective lawyers.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

Subrogation

Subrogation is the right that the insurance company has to claim, from the person who caused damages, the amount it has indemnified to the insured (Article 786 of the CCB and, for maritime transport insurance, Article 728 of the Commercial Code). The insurance company, therefore, enters the place that previously belonged to the insured, receiving from them by transfer their rights, actions and claims regarding the fact, up to the limit of the amount they actually paid based on the mandatory insurance relationship.

Through subrogation, multiple functions are taken into account, with repercussions, therefore, for the reduction of insurance costs, preventing those who cause accidents and injuries from being exempt from the effects of their conduct, and valuing the indemnity principle, also making sure the insured does not receive double indemnity, one from the insurance company and the other from the third party who caused the damage.

Subrogation, however, is reserved for damage insurance (Article 800 of the CCB) and does not extend to the strictly personal rights of the insured.

Except in the case of intent, the law prevents subrogation in situations where the damage was caused by people linked by family ties close to the insured, such as nephews.

Once the subrogation is carried out, the insured has the duty to collaborate in the exercise of the insurance company's right of return, providing information, clarifications and delivering documents that are useful or necessary. Any act by the insured that disturbs the insurance company's right to subrogation will be considered ineffective.

In March 2022, the STJ (REsp 1,962,113/RJ) solidified the understanding that the choice of forum clause signed between the author of the damage and the insured cannot be enforced against the subrogated insurance company in a regressive action in which it claims reimbursement of the amount paid to the insured.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

The right is not explicitly set out in Brazilian law.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

The Effects of COVID-19 on the Brazilian Insurance Market

There has been a considerable growth in the life insurance sector. In the first semester of 2023, BRL14,29 billion was collected in life insurance

premiums, representing a growth of 11.3% compared to the first semester of 2022.

Despite the substantial growth in health insurance beneficiaries during the pandemic, the sector is experiencing a slowdown, with a mere 0.2% increase in beneficiaries during the first quarter of 2023. There is a trend towards a decline in the number of beneficiaries due to the increase in use and costs.

Also due to the introduction of hybrid work, Brazilian companies were more concerned with hacker attacks, increasing the demand for cyber-insurance; in the first semester of 2023, purchases of this type of insurance grew 27.2% from the same period the previous year.

In the same sense, civil liability insurance, especially D&O, also grew considerably. In the first semester of 2023, there was a 14.6% increase in premium collection. This is because the pandemic has brought great challenges to managers, with sensitive topics such as returning to face-to-face work, vaccination, dismissals and financial decisions to ensure the sustainability of the business and, consequently, the need for less exposure of directors.

The contracting of judicial guarantee insurance also expanded as an instrument for litigating companies to replace the use of their own equity to guarantee lengthy defences of lawsuits.

7.2 Forecast for the Next 12 Months

The insurance market is a very traditional market, but it is undergoing some potentially significant changes, as outlined below.

Change in SUSEP's Regulatory Framework

SUSEP had reviewed most of the regulatory framework by 2023. This is covered in detail in **9.1 Developments Affecting Security Coverage**.

There are also initiatives for innovation in the sector, including the sandbox and "open insurance". Open insurance comes with the proposal to transform the insurance market in Brazil, allowing consumers the possibility of sharing their information with different companies authorised by SUSEP.

The regulatory sandbox is an experimental regulatory environment to enable the implementation of innovative projects that present products and/or services to be offered within the scope of the insurance market and that are developed or offered based on new methodologies, processes, procedures or existing technologies applied in different ways. The companies participating in the sandbox will be able to test – under the supervision of SUSEP – new products and services or new ways of providing traditional services. The project implementation process is already in the second phase.

Insurtechs and Start-Ups in the Insurance Sector

The Brazilian market has seen investments in insurtechs and start-ups in the insurance sector, although at a lower rate than the global market. Traditional insurance companies, on the other hand, have also sought innovation, either in an attempt to reduce bureaucracy in procedures or in the launch of new products (eg, pay per use car insurance, parametric insurance).

Macro-economic Scenario in Brazil: Presidential Elections

With a newly established left-wing government, characterised by a more interventionist stance, an increase in social policies and investment is expected, especially in infrastructure such as highways, roads, telecommunications, renewable energy and sanitation. All this should drive more contracting of engineering risk insurance and insurance bonds, in addition to civil liability and other forms.

On the other hand, although a reduction in inflation is being observed in 2023, high interest rates and unemployment remain persistent, which slows down consumption and can reduce the rate of purchase of car insurance, extended and home guarantees, etc.

Insurance Bond

In 2023, the Brazilian Federal Procurement Law will still be in full force, which increases the percentage of insurance bonds for public works to 30%.

Agricultural Insurance

As for agricultural insurance, the insurance market believes that there is a lot of potential for growth. This is because the insurance industry has not kept up with the growth of agribusiness and there is still very little territorial insurance coverage.

Life Insurance

Despite the clear growth in the pandemic, the national market is still far behind countries such as the United States and Japan. About 60% of Americans and 90% of Japanese citizens have some form of life insurance, while in Brazil only 15% of the economically active population has this type of insurance.

Cyber-insurance

According to SUSEP, the demand for cyber-insurance grew by 27.2% in the first semester of 2023 from same period last year, and this trend is set to continue to grow even more. Whether due to hyper-digitisation or the increasing frequency of cyber-attacks, it is believed that, in the coming years, cyber-insurance will be widely known and commercialised.

M&A

There are also prospects for M&A in the insurance sector. Brazilian companies have, in recent years, been investing in M&A operations. It is expected that there may be movement in the same direction in the insurance sector. The acquisition of Sulamérica Seguros by Rede D'Or, valued at approximately BRL15 billion, is an example of a recent M&A operation carried out in the sector.

7.3 Coverage Issues and Test Cases

There are no cases that are relevant to mention.

7.4 Scope of Insurance Cover and Appetite for Risk

Agricultural Insurance

Climate change has caused an increase in claims in agricultural insurance. The Reinsurance Institute of Brazil (IRB) claims ratio – which measures how much the company spends on insurance in relation to what it collects from policyholders – reached 108% in the second trimester of 2023, a decrease of 46% in comparison with the same trimester of 2022. In 2022, the claim rate reached 154% in the same period. It is likely, therefore, that agricultural producers will find fewer product options and more restrictions on insurance guarantees or higher premiums. Despite the rise in premiums, in 2023, there has been an increase in the search for agricultural insurance.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

To encourage ESG in the insurance sector, SUSEP released Circular 666/2022 in June 2022, which provides a regulatory framework for issues involving ESG, stimulating the evolution of this agenda in a standardised way. The objective is to induce the insurance sector to integrate sustainability risk into its risk matrix, especially the impact of climate change.

The new Circular establishes the sustainability requirements to be observed by insurance companies, open supplementary pension entities (EAPCs), capitalisation companies and local reinsurance companies, as well as regulating in detail the concepts of risk management, risk measurement and incorporation of losses. This regulatory rule was already expected by the sector in view of the awareness that, for example, climate issues are also financial risks and directly affect the results of companies in the long term. This regulation is in line with the global trend of incorporating climate risks in the portfolio analyses of companies.

The mandatory implementation of such regulatory and environmental standards in the insurance sector in Brazil will be gradual and will take into account the size of insurance companies supervised by SUSEP, starting in December 2022 (CNSP Resolution No 388/2020). Among other consequences, insurance companies that do not meet the ESG criteria may find it more difficult to have their insurance proposals accepted or charge higher premiums, which will stimulate compliance in the medium term.

8.2 Data Protection Laws

Brazilian Law No 13,709/2018 has impacted the insurance market, particularly in the risk subscription process. It introduced barriers to the sharing of policyholder's personal data among peers which could have been used for risk assessment and acceptance purposes. Now, personal data must be anonymised and cannot be used for discriminatory purposes.

The regulation of claims has also been affected, as it greatly hindered the regulator's access to personal data and information during the claim process This access is only permitted with explicit consent from the data subject, as outlined in Article 7 of Brazilian Law No 13,709/2018.

Moreover, the looming threat of sanctions by the Brazilian National Data Protection Authority (ANPD) has propelled a notable increase in the demand for cyber-risk insurance, particularly considering the exponential growth of data breach incidents, largely due to vulnerabilities in policyholder's information security systems.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

SUSEP has advocated for substantial changes.

Since 2019, all standards related to the development of products must go through the review process, always based on simplification, flexibility and the elimination of standardised plans, fostering innovation. The objective is to increase the offer of products to policyholders, increasing competition between insurance companies and, therefore, reducing the value of premiums.

Until now, the insurance market's response to SUSEP's proposals has been very slow, many of the products and insurance contracting processes are essentially the same as before the regulatory reform.

In 2023, the Brazilian Federal Procurement Law will be in full force, increasing the percentage of the insurance guarantee for contracted public works to 30%, bringing the step-in instrument into the legal system, which allows insurance companies to assume the completion of unfinished public work up to the policy limit.

The Brazilian Law No 14,454/2022, which was recently approved, overturns the exhaustive list and establishes that health plans may be required to finance health treatments that are not on the list maintained by the ANS (see **4.3 Significant Trends in Policy Coverage Disputes**). This means that health insurance companies may be faced with an expansion of the guarantees they need to offer to policyholders, and the impact on the mutual fund and premium prices is still uncertain.

The most recent development was the revival of the Bill of Law from the Brazilian House of Representatives No 29/2017, which is endorsed by the government and aims to establish a general insurance law in the country, thereby superseding the provisions of the current Brazilian Civil Code that pertain to the subject matter. The bill is set for consideration in the plenary session of the Federal Senate and, upon approval, will proceed for the presidential sanction, since it has already been approved by the Brazilian House of Representatives.

In the event it is ratified, the law will come into effect one year after its publication.

Trends and Developments

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SABZ Advogados is a boutique law firm that, with versatility and commercial acumen, formats its services to each client's industrial sector, finding solutions that meet specific demands and trigger positive results for the businesses involved. The head of the firm's insurance and reinsurance practice is Pedro Souza, leads three associate attorneys. The team has acted representing both insurers and insureds in several high-profile litigations and in pre-litigation scenarios. The team has a deep knowledge of litigation and insurance, offering solutions to local and foreign clients, for whom it provides insightful recommendations and realistic assessments of risks and liability before Brazilian courts. Construction, infrastructure, banking, chemicals, agribusiness and insurance are the main industries in which SABZ Advogados works, where it renders services to the biggest institutions in these sectors.

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Introduction

The last few years have been an eventful time for the Brazilian insurance market in general. Litigation in this area has been busy and rapidly evolving regulation of the sector will have a significant effect in the coming years.

The *Conselho Nacional de Seguros Privados* (CNSP), the superior normative body of the Brazilian insurance regulatory system, and the *Superintendência de Seguros Privados* (SUSEP), the Brazilian insurance regulator, have (i) restructured most of the country's insurance and reinsurance regulation and (ii) pioneered several innovative ideas which have now begun to bear fruit, such as a "sandbox" project and the open insurance system (explored in detail below).

Furthermore, due to a current Bill of Law, the Brazilian market also faces the possibility of substantial changes to the legal framework that has been in place over the last 20 years.

This article presents an overview of the current and future status of insurance litigation in Brazil, highlighting four key topics:

- the binding of insurers to the arbitration clause inserted in the guaranteed contract;
- the impacts of new technologies;
- the new rules for carrier's cargo civil liability insurance; and
- the possibility of a new insurance and reinsurance law.

Binding Arbitration Clauses: Analysis of Special Appeal No 1.988.894

On 9 May 2023, the Superior Court of Justice (STJ) – the highest Brazilian non-constitutional Court and the most relevant judicial body for insurance matters – issued a ruling on Special Appeal (*Recurso Especial*) No 1.988.894-SP and buried (at least for the foreseeable future) any doubts that insurers, when filing for subrogation against the principal, are bound by the arbitration clause inserted in the contract guaranteed by a surety bond.

The context: accident at sea

The Special Appeal was part of a subrogation action filed by Mapfre Seguros Generales de Colombia S/A ("Mapfre") against Log Wisdom S/A, Thorco Shipping A/S and Asia Shipping Transportes Internacionais Ltda.

The case concerned Mapfre's right of subrogation under a surety bond issued to guarantee the risks of maritime cargo transport from the Port of Santos (Brazil) to the Port of Barranquilla (Colombia). The terms and conditions of such operation – including an arbitration clause – were part of the Bill of Lading.

During the transportation, the insured cargo (parts of a hydroelectric power plant) was damaged. A claim was made and Mapfre indemnified the obligee *(Empresas Públicas Medellin*), subsequently filing the subrogation action.

At first, the lower court trial found the defendants to be responsible for reimbursing Mapfre the full amount of the indemnity paid. After appeal, the São Paulo State Court overruled this decision arguing that Brazilian courts had no jurisdiction since the arbitration clause in the shipping contract bound Mapfre.

The decision: interpretative guideline

The STJ ruled on this divergence in a trial reported by Justice Maria Isabela Gallotti. The STJ drew an important distinction between surety bonds and other insurances policies.

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In the case of a surety bond, the insurer necessarily knows – or should know – the terms and conditions of the underlying contract, because this kind of insurance guarantees precisely the fulfilment of obligations undertaken by the principal(s) in the contract. As such, bond and contract are inextricably connected. Therefore, the existence of an arbitration clause (or lack thereof) should be a factor considered in the underwriting procedure.

With other forms of insurance, there is no such automatic connection, because the insurer does not know – or at least is not obliged to know – the terms and conditions of the contracts signed by the insured (eg, in a constructor's all risk policy, the insurer may not know the contract signed between the contractor and the owner).

The distinction underlined in the decision – whether the insurer knew or should have known of the arbitration clause or not – is expected to become an interpretative guideline for future cases related to the transmission of arbitration agreements by subrogation.

Legal repercussions of the decision

This decision closes an old point of contention and is a warning to insurers that, when issuing surety bonds, they must be attentive to the existence of an arbitration agreement in the guaranteed contract.

Also, having been issued by a higher court, the decision will likely deter both insurers and insureds from starting new lawsuits in similar cases. Avoiding repetitive discussions in the courts is a fundamental step in the construction of a faster and more efficient judiciary in Brazil.

Finally, it is noteworthy that the STJ deemed the analysis of the arbitration agreement to be an integral part of insurer's risk assessment. That stands in line with the spirit of Circular SUSEP No 662/22, a norm that redefined the regulatory framework for surety bonds placing the guaranteed contract as the cornerstone for the insurers' underwriting processes.

Surety bonds and arbitration

Surety bonds and the guaranteed contract are linked, just as car insurance is linked to an automobile or house insurance to a building; one cannot exist without the other. A surety bond is the insurance with which an insurer guarantees the legitimate interest of the obligee in the fulfilment of the principal's obligations under the guaranteed contract.

Therefore, it could be said that each surety bond is a policy "tailor made" for the guaranteed contract, as it should be designed in light of the obligations it will cover. That is why an arbitration clause could never go unnoticed.

Furthermore, arbitration is the rule – and not the exception – in high-value disputes and/or in international contracts, as is the case in international maritime transportation, because arbitrators are experts in their fields (eg, insurance law) and the procedure is (usually) faster and more customisable.

By upholding the arbitration agreement and rendering it binding on the insurer, the STJ is contributing to fostering an environment for arbitration to thrive in Brazil.

A Look Into the Future: Digitalisation and Insurance

It would be a serious oversight to write about insurance litigation trends in 2023 without taking a moment to consider the impacts of digitalisation on the insurance market. The next

few sections will consider some of the hottest topics in the ever-evolving relationship between insurance and technology.

Data protection

Over three years have passed since Federal Act No 13709/2018 – the General Data Protection Law (LGPD) – came into full effect. It is openly inspired by the European Union's General Data Protection Regulation (GDPR), forcing Brazilian companies – insurers among them – to adapt to new standards in the treatment of personal data.

Once without a driving enforcement agency behind it, the supervision and enforcement of LGPD compliance is now spearheaded by the *Agência Nacional de Proteção de Dados* (the National Data Protection Agency), with power to issue sanctions and penalties to infracting companies – ranging from a simple warning to fines of up to BRL50 million. The first fine was applied in July 2023. One could say that the "trial period" of LGPD is over.

Furthermore, SUSEP (the Brazilian Insurance Authority) has also issued several guidelines related to privacy and data protection (eg, Circular SUSEP No 619/2020 and Circular SUSEP No 638/2021), which, if not followed, could lead to administrative procedures and more fines and penalties to the involved companies and their officers.

That framework does not discard the continuous possibility of the *Ministério Público* (the Public Prosecution Office), responsible for protecting diffuse and collective rights, filing a public civil action and/or pressing criminal charges related to any personal data breach.

The point is that insurers and brokers, as companies that treat and store personal data (including sensitive data such as that found in medical files) are themselves heavily exposed to data protection breaches and the consequences thereof. Also, as data subjects become more versed in the rights granted by the LGPD, an increase in administrative and judicial requests related to data treatment is expected.

Finally, for the same reasons, insurers that cover cybersecurity risks – either in standalone policies, through extension clauses or simply by not excluding it from their non-cyber products – are very likely to see an increased number of claims in the following years.

Open insurance

A topic deeply intertwined with data protection is Open Insurance, a system supervised by the insurance authority, which allows for the personal data of insureds to be shared between insurers, conditional on the express consent of the data subject.

The sharing of data is, unequivocally, an important catalyst for efficiency and innovation in the insurance market; as such, it is mostly beneficial to insureds, which will have access to new and more personalised products at better rates.

However, it also poses risks and challenges. First and foremost, it aggravates the previously mentioned exposure to privacy and data breaches, as the increased data flow between insurers means that, at any given time, each will be holding considerably more personal data than it could without access to Open Insurance.

Furthermore, not all Brazilians are tech-savvy and/or capable of fully understanding the nuances of the different policies and services offered. While enabling faster and digital-only

business, Open Insurance also raises the bar for the duty of information placed on insurers, particularly when dealing with individuals and/or entities that qualify as consumers under Federal Act No 8078/1990 (the Brazilian Consumer Defence Code).

Addressing these issues is a necessary step in developing a safe environment for data sharing, while also protecting insurers against regulatory and judicial action by the insurance authority and insureds, respectively.

New technologies

The success and media surrounding Chat GPT has drawn a lot of attention to artificial intelligence (AI). This, and other new technologies, are spreading in the insurance industry. It began with time and cost-saving tools (eg, chatbots), but it now looms closer to the business core, as algorithms manage KYC, credit rating, risk underwriting, claims adjustment and other crucial matters.

However, the use of these new technologies raises several ethical questions, for example:

- monitoring of insureds (eg, tracking driving speed, health and behaviour);
- exclusion of vulnerable and/or unprofitable groups from the insurance market;
- risk of algorithmic bias (unfairness) in underwriting and claims adjustment; and
- lack of transparency in underwriting decisions

These questions have been detailed and debated internationally; for example, within the European Union, where the European Insurance and Occupational Pensions Authority (EIOPA) has issued governance guidelines to ensure non-discrimination, fairness, and trustworthiness in AI use for insurance purposes.

At the time of writing (October 2023), there is no similar guideline within Brazilian regulation. However, as the use of new technologies increase, fuelled by the data sharing in Open Insurance and innovation in the insurance market – for example, by companies taking part in the Sandbox project, as defined in Resolution No 381/2020 of the *Conselho Nacional de Seguros Privados* (CNSP) and Circular SUSEP No 598/2020 – it is likely that SUSEP will turn its attention to this matter.

New Rules for Carrier's Cargo Liability Insurance: Law No 14599/2023

Within a broad reform of the Brazilian Traffic Code, the Law No 14599/23 was enacted on 19 June 2023. This law obliged road freight carriers to buy three types of insurance:

- cargo civil liability insurance for losses and damages to the goods transported;
- cargo civil liability insurance for theft or disappearance of the goods; and
- civil liability insurance for body and material losses to third parties.

Besides this obligation, the new regulation imposes a connection between the first two types of insurance (those related to the cargo) to a risk management plan (PGR) to be developed and observed by the carriers and their insurer(s).

Although the Law forbids the carrier contractor to offset the insurance prices from the freight contract price, discussions on who should bear the burden of the new costs are expected to arise, mainly in long-term contracts.

Nevertheless, following the hotly debated negotiation of a PGR, disputes over such document are expected to dwindle, since the new Law

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cements its status as an indispensable document to cargo transport operations.

The Possibility of a New Law for Insurance: PLC No 29/2017

On 23 March 2023, *Projeto de Lei da Câmara* No 29/2017 ("PLC 29/2017" or the "Bill") – an insurance law project – was unarchived by the Brazilian Federal Senate resuming its legislative course. It is currently under appreciation by the Senate's Constitution, Justice and Citizenship Commission.

The Bill was originally drafted almost 20 years ago by Federal Deputy José Eduardo Cardozo and registered as *Projeto de Lei* No 3555/2004. However, after being forwarded from the House of Deputies to the Federal Senate on 12 April 2017, it was rebranded as the current PLC 29/2017.

At its inception, the Bill was aimed at modernising and expanding the private insurance rules laid down in the Brazilian Civil Code. However, the insurance market and regulatory framework have changed significantly over the last couple of decades – in most cases, for the better – and these changes have not been reflected in the Bill. Therefore, as it now stands, the Bill presents inconsistences and incompatibilities with the current system and the global insurance and reinsurance markets, which can have a profound impact the Brazilian litigation scenario, as detailed below

Key points of the bill

It is a tall task to write about a Bill that is not yet – and may never become – an actual law, for there are many doubts and no certainties. However, given the ample scope of the Bill and the changes it would bring about if approved, it would be remiss to not dedicate a few lines to it.

Since the Bill has over 100 sections, this article will limit its focus to three topics that could directly impact litigation and arbitration: (i) the use of undefined legal terms; (ii) the changes in the reinsurance system; and (iii) the rules for arbitration and other forms of alternative dispute resolution (ADR).

Use of undefined legal terms

The Bill is prolific in its use of vague terms and expressions that are open to interpretation; the so-called "undefined legal terms". Examples of such expressions are:

- "*relevante agravamento*" (significant aggravation) (Section 18);
- "*intenção de aumentar a probabilidade"* (the intent to increase the likelihood) (Section 18, § 5º);
- "*tornar inócua a garantia"* (to make the cover meaningless) (Section 116, § 2º); and
- "*colocarem em perigo interesses relevantes do segurado, beneficiário ou terceiros, ou sacrifício acima do razoável"* (to endanger relevant interests of the insured, beneficiary or third-parties, or (demand) sacrifice beyond what is reasonable) (Section 70, § 5º).

The use of undefined terms is a common, and, at times, necessary part of any piece of legislation. However, in the best interests of a consistent system such usage should be limited to a minimum and based on previous and consolidated case law; otherwise, there is considerable risk of non-transparent or even biased decision-making based on such concepts.

If the current text of the Bill is approved, an increase in litigation is expected, as the parties will bring their divergent understandings of the

norm to the courts so they can define legislators' intention.

Reinsurance

To understand the impact of the Bill on the reinsurance system it is important to know that until 2007 – more precisely, until the enactment of *Lei Complementar* No 126 (LC 126/07) – the reinsurance market in Brazil was monopolistic, controlled by IRB-Brasil Resseguros S.A. (IRB).

The opening of the reinsurance market allowed for the entrance of foreign reinsurers into the local market, on terms of (relative) parity with IRB. With them came the contracts, usages and customs of the global trade, which became an integral part of the Brazilian insurance system.

Being drafted prior to said opening of the reinsurance market, the Bill – despite amendments – is anachronistic in its treatment of reinsurance. These incompatibilities include the following issues:

- Tacit agreement – the lack of response by the reinsurer to a proposal will be interpreted as tacit acceptance of its terms, resulting in the reinsurance contract being formed without the express consent of the reinsurer.
- Scope – the reinsurance contract must comprise all the reinsured interests, including salvage expenses (in all insurance branches) and expenses incurred with claims adjustment.
- Claims control – the claim adjustment would be solely under the insurers' responsibility, thus voiding any "claims control clause" included in the reinsurance contracts.

Unusual rules on ADR

Finally, the Bill also makes a controversial incursion into the arbitration field, resulting in concerning incompatibilities with Federal Act No 9307/1996 (the "Arbitration Act"), which could place Brazil in an uncomfortable position before the international (re)insurance community.

The insurance and reinsurance markets are inherently global, complex and technical, especially in the case of large and cross-border risks. For these reasons, ADR procedures – arbitration in particular – are commonly used to solve disputes in the (re)insurance field.

In Brazil, these procedures are recognised under the Civil Procedure Code and governed by the Arbitration Act and by Federal Act No 13,140/2015, which details rules for mediation and conciliation. There is a natural fit between ADR procedures and (re)insurance disputes, because those allow for a much higher degree of freedom (eg, allow choice of applicable law) and confidentiality than regular court proceedings.

Nevertheless, the Bill aims to restrict the parties' autonomy and alter the practices of international litigation in various ways:

- Applicable law – the parties will not be allowed to choose the applicable law and location of the dispute resolution, which must happen in Brazil under Brazilian laws. This strays from the usual freedom to choose the applicable material and procedural law, to opt for equity (both supplementary and corrective), and/or to solve the dispute based on general principles of law, usages and customs and international rules of commerce, provided that good customs and public order are respected.
- Confidentiality – the ADR bodies must disclose sensitive information, including a summary of the disputes and their respective decisions to the general public. This harms

the confidentiality inherent to ADR procedures because, even if anonymised data is used, in such a restricted and interconnected market, players will be able to discern the parties involved.

The three issues presented in this article are but a small sample of the "food for litigation" the Brazilian (re)insurance market will face if the Bill is passed with the current text.

CHINA

Law and Practice

Contributed by:
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SGLA Law Firm

Contents

SGLA Law Firm (SGLA) was founded in Shanghai in 2008. In 2020, SGLA became one of the largest domestic integrated law firms as member firms of the Sino-Global Legal Alliance joined SGLA. Headquartered in Shanghai, the firm sets its first batch of national offices across key regional cities in China, including Chongqing, Guangzhou, Guiyang, Chengdu, Kunming, Nanchang, Dalian, Tianjin, Zhengzhou, Xi'an and Hefei. It also has a strategic co-operative partnership with well-known international firms. SGLA has a professional and experienced team in the following areas: insurance and reinsurance, shipping and logistics, aviation, foreign-related affairs, dispute resolution, foreign-related affairs, corporate and commercial, securities and capital markets, bankruptcy and restructuring, intellectual property, labour and employment, urban renewal and real estate, criminal and compliance, etc. SGLA aims to be the trailblazer for the new model of growth by scale for Chinese law firms.

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Dylan Yu graduated from Shanghai Maritime University and formerly worked in a Top 500 property insurance company in China, gaining rich practical experience in loss assessment and claim settling. In 2014, when credit insurance cases were a frequent occurrence, Dylan effectively handled several credit insurance claims and participated in the whole process from preliminary investigation to lawsuit. The total amount involved exceeded CNY100 million. Dylan understands clients' needs, providing legal services covering the design and compliance review of insurance products, and the settlement and recovery of insurance claims.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

In China, substantive issues of insurance disputes are mainly governed by the following laws and rules:

- the Insurance Law of the People's Republic of China (hereinafter referred to as "the Insurance Law") and its relevant Interpretation promulgated by the Supreme People's Court (hereinafter referred to as "the Interpretations of the Insurance Law"); and
- the Civil Code of the People's Republic of China (hereinafter referred to as "the Civil Code") and its related Interpretations promulgated by the Supreme People's Court.

Additionally, the Maritime Law of the People's Republic of China (hereinafter referred to as "the Maritime Law") is applicable to marine cargo insurance and marine hull insurance.

Procedural issues are mainly governed by the Civil Procedural Law of the People's Republic of China (as amended in 2021) (hereinafter referred to as "the Civil Procedural Law") and its relevant Interpretation promulgated by the Supreme People's Court. In respect of marine insurance disputes, the Special Maritime Procedure Law of the People's Republic of China shall be applied.

1.2 Litigation Process and Rules on Limitation

Litigation Process

Filing a lawsuit

The litigation process of an insurance dispute begins with the plaintiff (who could be the policyholder, the insured or the beneficiary, etc) submitting a complaint to the competent People's Court of the First Instance, stating the facts of disputes, claims, and attaching preliminary evidence.

Registering the case

The People's Court will register a case after examining the submitted complaint and finding it satisfactory according to registration requirements.

Mediation

After registration of the case, the court may attempt to mediate between the parties and seek a settlement.

Hearing

If the dispute cannot be resolved through mediation, the court will hold hearing(s) to hear the statements and arguments of both parties, during which the cross-examination of evidence will be carried out.

Judgment or ruling

After the hearing, the court will hand down a judgment or ruling based on the facts and the legal provisions to resolve the insurance disputes concerned.

Appeal

Where a party disagrees with the first-instance judgment, they have the right to directly file an appeal with the higher-level People's Court, without a precondition of obtaining any permission/"leave" from any court.

Final judgment or ruling

After registration of the appeal, the higher court will give final consideration to the case and make a final judgment or ruling. There could also be retrial proceedings, although such applications are not always approved by the courts having jurisdiction, and the corresponding enforcement proceedings will not be stayed unless any specific

rulings to stay the enforcement proceedings are made.

General Rules on Limitation

The starting point of limitation

In accordance with the Civil Code and other relevant provisions in China, the time limitation regarding insurance disputes generally runs from the date when the parties know or should have known about the occurrence of the insurance incidents concerned.

Limitation period

According to the Insurance Law, the time limitation for the insured or the beneficiary of insurance (except for life insurance) to claim compensation or payment of insurance benefits from the insurer shall be a period of two years, running from the above-mentioned date. With regard to life insurance, the said time limitation is a period of five years.

Suspension of limitation

Under any of the circumstances stipulated in Article 194 of the Civil Code, the time limitation may be suspended and expire six months from the date when the reason for the suspension is eliminated.

Interruption of limitation

Time limitation may be interrupted pursuant to the provisions of Article 195 of the Civil Code, and shall recommence from the time of the interruption or the termination of the relevant procedures.

1.3 Alternative Dispute Resolution (ADR)

Alternative Dispute Resolution (ADR) exists and is encouraged in China. A relatively popular method of ADR at present is mediation, a procedure organised by court prior to registration of the case, usually with a specialised judge (typically a retired senior judge) appointed by court giving assistance to the parties. For certain cases with a relatively low value of claims, the court might entrust a third-party agency to give assistance in mediation.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Jurisdiction

Hierarchical jurisdiction

In China's legal system, the primary court will act as the first instance court in most insurance cases. However, insurance disputes that involve significant sums or cross-border aspects might be directly handled by higher level courts, such as intermediate courts or the high courts.

Territorial jurisdiction

As is provided in Article 24 of the Civil Procedural Law, for actions arising from insurance contract disputes, the jurisdiction lies with the People's Court of the defendant's place of residence or the location of the insured object.

For property insurance disputes involving transportation vehicles or goods in transit, jurisdiction can be asserted by the courts in three potential areas:

- the place where the transportation vehicle is registered;
- the destination of the transportation; and
- the location where the insurance incident occurred.

For personal insurance contract disputes, the court in the jurisdiction where the insured person resides holds the authority. For actions arising from personal insurance contract disputes, the

jurisdiction can be with the People's Court of the insured person's place of residence.

Agreed jurisdiction

In accordance with Article 35 of the Civil Procedural Law, parties in a dispute can decide on a specific jurisdiction through written agreements. Where a jurisdictional agreement clearly defines a court without violating the provisions of hierarchical jurisdiction and exclusive jurisdiction by law, the specified court should assume jurisdiction, otherwise the regular rules of the civil procedural law apply. In accordance with Article 36 of the Civil Procedural Law, where multiple courts with actual connections to the dispute are mentioned, the plaintiff is entitled to select any of them for filing the lawsuit. It is noteworthy that agreements concerning jurisdiction made between service providers and consumers using standard terms are invalid if the service provider did not adequately draw the consumer's attention to such clauses. Courts should uphold a consumer's claim that such an agreement is invalid. If there is a change in the defendant's address after a jurisdiction agreement is made, the court that was in the defendant's jurisdiction when the agreement was made retains jurisdiction unless otherwise agreed upon by the parties.

Choice of Law

Insurance contracts usually specify under which legal jurisdiction they are to be interpreted and applied. In respect of the contracts of international commercial insurance and cross-border insurance, it is common for the parties to choose a particular applicable legal system (such as English law, US law, etc) in the contract. Where the choice of applicable law is not specified in the insurance contract, the court will usually determine which country's law is applicable pursuant to the rules of private international law. In China, the determination of the applicable law will generally be considered with reference to factors such as the location where the insurance contract is signed or performed or which has an actual connection with the dispute.

2.2 Enforcement of Foreign Judgments

In accordance with the Civil Procedure Law and relevant international conventions, foreign judgments can be applied for enforcement in China subject to the following conditions.

- The judgment must have entered into force in the foreign country, ie, the court in that country must have confirmed the judgment and it has legal effect.
- The judgment must not violate China's public policy principles, ie, the content of the judgment must not be contrary to China's basic legal principles and social public interests.
- The judgment must not be contrary to China's civil litigation jurisdiction principle, ie, the content of the judgment must be within China's jurisdiction.

Exclusion of Foreign Judgments

The People's Court may exclude the enforcement of foreign judgments under certain circumstances, including the following.

- The foreign judgment has no legal effect in China, ie, it has not been recognised or acknowledged in China.
- The foreign judgment is contrary to China's public policy principles, ie, the content of the judgment seriously violates China's basic legal principles and social public interests.
- The foreign judgment is in conflict with China's own judgment, ie, in the same dispute, the People's Court has already

made a judgment that is inconsistent with the foreign judgment.

It is important to note that the enforcement or exclusion of a foreign judgment usually needs to be decided through litigation proceedings. The parties must file an application to a competent court, and the court shall hand down a judgment in accordance with the relevant laws and international conventions.

2.3 Unique Features of Litigation Procedure

Special Rules on Jurisdiction

For insurance cases, different regions in China may be under the jurisdiction of specialised courts. For instance, in Shanghai, the second instance for insurance contract disputes is under the jurisdiction of the Shanghai Financial Court instead of the Shanghai First Intermediate People's Court and Second Intermediate People's Court, which have jurisdiction over other civil and commercial cases. Marine insurance cases are under the jurisdiction of specialised maritime courts.

Guarantee Required for Property Preservation Applications

In accordance with Article 100 of the Civil Procedure Law, a party who applies for the preservation of the other party's property shall provide a guarantee. However, as is stipulated in Article 9.6 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Handling of Property Preservation Cases by the People's Courts, which came into effect on 1 December 2016, where the applicant for preservation is a financial institution or one of its branches (such as a commercial bank or an insurance company) with independent solvency, which are established with the approval of the financial regulatory authority, the People's Court may not require the applicant to provide a guarantee.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Chinese courts generally enforce arbitration provisions in commercial contracts, including those in insurance and reinsurance agreements. In accordance with Article 5 of the Arbitration Law of the PRC, should parties have an existing arbitration agreement, a People's Court should decline a claim brought by one party unless the arbitration clause is deemed void. Additionally, if, after agreeing to arbitration, one party initiates litigation without revealing the arbitration agreement and the opposing party does not object before court hearings begin, the arbitration clause is considered waived and the court shall proceed with the trial.

However, it is noteworthy that under certain circumstances, Chinese courts, when considering the recognition and enforcement of overseas arbitration awards, may refuse to recognise and enforce the award on the grounds that the place of arbitration lacks a close connection to the subject matter of the dispute, which may be adjudicated and decided in accordance with the standards adopted in PRC law.

3.2 The New York Convention

China acceded to the New York Convention in 1986, with the reservation that the People's Republic of China only applies the Convention to:

- the recognition and enforcement of arbitration awards made in the territory of another signatory, on the basis of the principle of reciprocity; and
- disputes based on the contractual and non-contractual commercial legal relations recognised under the laws of PRC.

Enforcement Procedure

The procedure for enforcing a foreign arbitration award pursuant to the New York Convention involves the following steps.

Application to a competent court

A party seeking enforcement of a foreign arbitration award in China must apply to the intermediate people's court where the party against whom the enforcement is sought resides or where its assets are located.

Documentation

The party applying for enforcement must submit the original or a certified copy of the arbitration award and the arbitration agreement. Corresponding translated documents in Chinese are also required if the original documents are in another language.

Grounds for refusing enforcement

Chinese courts can refuse enforcement of a foreign arbitration award based on the grounds as set out in the New York Convention, including but not limited to the following situations:

- the arbitration agreement is invalid;
- the party against whom the award is invoked was not given proper notice or was otherwise unable to present its case;
- the award deals with issues not contemplated by or not falling within the terms of the arbitration agreement; or
- the award has not yet become binding or has been set aside or suspended by a court of the country in which it was made.

Local conditions

In practice, while China is generally supportive of international arbitration and has made efforts to harmonise its approach in accordance with international standards, parties seeking enforcement might face challenges. For instance, as mentioned above, Chinese courts may refuse enforcement if they opine that the place of arbitration lacks a close connection to the subject matter of the dispute.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Popularity of Arbitration

In recent years, due to the efficiency, flexibility, and perceived neutrality of arbitration as compared to litigation in local courts, both domestic and foreign parties have increasingly favoured arbitration for resolving commercial disputes in China, especially in sectors where disputes may be complex, involve technical expertise, or have cross-border elements. In the insurance context, this often includes areas such as marine insurance, large-scale property insurance, reinsurance, and liability insurance.

Privacy of Arbitration

It is noteworthy that, as is provided in Article 40 of the Arbitration Law of the PRC, arbitration sessions are not conducted publicly unless both parties agree to a public hearing. However, matters involving state secrets cannot be made public even with mutual agreement.

Rules Applicable

The primary law governing arbitration in China is the Arbitration Law of the People's Republic of China. There are specific arbitration institutions,

such as the China International Economic and Trade Arbitration Commission (CIETAC), which have their own sets of rules. For insurance-specific arbitration, parties could opt to refer to the China Maritime Arbitration Commission (CMAC) or other specialised arbitration bodies.

Appeal of Awards

Arbitral awards in China are generally considered final and binding. The concept of "appeal" as it exists in certain other jurisdictions does not apply in the same way to arbitral awards in China (even just for "legal issues"). However, parties are entitled to request a court to set aside an arbitral award, but only on the specific grounds stipulated by the Arbitration Law. These grounds include the following situations:

- where there was no valid arbitration agreement;
- where the award exceeded the scope of the arbitration agreement; or
- where there was bias or corruption among the arbitrators.

Additionally, as is stipulated in the New York Convention, Chinese courts may refuse the recognition and enforcement of a foreign arbitral award on certain grounds.

4. Coverage Disputes

4.1 Implied Terms

In the laws and regulations that are binding for the parties to insurance contracts, there are various provisions which can be applied as implied terms. Among the aforesaid provisions, some clearly prohibit the parties to the contract from making agreements inconsistent with the content of these provisions. Such provisions are common in the Insurance Law, mainly involving the basic principles of insurance contracts, as in the following.

The Insurable Interest

Pursuant to Articles 12, 31 and 48, the insured must have insurable interest in the insured when the life insurance contract is concluded, otherwise the contract is invalid. As for property insurance contracts, the insured must have an insurable interest in the insured object when an insured event occurs, otherwise, the insured cannot claim compensation or payment from the insurer.

Limit on Death Insurance

For instance, Articles 33 and 34 of the Insurance Law stipulate that people without civil capacity cannot be insured in a life insurance that requires death as a condition for payment of insurance benefit (except for life insurance policies taken by parents for the benefit of their minor children). Additionally, in a contract where death is the condition for payment of insurance benefits, the amount insured must be agreed to and recognised by the insured, otherwise the contract shall be invalid.

Obligation to Notify of Increased Degree of Danger

In accordance with Article 52 of the Insurance Law, the insured is obliged to notify any significant increase in the degree of danger of the insured object during the validity period of the property insurance contract. Where the insured fails to fulfil such obligation, the insurer shall not bear the insurance liability for an insured incident occurring as a result of the significant increase in the degree of danger of the insured object.

Limitation

The rules and regulations in China's legal system prohibit the parties to the contract from

negotiating to change the limitation of actions, yet clearly prescribe that the limitation of disputes over life insurance is five years, while the limitation of disputes over property insurance contracts is two years, which is one year shorter than the ordinary limitation provided in the Civil Code. It is noteworthy that, in accordance with the principle that special law is superior to general law, the two-year special limitation, instead of the three-year ordinary litigation, shall be applied in litigation regarding disputes over property insurance contracts.

Other Provisions

Other provisions prescribe terms that could be applied as implied terms provided that there is no agreement contrary to the provisions or no relevant agreement is made in the contract. The characteristic of these provisions is that the text of them usually contains the wording "unless otherwise specified in the contract", as in the following.

Termination of insurance contract

In accordance with Article 15 of the Insurance Law, the insurer may specify the causes of termination in the insurance contract. Where no similar agreement is made in the contract, the insurer shall not be entitled to terminate the insurance contract unless the conditions for the termination of contract stipulated by law are met.

Bearing costs related to liability insurance

With regard to the issue of bearing the costs related to liability insurance, the insurer may stipulate in the insurance contract that the arbitration or litigation costs shall be borne by the insured. Where there is no such agreement, the insurer shall bear the costs in accordance with Article 66 of the Insurance Law.

4.2 Rights of Insurers

Pursuant to Article 16 of the Insurance Law, the policyholder is under an obligation to disclose truthfully to the insurer the relevant information about the insurance objects or the insureds.

Remedies for Breaches of the Obligation of Disclosure

Where a policyholder deliberately fails to fulfil the aforesaid obligation, thus affecting the insurer's decision on underwriting or increasing premium rates, the insurer is entitled to terminate the contract without making compensation for any insured event which has occurred prior to the termination of contract, and the premium shall not be refunded.

Where a policyholder fails to fulfil the aforesaid obligation due to gross negligence, thus affecting the insurer's decision on underwriting or increasing premium rates, the insurer is entitled to terminate the contract. Where there is a serious impact on the occurrence of an insured event, the insurer shall not be liable to make compensation for the insured event which has occurred prior to the termination of contract, provided that the premium shall be refunded.

However, an insurer who is aware that the policyholder has not provided truthful information at the time of establishment of contract shall not be entitled to the right to terminate the contract and shall bear the insurance liability for the insured event.

The aforesaid right to terminate the contract shall be exercised within 30 days from the date on which the insurer knows about the trigger event for the termination; otherwise, it shall be extinguished. Additionally, the insurer will no longer be entitled to such right where the

contract has been concluded for more than two years.

4.3 Significant Trends in Policy Coverage Disputes

Establishment and Improvement of Multiple Dispute Resolution

The People's Courts all over the country are committed to establishing and improving multiple dispute resolution mechanisms. There has been an increase in the proportion of insurance disputes settled through pre-litigation mediation and in-litigation mediation procedures.

Increase in Disputes Caused by Electronic Insurance

There has been an increase in the number of cases where insurance contracts are concluded by electronic means, resulting in an increase in disputes regarding the insurer's fulfilment of the obligation of reminding and clear explanation. Such disputes mainly involve the specific application and understanding of Article 17 of the Insurance Law.

Increased Complexity and Number of Disputes in Liability Insurance Litigation

With the development of new types of liability insurance, such as occupational liability insurance, directors and officers liability insurance, cyber insurance, property preservation liability insurance, etc, a large number of related cases have emerged. The legal relations involved in such cases are complicated, and there is still much controversy over issues on fact-finding and the specific ways of undertaking responsibilities.

4.4 Resolution of Insurance Coverage Disputes

Insurance terms or special agreements in insurance policies usually contain dispute resolution terms, agreed by the parties, to resolve disputes through negotiation, arbitration or litigation. In legal practice, it is more common to resolve disputes through litigation.

Similar to general insurance contracts, reinsurance contracts usually stipulate dispute resolution clauses. The difference is that, in practice, the parties to the contract seem to be more inclined to agree to resolve disputes through arbitration.

4.5 Position if Insured Party Is Viewed as a Consumer

The Insurance Law and other relevant rules and regulations do not distinguish between consumer insurance contracts and non-consumer insurance contracts, nor do they distinguish between consumer insurers and non-consumer insurers in respect of the rights and obligations of the insured. However, there is a tendency to protect the insured in accordance with some specific provisions.

Bias Towards the Insured

In respect of a standard insurance term provided by the insurer, if the standard term includes contents that exempt the insurer from its liabilities (such as deductible amount, deductible ratio, principle of average, etc), the insurer shall make a reminder of the standard term that is sufficient to attract the attention of the policyholder, and the insurer shall clearly explain the content of the clause to the policyholder, otherwise the standard term is invalid.

Where the stipulation of the standard term exempts the insurer from its statutory obligations, increases the liability of the policyholder or the insured, or excludes the legal rights of the policyholder, the insured or the beneficiary, such term shall be invalid.

Regarding the interpretation of standard terms, the Insurance Law also provides that disputed terms should be interpreted according to common understanding, and the interpretation that is beneficial to the insured should be adopted if there are two or more interpretations.

Controversy Over Whether to Regard the Insured as a Consumer

There is controversy as to whether the insured is regarded as a consumer, of which the focus is whether the insurance involved in the case should be recognised as "purchasing or using goods, or receiving services for daily consumption" in Article 2 of the Law of the People's Republic of China on the Protection of Rights and Interests of Consumers (hereinafter referred to as "the Consumer Protection Law"). If the answer is positive, the insured shall also enjoy the relevant rights provided in the Consumer Protection Law.

For high-risk financial products such as insurance investment products, it is clearly prescribed in the Minutes of the National Court Work Conference for Civil and Commercial Trials that the insured's claim that the seller's agency should bear punitive compensation pursuant to Article 55 of the Consumer Protection Law on the grounds that the seller's agency has committed fraud will not be supported.

4.6 Third-Party Enforcement of Insurance Contracts

In liability insurance cases, where the insured causes damage to a third party, the third party may directly enforce the insurance contract or sue the insurer for payment of the amount insured, provided that all of the conditions stipulated in Article 65 of the Insurance Law are met.

In certain fields of liability insurance, the provisions of the third party directly suing the insurer are different from those of general liability insurance. For example, in accordance with the Law of the People's Republic of China on Road Traffic Safety and the Regulations on Compulsory Liability Insurance for Motor Vehicle Traffic Accidents, in the compulsory third-party liability insurance of the motor vehicle and commercial third-party liability insurance, the insurer could opt to directly compensate the third party for losses and damages caused by the insured vehicles, while the third party is entitled to directly sue the insurer. Another example is that in accordance with the corresponding provisions in the International Convention on Civil Liability for Oil Pollution Damage and the International Convention on Civil Liability for Bunker Oil Pollution Damage which China has joined, a third party is entitled to directly sue the civil liability insurer for oil pollution damages as well as filing a claim.

4.7 The Concept of Bad Faith

There is no concept of "bad faith" in the Insurance Law or other relevant laws or regulations. However, certain rules and regulations embody the spirit of the principle of good faith, as in the following examples.

- Article 5 of the Insurance Law prescribes that parties concerned in insurance activities shall comply with the principle of honesty and trustworthiness in the exercise of rights and performance of obligations.
- It is prescribed in the Insurance Law and the Maritime Law that the policyholder or the insured must perform the obligation of truthful disclosure, otherwise they shall correspondingly bear adverse legal consequences. At the same time, the Interpretation further prescribes that the insurer who is aware that the insured has not fulfilled the obligation of truthful disclosure,

yet still receives the premium, shall not be entitled to terminate the contract. This also reflects the requirement of good faith on the part of the insurance parties.
- In accordance with the Insurance Law, the insurer shall perform the obligation of reminder and clear explanation, and shall fulfil the obligation of payment of the insurance benefit in a timely manner, otherwise it will bear the corresponding adverse legal consequences.

4.8 Penalties for Late Payment of Claims

The Insurance Law stipulates that if insurance companies delay the payment of claims, they must compensate the insured party or the beneficiary for any resultant losses and damages. However, they will not be subject to administrative penalties.

4.9 Representations Made by Brokers

As is prescribed in Article 118 of the Insurance Law and Articles 2 and 48 of the Regulatory Provisions on Insurance Brokerages, where they provide intermediary services for the conclusion of insurance contracts based on the interests of policyholders, insurance brokers should sign a power of attorney with the principal to stipulate the rights and obligations of both parties, as well as other matters, in accordance with the law. However, it is noteworthy that the signing of the power of attorney does not mean that the broker is the agent of the insured, thus the insured is not bound by the statements made by the broker, unless otherwise stipulated in the power of attorney that there is a clear authorisation that the broker can make statements on behalf of the insured.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Authorisation arrangements for insurance agencies and insurance brokers are relatively common in practice, on which the Insurance law and the relevant rules and regulations also have provisions. There are also many litigation disputes caused by these arrangements, including but not limited to:

- whether the party involved is an insurance agent or an insurance broker (in many cases);
- whether the effectiveness of relevant acts of an insurance broker is attributable to or shall bind the insured/policy applicant;
- whether the insurance broker is at fault in engaging in the insurance brokerage business and has caused losses to the policyholder or the insured; and
- whether the effectiveness of the insurance agent's relevant behaviour is attributable to or shall bind the insurer.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

Pursuant to Article 65 of the Insurance Law, in liability insurance, unless otherwise stipulated in the insurance contract, the litigation, arbitration fees and other necessary and reasonable costs fall within the coverage of liability insurance, where the costs are incurred by the insured responding to a lawsuit or arbitration caused by an insured event causing damages to a third party.

In addition, many P&I clubs also provide insurance (Freight, Demurrage and Defence, referred to as "FD&D") for legal fees and expenses arising from bill of lading disputes, charterparty disputes,

collision accidents, salvage, towage, general average, insurance contracts, and so on.

5.2 Likely Changes in the Future

With the practice of FD&D, an increase in the number of insurance companies providing similar insurance products may be witnessed in the future. In addition, if a third-party funding arbitration system is introduced and established in China in the future, insurance products supporting defence may increase accordingly.

5.3 Trends in the Cost or Complexity of Litigation

In the past few years, litigation costs have mainly included litigation fees, arbitration fees, appraisal fees, attorney fees, and so on. With the development of diversification of dispute resolution methods, there may be a trend of an increase in, for instance, mediation fees and other fees incurred by alternative dispute resolution mechanisms.

In addition, with the continuous development of defence insurance, its field of application may gradually expand, and the complexity and diversity of such litigation will increase accordingly.

5.4 Protection Against Costs Risks

In accordance with the relevant provisions, the claimant can buy insurance to guard against costs risks incurred in filing or preparing for litigation or arbitration for the claim, such as litigation fees, arbitration fees, appraisal fees, and attorney fees.

At present, such types of insurance in the Chinese insurance market are legal fee insurance, legal fee compensation insurance, and so on, which are especially common in the field of intellectual property, as illustrated by the following.

- Patent Enforcement Insurance, Intellectual Property Enforcement Insurance to protect against investigation costs and legal fees arising from filing legal claims for compensation for the infringements of patent rights and intellectual property.
- Loss insurance of intellectual property rights litigation costs to compensate for the costs incurred in filing lawsuits to protect rights against intellectual property rights infringement.
- Patent worry-free insurance to compensate for direct economic losses, investigation costs, and legal costs arising from patent infringement by a third party.
- Copyright infringement loss insurance, trade mark infringement loss insurance and geographical indication infringement loss insurance to comprehensively cover the direct economic losses, investigation costs and legal costs caused by infringements of the insured's copyright, trade mark rights and geographical indications by a third party.
- Legal fee insurance of overseas intellectual property disputes and legal fee insurance of patent disputes at overseas exhibitions to compensate for legal fees incurred in intellectual property rights and overseas patent infringement disputes.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

The Insurance Law clearly grants the insurer of property insurance the right of subrogation against a third party (see Articles 60–63 of the Insurance Law), while the insurer of a life insurance contract is not entitled to claim the subrogation from a third party (see Article 46 of the Insurance Law).

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

There are provisions on the subrogation rights of property insurers against third parties in the Insurance Law and the Interpretation of the Insurance Law. Since there is much controversy in practice, the Supreme People's Court is committed to improving the relevant provisions on the right of subrogation by promulgating the Interpretation as well as publishing guiding cases and typical cases.

- Pursuant to the relevant provisions, under a property insurance contract, the insurer needs to claim the right of subrogation from a third party in its own name.
- In addition, the Insurance Law stipulates that when the insurer seeks subrogation from a third party, it is not allowed to exercise the right of subrogation against the insured's family members or its constituents.
- In insurance contract disputes involving the right of subrogation in practice, the party being subrogated usually argues that the insured has already waived its right of subrogation. The standard of the courts when hearing such cases is that the relevant waiver of the insured should be clearly stated, rather than through reasoning or ratification after the fact.
- It is noteworthy that, many insurers expressly promise to waive the right of subrogation of their affiliated companies or even business cooperation companies in the process of concluding insurance contracts. Such agreements specified in the contract are valid and binding for the parties hereto.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

Driven by the impact of the COVID-19 pandemic, China has expedited the adoption of digital solutions for dispute resolution, including online arbitration, mediation, and court hearings. While these approaches offer benefits like convenience, speed and cost savings, they also introduce concerns related to data protection, privacy and technical glitches.

Further, the pandemic has increased the number and complexity of insurance disputes, especially in relation to health insurance, life insurance, business interruption insurance, travel insurance and liability insurance. Some of the disputed issues include the definition and scope of force majeure, the causation and extent of losses, the interpretation and application of policy terms and exclusions, and the burden of proof and evidence rules.

7.2 Forecast for the Next 12 Months

Due to the impact of the COVID-19 pandemic, disruptions and uncertainties for individuals and businesses have increased the demand and complexity of dispute resolution, while in the post-pandemic era, there may be a gradual recovery and normalisation of social and economic activities in China, which may reduce the number and severity of pandemic-related disputes.

Furthermore, the efficiency of procedures such as litigation and arbitration had been significantly impacted, and there had also been more challenges and difficulties for conducting online or offline hearings due to travel restrictions, quarantine measures, and health risks. However, with the resumption of work in the relevant

industries and departments, this issue has now improved.

7.3 Coverage Issues and Test Cases

In China, there have been several cases involving health insurance claims related to COVID-19 infections or deaths. Some insurers denied or scaled back coverage based on the exemption terms or other limitations related to infectious diseases or force majeure events. In response, some policyholders have contested these decisions, invoking consumer protection regulations or principles of contractual interpretation. In terms of cases involving business interruption insurance with claims related to COVID-19 lockdowns or restrictions, some insurers argued that the relevant claims fell outside the scope of coverage, asserting that compensation and settlement necessitate physical damage to property or direct intervention by authorities. Conversely, some policyholders argued that the loss of income or profit due to an unforeseen event should also be included in the coverage. The outcomes of these aforesaid disputes have varied depending on the specific facts and circumstances of each case, such as the respective terms and conditions of the policies.

7.4 Scope of Insurance Cover and Appetite for Risk

The COVID-19 pandemic has increased the demand for and awareness of insurance products, especially health insurance, life insurance, and online insurance. However, this also means higher costs and risks for insurers due to potential increases in claims, disputes, and other uncertainties. Therefore, some insurers may adjust their coverage, premiums or exemption terms to better match the current market trends and the needs of customers.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

The concept of ESG (Environmental, Social, and Governance) has received widespread attention and discussion in China in recent years. In June 2022, the China Banking and Insurance Regulatory Commission released the Guidelines for Green Finance in Banking and Insurance Industries, the core content of which is to introduce the principles and requirements of ESG into the decision-making and management systems of financial institutions. For the insurance industry, the introduction of ESG relates to its core business's risk management and decision-making processes. This has encouraged insurance companies to make a series of adjustments in underwriting decisions, product development and risk assessment, which will have certain implications for insurance coverage and litigation.

Adjustment of Insurance Companies' Underwriting Strategy

Based on the characteristics of different industries or fields, insurance companies' underwriting strategies may be adjusted in responding to the ESG assessment system. This also means that insurance companies may be facing higher due diligence and compliance costs. For example, companies involved in high pollution and high energy consumption may face stricter regulatory constraints, which implies that these companies may face higher claim risks. Accordingly, insurers should be more cautious when carrying out due diligence investigations into these companies and should place stricter limitations on their coverage. Meanwhile, companies that adopt sustainable measures and actively fulfil their social responsibilities may

receive preferential treatment from insurance companies.

New Insurance Products and Services

Many risks in the ESG domain are insurable risks, such as environmental risks from natural disasters and pollution, social risks from employee health and product liabilities, and governance risks like director liabilities. In the future, it is believed that there will be more ESG-related new products and services emerging in the insurance market.

Potential Increase in Litigation Related to Insurance Coverage

As public attention to ESG issues increases, insurance companies may face more ESG-related claims and litigation. For instance, victims may seek compensation in cases of accidents or pollution caused by poor environmental management, in which situations the companies may attempt to obtain compensation from their liability insurance.

Potential Reduction in Litigation Risk for Insurance Companies

Since ESG covers the interests of various stakeholders in the environment and society, it essentially forms a supervisory mechanism, which, at least theoretically speaking, could regulate corporate behaviour more effectively than the previous evaluation standards, thereby reducing the company's litigation risks. Therefore, it is believed that insurance companies will incorporate ESG more in their internal governance and control for assessment in the future.

8.2 Data Protection Laws

The legal framework for data protection in China is underpinned by a series of comprehensive laws and regulations that address both the broader issues of data security and the specific challenges related to personal data.

Legal Framework for Data Protection in China and Its Impacts

The Cybersecurity Law (CSL)

The CSL, enacted in 2017, focuses to ensure network security and protect cyberspace sovereignty. The CSL established the minimisation principle in data collection, restricting the arbitrary use or transfer of data. Transfers require consent from the original data rights-holder, and individuals must also have access to their collected data and can request its deletion.

The Civil Code

The Civil Code, enacted in 2020, is the first comprehensive codification of civil law in China. It includes provisions on personal rights, including data rights, and clearly prescribes that businesses collecting user data must adhere to principles of necessity, legitimacy and reasonableness.

Personal Information Protection Law (PIPL)

The PIPL, enacted in 2021, as the comprehensive national law for personal data protection, emphasises lawful, legitimate and necessary data processing.

The law also addresses cross-border data transfers, which has a potential impact on multinational insurers.

Data Security Law (DSL)

While the PIPL focuses on personal data, the DSL enacted in the same year covers data security in a broader sense, encompassing both personal and non-personal data. It introduces a tiered data security system based on the relevance of the data to China's interests. Data

deemed "important" requires a risk assessment for overseas transfer.

Relevant Guidelines and Regulations

In addition to the aforementioned core laws, there are several sector-specific guidelines, regulations and standards, usually provided by the China Banking and Insurance Regulatory Commission (CBIRC), which further define the expectations and responsibilities for financial industries including the insurance providers operating in China. For instance, the Regulations on the Management of Insurance Sales Behaviour (Draft for Solicitation of Comments) specifically stipulates that insurance sales activities should respect and protect the fundamental rights to information security of the policyholders, insured parties and beneficiaries, further specifying the principles and rules that insurance companies and insurance intermediary agencies must adhere to during the information collection and processing as well.

Impact of Data Protection Laws on the Insurance Industry

In the domain of underwriting, data protection laws can create both challenges and opportunities for insurance companies. The stringent rules on data collection might limit the type and amount of data that insurers can gather, which is critical for assessing risks accurately. Precision underwriting techniques, which rely heavily on large datasets and employ AI and data analytics, might face restrictions. This situation could affect product development and risk profiling. Moreover, global insurers may find it challenging to consolidate data across borders due to data localisation requirements. As a result, while there is a push for insurers to innovate and offer personalised policies using personal data, they must navigate the regulatory landscape cautiously to ensure compliance and accurate risk assessment.

As for the litigating of insurance risks, insurers must exhibit heightened diligence during claims verification due to the rights individuals have, like data access and correction under data protection laws. If insurers contravene data protection regulations, they risk that litigation could lead to significant fines and reputational damage. Ambiguities in data collection or usage can also spur disputes between insurers and policyholders. Moreover, in legal scenarios, the way data has been protected might influence its credibility and admissibility as evidence. Hence, insurers have to be meticulous in their data-handling processes to avoid potential pitfalls during litigation.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

The Insurance Law is set for its fifth amendment, aiming to address prominent practical issues arising from its implementation, which, as understood from the corresponding discussions in the market, may include but not be limited to the following.

- *Internal governance of insurance companies*: The primary practical issues highlighted include the composition of the board of directors (especially the formation of independent directors), the need for independent directors to possess relevant professional knowledge and industry experience, and the specific procedures on how directors can effectively fulfil their roles.

- *Issues regarding standard terms*: In accordance with Article 17 of the current Insurance Law, where an insurer adopts standard terms during the conclusion of contract, it must explain these terms to the policyholder. Where exemption terms are included, the insurer must sufficiently highlight and provide a clear explanation of the terms. However, in practice, ambiguities exist regarding definitions such as "clear explanation". Furthermore, the scope of what constitutes an exemption term remains unclear. Also, the introduction of the Civil Code has brought about changes in the portrayal of standard terms, causing subsequent application issues under the Insurance Law. These problems are expected to be addressed and rectified in this amendment.
- *Inclusion of new insurance contracts*: There has been a debate over whether the Insurance Law shall govern the new types of insurance contracts, which are roughly categorised into investment-type insurance contracts and health insurance contracts. The revision needs to define the nature of these new types of insurance contracts and thus to clarify the obligations and responsibilities of all parties involved.

Impact on Insurance Litigation

As for insurance coverage, the amendment may place an emphasis on transparency and accountability, especially with the focus on board composition and the role of independent directors in insurance companies, which is anticipated to lead to stricter underwriting criteria, potentially reshaping the terms and design of insurance products. Additionally, the move to provide more clarity on standard terms, especially exemption terms, will likely simplify insurance policies and reduce ambiguities. The introduction of new types of insurance contracts will also expand and diversify the range of available insurance products, offering consumers more specialised coverage options.

As for the impact on insurance litigation, the upcoming amendment of the Insurance Law may aim to minimise policy interpretation disputes by seeking clearer definitions around terms and exemption clauses. By aligning with the interpretation of the Civil Code and pinpointing which terms are considered as exemption terms, the chances of litigation arising from misunderstandings or ambiguous interpretations could decrease. However, the integration and classification of new insurance contracts may bring a temporary increase in litigation. This increase will be a result of the market adapting to and navigating the boundaries and interpretations of these contracts until standardised practices are firmly in place.

In addition, it is believed that, with better-defined standard terms and exemption terms, insurers will be equipped with clearer criteria on which to base their claims decisions, potentially reducing the frequency of disputes and the consequent need for defence funding. Yet, the initial unfamiliarity with claims related to these fresh product offerings may necessitate insurers to allocate more resources towards claim defences until practices become standardised.

Trends and Developments

Contributed by:
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AnJie Broad Law Firm

AnJie Broad Law Firm has an insurance practice team that provides a wide range of service areas, including insurance M&A, establishment and compliance operation of insurance institutions and finance work. It provides its clients with accurate policy advice and first-class dispute resolution services across numerous policy types and market sectors. Insurance dispute resolution is a core practice area and a team priority. The team of over 50 lawyers continually acts on the toughest arbitration cases on the forefront of insurance dispute resolution. Disputed insurance matters handled by AnJie Broad's insurance team include property insurance claims disputes, life insurance claims disputes, insurer's subrogation disputes, reinsurance contract disputes, insurance-fund product disputes and insurance institution investment disputes. The firm can offer both local insights and global reach. It has established an extensive co-operative network with first-class law firms in the US, the UK, Germany, France, Canada, Australia, Japan, South Korea, and other states and regions. This allows AnJie Broad to continue to deliver top-tier global insurance-related legal services.

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Introduction

The insurance industry is an important pillar of the financial system and social security system. In recent years, China's insurance industry has achieved rapid development. As of April 2023, there are 347 members of the Insurance Association of China (IAC), among which are 13 insurance group (holding) companies, 86 property insurance companies, 93 life insurance companies, 14 reinsurance companies, 18 insurance asset management companies and 69 insurance intermediaries. In fact, other than the members of IAC, there are still more asset management companies and insurance intermediaries acting in the market. According to data released by the former China Banking and Insurance Regulatory Commission and the State Financial Regulatory Administration, the insurance premium income from January to May 2023 totalled CNY2.6 trillion, an increase of 10% year-on-year-growth. With the continuous development of the insurance industry, the volume of insurance litigation also grows with every passing day. As of July 2023, there were nearly three million litigation cases in relation to insurance policies from the China Judgments Online Database, mainly involving disputes over property insurance policies and life insurance policies, as well as some subrogation cases and a small number of insurance premium disputes cases. The trends and developments of insurance litigation present distinctive characteristics as described below. Meanwhile, although litigation resolutions and arbitration resolutions are still the mainstream ways to resolve insurance disputes, the surge of insurance disputes cases has also created a demand for building a diversified disputes settlement system.

Characteristics of Trends and Developments of Insurance Litigation in China

Disputes may arise in all aspects of formation and performance of insurance policies: for example, the determination of the validity and application of the exclusion clause, whether the insurer performs the obligation to make an explicit explanation of the meaning of the exclusion clause, whether the incident is covered by the insurance policy, whether the calculation of the loss is accurate. These are the very typical disputed issues in insurance litigation.

Insurance litigation cases regarding new types of insurance policies continue to emerge as well. Apart from disputes arising out of traditional insurance policies, such as motor vehicle

liability insurance, work injury insurance, pension insurance and life insurance, cases related to cyber insurance, D&O liability insurance and green agriculture insurance are emerging. Compared with insurance litigation regarding traditional insurance policies, the insurance litigation regarding new types of insurance policies may involve multiple legal relationships and complicated facts, which presents difficulties and challenges for law practitioners and adjudicators. Some new types of insurance litigation are set out in detail below.

The increase of securities class actions has led to a rapid growth of the number of claims and litigations under D&O liability insurance policies

With the official implementation of the new Securities Law of the People's Republic of China in March 2020, PRC supervisory departments have continued to make breakthroughs in clarifying the scope of liability and compensation for those responsible directors and officers and have further strengthened the recourse against actual controllers of listed companies. As of January 2023, a total of 337 A-share listed companies issued announcement information about purchases of D&O liability insurance, the number of which increased by 36% year-on-year. Under the influence of stricter regulation, the risk of litigation involving listed companies related to misrepresentation and fraudulent statements has risen, the required standards for directors and officers performing their fiduciary duties have been higher, and corresponding disputes over D&O liability insurance policies have increased. Compared with other liability insurance litigation, D&O liability insurance litigation presents characteristics such as fewer referable precedents, complex legal relationships and difficulties in the application of laws.

Situations will be more complex when foreign litigation procedures are involved. As many Chinese companies choose to be listed in stock markets outside mainland China, such as the Hong Kong Stock Exchange, the New York Stock Exchange or the NASDAQ, class actions and investigations brought against insureds in those jurisdictions will make claims under the D&O insurance policy even more challenging, such as whether the penalties imposed by the foreign regulator are covered under the D&O policy, how to apply the foreign law to make the allocation of loss when covered and uncovered insureds are both sued, how to determine the reasonableness of the settlement amount entered in the proceedings in another jurisdiction when the D&O policy dispute is heard by a PRC court or arbitration tribunal, etc.

Insurance litigation in the Internet Plus era

With the rapid development of the social economy and internet service, online sales of insurance products expand rapidly, creating new opportunities for the development of the insurance industry. According to the Interim Measures for the Supervision of the Cyber Insurance Business issued by the China Banking and Insurance Regulatory Commission (CBIRC, the former China Insurance Regulatory Commission), insurance companies can operate cyber insurance business in several areas, such as personal accident injury insurance, term-life insurance and whole-life insurance, household property insurance, liability insurance, etc. In 2016, nearly 80% of Chinese insurance companies have started their cyber insurance business through different business models such as constructing their own websites or co-operating with third-party platforms. The development of cyber insurance without a well-established regulatory system has triggered chaos. In 2018, the CBIRC and its branches received 10,531 consumer complaints

about cyber insurance, which correspondingly resulted in a surge of litigation cases related to cyber insurance policies. Formation of cyber insurance policies is different from that of traditional policies, so disputes usually relate to the formation process.

According to Article 3 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Insurance Law of the People's Republic of China (II) (amended in 2020), if the policyholder or the policyholder's agent does not sign or seal the insurance policy in person, but the insurer or the insurer's agent signs or seals it on behalf of the policyholder, the policy should not take effect for the policyholder; however, if the policyholder has already paid the insurance premium, it should be regarded as retroactive recognition of the act of signing or stamping on behalf of the policyholder. Thus, it weighs a lot to the formation and inception of cyber insurance policies whether the electronic signature is personally signed by the policyholder and whether the electronic signature is valid. The effectiveness of the cyber insurance policy also relates to whether the policyholder pays the premium in full and on time through electronic payment.

According to Article 17 of the Insurance Law of the People's Republic of China (the "PRC Insurance Law"), an insurer should highlight clauses which exclude the liability of the insurer on the insurance application form, insurance policy document or any other insurance certificate, bringing them to the attention of the policyholder in an insurance policy, and in writing or verbally explain to the policyholder the contents of such clauses; where there is no highlighting or explicit explanation, such clauses would be invalid. Due to the convenient and efficient characteristics of purchasing cyber insurance, the policyholder frequently asserts that insurers failed to perform their obligation under Article 17 of the PRC Insurance Law. Thus, in cyber insurance litigation, the burden of proof is placed upon the insurers to prove that they fulfil the obligation to inform the policyholder of the contents of the insurance policy truthfully through the internet sales platform.

Insurance litigation under the influence of the green economy

The demand for green insurance in the green financial market is increasing, and agricultural insurance plays an essential role in the growth of green insurance in China. China is currently one of the major countries in terms of agricultural insurance premium income, with premium income of CNY119.2 billion in 2022. Faced with the direct or indirect risks brought by global environmental pollution, climate change and natural disasters, the corresponding disputes over agricultural insurance policies have increased. The main features are as follows.

First, agricultural insurance policies litigation usually comes in the form of a series of cases, ie, different plaintiffs in the same area bring separate litigation cases against the same insurer for similar facts and reasons.

Second, agricultural insurance products are generally policy-oriented and subsidies from the local government are granted for public interest considerations. The PRC Agricultural Insurance Regulations clearly stipulate that the local financial department is the administrative agency of agricultural insurance, and the subsidies are determined by the local financial department. Therefore, when the PRC courts hear the relevant cases, in addition to applying the PRC Insurance Law, the Civil Code of the People's Republic of China (the "Civil Code")

and other laws, the PRC courts also need to take into account regulations issued by local financial departments.

Third, parties to agricultural insurance policies are prone to disputing the validity of the terms of the insurance policy and the manner of determining the loss resulting from the incidents. In practice, the two main disputed focal issues are whether the loss has really occurred and whether the insurance claim is fraudulent.

Lastly, given that the insureds of agriculture insurance policies generally have low incomes and are in a relatively vulnerable position, the PRC courts tend to protect their interests by taking into account the principle of equity.

Increasing number of litigation cases arising out of litigation property preservation liability insurance

Litigation property preservation refers to the protection measures taken by the court to prevent a party (generally the defendant) from transferring, concealing or selling the property before the judgment is issued, so as to ensure the smooth execution of the judgment after it takes effect in the future.

In accordance with the Civil Procedure Law of the People's Republic of China, when receiving an application for taking preservation measures, the people's court may require the applicant/plaintiff to provide a guarantee. In recent years, a litigation property preservation liability insurance policy (LPPL) is considered as a qualified and legitimate method of providing a guarantee.

LPPL insurance generally covers the losses suffered by the defendant as a result of the wrongful or improper application for property preservation. When the applicant/plaintiff loses the case, the defendant will sue the applicant/plaintiff and the insurer to reimburse the losses caused by property preservation measures.

With the wide application of LPPL insurance in civil litigation cases, more and more disputes have arisen out of such insurance policies. The following criteria will be considered in LPPL disputes:

- whether the applicant had subjective fault;
- whether the preservation measures were adopted in an improper manner;
- whether the defendant suffered any loss; and
- whether there was a direct causation between the improper preservation measures and the defendant's loss.

New Laws, Regulations and Trends

The formation of the State Financial Regulatory Administration

On 18 May 2023, the State Financial Regulatory Administration was formed on the basis of the China Banking and Insurance Regulatory Commission (CBIRC) and is responsible for the supervision of the financial industry, including the insurance industry.

Before this, the CBIRC had been in operation for more than five years. With the formation of the State Financial Regulatory Administration, the CBIRC will no longer exist.

Changes of hierarchical jurisdiction

In China, there are four levels of courts: the primary courts, the intermediate courts, the high courts, and the Supreme People's Court. In accordance with the judicial interpretations published by the Supreme Court on 17 September 2021, if the amount in dispute for a civil case is less than CNY500 million (not inclusively), the primary court will have first-

instance jurisdiction; if the amount in dispute for a civil case is between CNY500 million (inclusively) and CNY5 billion (not inclusively), an intermediate court will have first-instance jurisdiction; if the amount in dispute for a civil case is more than CNY5 billion (inclusively), the high court will have first-instance jurisdiction. It is rare for the Supreme People's Court to hear a case at the first instance.

Changes of territorial jurisdiction

In accordance with PRC laws, a lawsuit brought on an insurance dispute will fall under the jurisdiction of the people's court where the domicile of the defendant or the insured object is located.

However, the territorial jurisdiction is subject to some exceptions. China has established some professional courts, such as the financial court, to handle litigations in some specific sectors. For instance, since 26 March 2021, the Beijing Financial Court will hear insurance disputes over which the Beijing Intermediate People's Court has first-instance jurisdiction. The Beijing Financial Court will also try the appeals for insurance disputes from the district courts of the first instance.

Impacts of the Civil Code's effectiveness

On 1 January 2021, the Civil Code came into force. The provisions of the Civil Code have numerous and significant impacts on the PRC Insurance Law and its judicial interpretations.

In accordance with the Civil Code, the insurer shall have a specific explanation obligation not only with regard to clauses which exempt or diminish the insurer from liability as prescribed by the PRC Insurance Law, but also for those clauses in which the applicants, beneficiaries or insureds have major interests.

Another noteworthy point concerns the amendment of the statute of limitations. Article 188 of the Civil Code provides that the limitation period for a person to request the people's court to protect his civil rights is three years, unless otherwise provided by law. However, before the Civil Code officially stipulated that the statute of limitation is three years, a two-year statute of limitation had long been implemented in China in accordance with PRC General Principles of Civil Law since their promulgation in 1987.

In considering the effectiveness of the Civil Code, the PRC courts have been divided as to whether a two-year or three-year statute of limitation should apply to disputes involving property insurance policies because the current effective PRC Insurance Law still stipulates that the period of limitation for the insured or beneficiary of non-life insurance to claim for insurance benefits is two years. Up to now, most of the courts would hold that a three-year statute of limitation in accordance with Article 188 of the Civil Code should be applied in property insurance claims as most courts consider that the two-year statute of limitation prescribed by PRC Insurance Law was inherited from the abolished PRC General Principles of Civil Law, instead of the special provisions of the PRC Insurance Law.

New approach to insurance disputes resolution: diversified dispute resolution mechanism

Against the background of increasingly complex insurance policy types and the upsurge of disputes, in addition to the traditional dispute resolution measures of litigation and arbitration, the establishment of diversified dispute resolution mechanisms has become a new trend.

On 22 May 2020, the Supreme Court of the People's Republic of China, the Ministry of

Public Security, the Ministry of Justice, and the CBIRC jointly issued the Notice on Promoting the Reform of "Integrated Online Data Processing" for Road Traffic Accident Damage Disputes (Law [2020] No 142), which standardised and improved the relevant mediation mechanism. The issuing of a series of relevant legal documents then followed, reflecting the importance of establishment and improvement of the diversified dispute resolution mechanisms.

The definition of the diversified dispute resolution mechanism is that when a dispute arises between an insured and an insurer, and the two parties cannot reach a settlement by themselves, they adopt a mechanism of resolving the dispute through mediation in the form of non-litigation by insurance industry associations, arbitration institutions, courts and other third parties.

According to the different participants, there are three main forms of diversified dispute resolution mechanisms in the insurance industry: the first model involves the CBIRC and the insurance industry association. In this scenario, with guidance from the CBIRC, the insurance industry association would lead the parties in settling the disputes. The second model involves the administrative organs as the main body to lead the two parties in settling the disputes. The third model involves the arbitration institution as the main body to lead the parties in settling the disputes through mediation or settlement instead of arbitration procedures.

In recent years, valuable experience has been accumulated in the establishment of the diversified dispute resolution mechanism. However, there are certain shortcomings, as follows. First, the legal and regulatory system has not been well established. Although the Supreme Court of the People's Republic of China and the CBIRC have issued a series of legal documents, in practice, the legal status of the parties involved in mediation and the unified implementation of rules and regulations are still subject to further detailed laws and regulations. Second, the publicity and popularisation of the diversified dispute resolution mechanism needs to be strengthened. Third, the multiple dispute resolution mechanism requires enhanced financial supports.

Outlook and Conclusions

China has shown great potential in the development of the insurance industry, achieving a rapid expansion of the insurance market. Correspondingly, the number of insurance litigation cases has also increased significantly due to the development of the market. With the gradual maturity of the insurance industry, the improvement of relevant laws and regulations, and the development of diversified dispute resolution mechanisms, insurance litigation related to traditional insurance policies, as well as new-type insurance policies, are expected to be more properly resolved in the near future.

DENMARK

Law and Practice

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Contents

Bech-Bruun is a market-oriented law firm offering a wide range of specialist advisory services to large sections of the Danish corporate and public sectors, as well as to global enterprises. Counting almost 600 experienced and highly specialised employees, of which 64 are partners, it is one of Denmark's leading full-service law firms.

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Bech·Bruun

1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

In Denmark, there is no specific procedural regime that governs the resolution of insurance disputes. Instead, insurance disputes are resolved under the general regime of civil procedure before the ordinary courts, or through alternative dispute resolution bodies or the Insurance Complaints Board for non-commercial cases.

Denmark is a member of the EU, which means that it is obliged to legislate in accordance with EU treaties and conventions. However, when Denmark joined the EU in 1973, it required four derogations or "opt-outs" from EU co-operation – including a legal reservation regarding Justice and Home Affairs. This means that Denmark is not bound to follow EU legislation on civil law matters. However, Denmark has adopted the Brussels I Regulation and therefore does – to some extent – co-operate with the EU on civil law matters.

Insurance Disputes Before the Danish Courts

The Danish Administration of Justice Act (the "Justice Act") regulates civil proceedings in the Danish courts, which comprise:

- the Supreme Court;
- the Eastern and Western High Court;
- the Maritime and Commercial High Court; and
- 24 district courts.

A civil case is initiated when the court receives a writ of summons from the plaintiff. The Justice Act regulates the requirements and timeframes that apply to the writ of summons and the defence, etc, and also includes detailed provisions for the preparation of the case, the presentation of evidence and of witnesses, and more.

Insurance Disputes by Arbitration

Arbitration is a way of solving insurance disputes without involving the ordinary courts. Arbitration is governed by Danish legislation in the Danish Arbitration Act 2005, which corresponds to the UNCITRAL Model Law on International Commercial Arbitration 1985.

The Arbitration Act has few mandatory provisions on arbitral procedure and leaves the parties to decide on the process of dispute resolution. For example, the parties are free to decide on the number of members of the arbitral tribunal, as well as on the timeframes and limits on the statement of defence, etc.

In Denmark, arbitration outside the construction sector is typically initiated in the Danish Institute of Arbitration (DIA) in Copenhagen. The DIA has its own set of rules which apply when parties commence arbitration there. Disputes in the field of building and construction are typically contractually bound to be initiated by the Danish Building and Construction Arbitration Board, which also has its own set of rules.

Insurance Disputes by Mediation

Denmark has no laws governing mediation. However, both the DIA and the Danish Building and Construction Arbitration Board have their own set of rules regarding mediation.

Insurance Disputes by the Insurance Complaints Board

The Insurance Complaints Board, authorised by the Danish Ministry of Industry, Business and Financial Affairs, deals with consumer insurance.

Complaints regarding legal issues arising from the relationship between the customer and the insurance company can be submitted to the Board, which will handle the complaint. The

Board cannot, however, handle issues which have been settled by a final judgment, validly binding arbitration, or court settlement.

1.2 Litigation Process and Rules on Limitation

Civil Cases

The Danish court system is structured on three levels. The district courts are the ordinary first instance courts in civil disputes. In extraordinary situations, the district court can direct a case to the High Court in the first instance if the case is of general public importance, or if the case could have a significant impact on others besides the parties involved. The Maritime and Commercial Court handles cases regarding commercial matters and intellectual property rights.

The Danish legal system is based on a two-tier system, which means that most cases can be appealed once to a higher court. A civil case is usually initiated in a district court and can normally be appealed thereafter in one of the High Courts. Some cases which are of general public importance can be appealed to the Supreme Court as a third instance. The right to appeal the case to the Supreme Court is given by the Appeals Permission Board (*Procesbevillingsnævnet*).

Before the oral hearing (preparations)

The litigation process before the court is formally initiated when the plaintiff submits its writ of summons to the defendant's home court (as the primary rule). If the requirements of the writ of summons are not fulfilled, the court will dismiss the case as unsuitable to serve as the basis for legal proceedings. If the statement of claim is suitable, the court then sets out a deadline of two weeks for the defendant to submit its statement of defence. If the defendant does not comply with the deadline for submission, the court may deliver a default judgment in favour of the plaintiff.

After receiving the defendant's statement of defence, and in some cases after further exchange of pleadings, the court conducts a preparatory meeting between the parties for the purpose of planning the events leading up to the oral hearing, etc.

In Denmark, all civil cases are almost exclusively processed using a digital portal, www.minretssag.dk, where all pleadings, evidence, court decisions and correspondence are uploaded by both parties and the court. The Danish civil procedure system follows the adversarial procedure, which means that the courts can only make decisions based on the claims and the evidence presented by the parties.

The oral hearing before the court

The main hearing begins with a presentation of the facts of the case by the plaintiff to the court. Afterwards, the parties and witnesses are summoned to give their testimonies to the court. The party representative of the plaintiff will testify first, followed by the defendant (if relevant).

Thereafter, the summoned witness(es) will testify before the court. First, the plaintiff's witness(es) will be interviewed, and subsequently the defendant's witness(es). It is a statutory duty to give evidence as a witness, with only a few exceptions – eg, for doctors, priests or attorneys.

If experts have been appointed to give an opinion, the parties will in some cases go through and question the expert's report during the oral hearing.

Before the court renders its decision, each party must submit their oral, closing arguments before the court, followed by rebuttal and surrebuttal.

In civil cases, it normally takes up to four weeks before the judgment is complete and published to the parties.

Small claims procedure

In Denmark, there is a special form of civil procedure if a claim has a value of DKK50,000 at maximum (approximately USD6,918). The Justice Act has a separate chapter regarding the rules on small claims procedures, as the process is simplified compared to the ordinary process described above. In most of these cases, the parties do not need to engage an attorney as the court assists the parties in the preparation of the case. It is, however, possible for the court to decide that a party must be represented by an attorney.

Rules on Limitations

The Danish Limitation Act applies in general to all civil claims in Denmark, including insurance claims. There are only a few additions or regulations mentioned in Section 29 of the Insurance Contract Act, including insurance claims regarding personal injury, as in these cases the limitation period is extended to ten years, and the limitation period against an insurance company's rejection of an insurance claim cannot be shorter than a year after the company's notification that it rejects the claim in whole or in part.

The main rule for limitation of monetary claims is three years. This means that a case must be filed within three years, calculated from the earliest time a creditor could demand fulfilment of their claim. For tort claims, the calculation begins from the date of injury. The beginning of the three-year period can be suspended if the creditor does not have knowledge – and should not have had knowledge – about the claim. The period is then suspended until the creditor has been made aware of the claim. The absolute limitation of claims is ten years, calculated from the moment the damage was caused or the moment the creditor could have demanded its claim fulfilled.

If a case is brought before the Insurance Complaints Board before the limitation period, the case will not become statute-barred while the Board processes the case. When the Board's decision is complete, there is an additional deadline of one year to file the claim to the courts if the claim has not been successful before the Board. The one-year deadline runs in parallel with the regular three-year limitation period.

1.3 Alternative Dispute Resolution (ADR)

In Denmark, the main ADR methods include arbitration, mediation and court-based mediation.

Arbitration

Arbitration is one of the preferred forms of ADR in Denmark when dealing with commercial claims, including insurance claims. It is, however, mandatory that the parties – ie, the insurer and the insured – have agreed on arbitration as their method of dispute resolution.

Arbitration is often preferred in cases with professional parties on both sides. It is a more expensive resolution measure, but the process is normally quicker than before the national courts. In 2022 the average arbitration process at the Danish Institute of Arbitration was nine months for Danish cases and 14 months for international cases. See the statistics here.

Professional parties usually have the financial capacity to go through with the arbitration pro-

cess. Moreover, the Institute's rulings are not public, which means that the parties can arbitrate their dispute without public awareness.

Arbitration is also preferred within the field of construction. It is typically agreed between the parties, as it follows from standard documents such as AB18 or AB92, which are commonly used in this field.

Mediation

Over the past few years, there has been increasing focus on mediation in Denmark – both by the courts and ADR. However, mediation has still not become the preferred way of solving disputes.

Court-based mediation is offered when initiating cases, but it is not a general rule that both parties wish to proceed with such mediation.

Mediation is also offered in the DIA, which published rules on mediation in 2015. Despite the effort to promote mediation as an alternative to arbitration, mediation only constituted 4% of the cases admitted to the DIA in 2021.

However, when dealing with cases in the field of construction, it is normal for the parties (the building owner and the contractor) to agree on a standard document where definite rules on construction are set out. According to the standard document AB18, it is mandatory to start a mediation process before the parties commence an arbitration process. Mediation is therefore used regularly in the field of construction.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

The rules in the Justice Act, the Brussels I Regulation and the Lugano Convention are applicable when discussing applicable law on insurance disputes. If the parties have made special agreements on jurisdiction or choice of law in their insurance contract, these agreements are binding.

Jurisdiction

Rules on jurisdiction are stated in the Justice Act. The primary rule is that the defendant's home court in one of the 24 district courts – or in special cases, one of the High Courts – will have territorial jurisdiction (Justice Act, Section 235). If the defendant is a legal entity, the home court is where the main office is located (Justice Act, Section 238). The rules that regulate the territorial jurisdiction of the national courts are set out in Chapter 22 of the Justice Act.

The rules on jurisdiction in the Brussels I Regulation and the Lugano Convention are also applicable law in Denmark. These rules are used when one or more of the parties has a connection to an EU or EEA country.

Choice of Law

As Denmark does not co-operate with the EU on Justice and Home Affairs, it is only bound by the Rome I Regulation 2008. When dealing with insurance disputes, the Rome I Regulation has certain special rules regarding insurance contracts set out in Article 7. If the applicable law has not been chosen by the parties, it follows from Article 7 that the insurance contract will be governed by the law of the country where the insurer is habitually resident, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, in which case the law of that other country will apply.

The Insurance Contract Act Section 34 implements Article 12(2) of the Financial Distance-

Selling Directive, which regulates free choice of law to the consumer's advantage. The rules on choice of law in the Rome I Regulation are not changed or affected by this rule.

2.2 Enforcement of Foreign Judgments

The Danish enforcement court – a subdivision of the district courts – handles the enforcement of foreign judgments.

Judgments from courts within the EU or the EEA are recognised and enforced in Denmark in accordance with the Brussels I Regulation and the Lugano Convention.

In 2017, it was decided in the Danish parliament that the Hague Convention of 30 June 2005 on Choice of Court Agreements was to be implemented in Danish law. Through this change, every judgment handed down in the Hague Convention states should be recognised and enforceable in Denmark, and vice versa.

2.3 Unique Features of Litigation Procedure

Denmark is internationally recognised by the World Justice Project as having one of the best rules of law in the world. This means that a fair trial is expected and provided in all cases. The procedural rules in the Justice Act, the Brussels I Regulation, the Lugano Convention, etc, all support this perception.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

As a rule, once the parties have agreed on an arbitration procedure, the authority of the ordinary courts is limited. If the parties have agreed on arbitration, and the agreement is valid, the ordinary courts are obliged to dismiss the case.

Only a few situations give the ordinary courts authority to intervene in arbitration proceedings. For example, if the parties request the ordinary courts to appoint the arbitrators (Arbitration Act, Section 11(3)) or assess an arbitrator's impartiality (Arbitration Act, Section 13(3)).

If the insured is a consumer, stricter rules apply to the arbitration agreement. Arbitration agreements between a professional company and a consumer, entered into before a dispute arises, are not necessarily binding on the consumer.

3.2 The New York Convention

Denmark is subject to the New York Convention from 1958, and this is implemented in the Danish Arbitration Act. The New York Convention's rules on recognition and enforcement in Article V appear in the Arbitration Act in Sections 38 and 39.

According to Section 38, an arbitral award, whether issued in Denmark or abroad, can be enforced according to the rules in the Justice Act. However, Section 38 also refers to the limitations set out in Section 39, which regulate situations where an arbitral award can be refused recognition and therefore cannot be enforced according to Section 38.

The dispositive reasons to refuse enforcement and recognition in Section 39 are that:

- the arbitration agreement was invalid or one of the contracting parties lacked legal capacity under the law of the country in which they were domiciled at the time of the conclusion of the agreement;

- one of the parties was not properly notified of the appointment of an arbitrator or of the arbitration proceedings, or the party was not able to present its case;
- the arbitration concerns a dispute not included in the arbitration agreement, or that is beyond the scope of the agreement;
- the composition of the arbitral tribunal or the arbitration proceedings were not in accordance with the arbitration agreement or with the law of the country where the arbitration took place; or
- the arbitral award is not yet binding on the parties or has been disregarded or suspended by the court in the country in which it was given, or under the law of which it was given.

It is also stated that a ruling under any circumstance must be refused recognition by the court if:

- the dispute lacks arbitrability; or
- recognition and enforcement are incompatible with the legal order of the country (ordre public).

The reason for refusal is consistent with the New York Convention's Article V and both sections are to be interpreted in accordance with this. The two rules are mandatory and cannot be deviated from in the parties' agreement.

3.3 The Use of Arbitration for Insurance Dispute Resolution

As arbitration rulings are not published by the DIA, it is unfortunately difficult to answer whether arbitration is a significant form of insurance dispute resolution. In general, arbitration is commonly used in commercial matters and there is a good chance that it will be used in an insurance dispute of significant value between professional parties.

In general, the advantage of using arbitration as the dispute resolution mechanism is that the Arbitration Act gives the parties authority to "design" their process. For example, it is possible for the parties to appoint an insurance specialist as a member of the arbitral tribunal or to appoint an insurance specialist as an expert to provide an expert report.

4. Coverage Disputes

4.1 Implied Terms

The Danish Insurance Contract Act regulates the formation of insurance contracts and the rights or duties of insurance companies and policyholders. It does not contain specific terms.

The essence of the Insurance Contract Act is the parties' right to contractual freedom. However, this contractual freedom is limited in certain respects. Many of the provisions in the Insurance Contract Act are mandatory, and therefore cannot be deviated from to the policyholder's disadvantage. Also, stricter rules apply when regulating consumer relations.

4.2 Rights of Insurers

The Insurance Contract Act Sections 4–10 regulate the insurer's rights concerning the presentation of the risk prior to the inception of the policy. Deviation from these rules is not permitted.

It is fundamental that there is honesty between the contracting parties. The policyholder has a formal obligation to give all risk information – this means that it has a duty to respond and a duty of disclosure.

The duty to respond is relevant in situations where the policyholder is required to submit an insurance claim or if the insurance company

is asking specific questions relating to entering an insurance contract. Under any of these circumstances, the policyholder has a duty of disclosure. This duty is explained in Section 7 of the Insurance Contract Act, which states that any information not disclosed to the insurance company is at the policyholder's own risk. In practice, it is problematic to delimit the scale of the duty to respond. Normally it would be sufficient for the policyholder to answer the questions asked by the insurance company, without making a detailed assessment of the issues. However, when dealing with personal insurance such as life or accident insurance, there might be a stricter duty for the policyholder to respond.

According to Section 4 of the Insurance Contract Act, a contract is not valid if the policyholder fraudulently gives wrong information or withholds information which is of importance to the insurance company (bad faith). However, Section 5 of the Act states that the insurance company is liable if, at the time of effecting the contract, the policyholder did not know or could not have known that the information was incorrect (good faith).

4.3 Significant Trends in Policy Coverage Disputes

During the past 12 months, there has been an increased focus on insurance companies being anti-discriminatory.

Recently, the Insurance Complaints Board examined multiple cases considering what constitutes an accident in the context of childbirth, and whether these accidents warrant insurance coverage. Two of the cases were ruled in favour of the insured parties establishing their entitlement to insurance benefits. These verdicts stated that injuries related to childbirth were to be treated on equal terms as injuries related to any other form of physical activity.

The cases mentioned above have had an impact on insurance companies' terms of insurance coverage. In the past, women who sustained an injury during pregnancy were excluded from insurance companies' accident coverage. As now follows from case law and the Insurance Equality Act, women must not be disadvantaged due to pregnancy, childbirth or maternity leave.

The legal development underscores the shift in insurance coverage in relation to pregnancy and childbirth, highlighting the focus on fair treatment and non-discrimination within the insurance domain.

See also the Denmark Trends and Developments article in this guide.

4.4 Resolution of Insurance Coverage Disputes

There are different ways of resolving insurance coverage disputes, depending on the type of dispute.

The Insurance Complaints Board handles disputes involving consumers where a dispute concerns insurance taken out by a private individual (consumer insurance). The decision made by the Insurance Complaints Board does not have the same legal status as a judgment from the courts. It is, however, normally respected by insurance companies; if not, the decision does not prevent the parties from going to the ordinary courts.

If both parties are professionals, disputes will normally be resolved by court proceedings, ADR or internal negotiations.

4.5 Position if Insured Party Is Viewed as a Consumer

The Danish Insurance Contract Act generally does not distinguish between consumers and non-consumers. As stated in **4.4 Resolution of Insurance Coverage Disputes**, it is possible for consumers to resolve their disputes via the Insurance Complaints Board. If the dispute is brought before the ordinary courts, the courts may seek to protect the consumer as they are the "weaker" party compared to the insurance company.

4.6 Third-Party Enforcement of Insurance Contracts

Under the Insurance Contract Act, it is only possible for a third party to enforce an insurance contract under Section 95, which states that when the insured's liability towards the injured person (third party) has been proved and the amount of the damages assessed, the third party shall be subrogated into the assured's rights against the company if the third party has not obtained satisfaction for their own claim.

4.7 The Concept of Bad Faith

The concept of bad faith applies in contractual relations where a party acts intentionally or is to a certain extent negligent towards the other party.

As mentioned in **4.2 Right of Insurers**, it follows from Section 4 of the Insurance Contract Act that if a policyholder fraudulently withholds information or gives incorrect information to the insurance company, the insurance company is not liable. Section 18 of the Insurance Contract Act also states that the policyholder does not have a claim against the insurance company if they intentionally provoke the insurance event.

These rules reflect the general rule on bad faith as in the law of contracts.

4.8 Penalties for Late Payment of Claims

Penalties for late payment of claims are regulated in the Insurance Contract Act Section 24, according to which payment can be demanded 14 days after the insurance company has collected the necessary information about the insurance event for the assessment of the payable amount. If it is certain that the insurance company must pay a part of the total amount, this amount can be demanded. Payment carries interest from the time when the amount could have been demanded according to Section 24, with an annual interest rate. The annual interest rate is set out in the Danish Interest Act Section 5 and is currently around 8% per annum.

4.9 Representations Made by Brokers

Representations made by a broker are normally legally binding for the insured. The basis of the broker's work relies on the agreement of representation between the insured and the broker. The broker carries out its work on the basis of a power of attorney and a co-operation agreement, and the agreement between the parties regulates the broker's mandate, fee, liability, etc.

Insurance brokers are subject to the Danish Financial Supervisory Authority. This means that brokers must always maintain liability insurance in case of incorrect advice to clients, and therefore brokers can be liable for damages as a consequence of the advice.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Delegated underwriting and claims-handling authority agreements are common in the insurance field. However, rulings on these claims are

not often seen, or are handled internally without resorting to dispute resolution.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

In general, when the insured is covered by liability insurance, insurance companies will fund the defence of the insured if the insured is met by a claim. This also follows from the Insurance Contract Act Section 92 regarding liability insurance.

If the insured is a private person with contents insurance, boat insurance, insurance covering loss of or damage to their car, etc, the person also has legal expenses insurance, meaning that the insurance company will cover the cost of a lawsuit on private matters. The terms for legal expenses insurance may vary in each insurance policy.

5.2 Likely Changes in the Future

For some years, a growing number of companies have had special insurance needs or have required tailor-made insurance products for their insurance coverage. Therefore, it is expected that the market for such insurance products will continue to grow over the next couple of years. This is also the case with professional indemnity insurances. It is expected that the need for this type of insurance will increase, and therefore so will the number of disputes in this regard.

5.3 Trends in the Cost or Complexity of Litigation

Litigation disputes in Denmark appear to have become larger and more complex in recent years, with the consequence of increasing costs. This trend will most likely continue.

5.4 Protection Against Costs Risks

It is possible to buy protection against costs risks in Denmark, but this is not widely distributed.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

The insurers' right of action to recover sums from third parties is not regulated in the Insurance Contract Act. It is, however, common for insurance contracts to include terms in which the policyholder's claim against a third party is transported to the insurance company. This is also a general principle of law.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

As stated in **6.1 Right of Action to Recover Sums From Third Parties**, the Insurance Contract Act does not contain rules on the insurers' right to pursue third parties, and this follows from general principles of law.

However, Danish law includes specific provisions on the injured party's possibility of recovering sums directly from the tortfeasor's insurance company. Pursuant to Section 95 of the Insurance Contract Act, the injured party accedes to the tortfeasor's/insured's rights against their insurance company when the tortfeasor's/insured's obligation to compensate the injured party has been established and the amount of the compensation determined. The same applies if the tortfeasor becomes insolvent.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

In Denmark, climate change has caused residents to experience an increase in extreme weather conditions that have damaged their property or belongings. The impact of this increase in frequency is expected to be seen in the insurance industry, where cases can arise between policyholders and insurance providers, as well as across policyholders when assigning liability for consequential damages. See also the Denmark Trends and Developments article in this guide.

Furthermore, the repercussions of the Ukrainian conflict within the insurance sector remain on the not-so-distant horizon. As the conflict unfolds, it is probable that many sectors will gradually confront the losses faced throughout the conflict. Russia's incursion into Ukraine, coupled with the ensuing international sanctions imposed on Russia, are expected to launch a sequence of claims associated with the war and sanctions. Property Claims Services (PCS) has prognosticated that total insured losses within the industry from the war could surpass USD20 billion.

Moreover, the conflict could potentially give rise to claims in the business realm, including directors and officers (D&O) insurance. Directors and officers risk facing investor claims in cases where Russian assets have been written off.

7.2 Forecast for the Next 12 Months

No major changes in types of cases are expected within the next 12 months, though this depends on a variety of now-unknown factors.

7.3 Coverage Issues and Test Cases

So far, there have been no major public cases before the ordinary courts regarding insurance cases relating to climate change or the war in Ukraine.

7.4 Scope of Insurance Cover and Appetite for Risk

The increased focus on climate change and ESG has created a new market for diversified insurance products.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

From 2 August 2022, new EU rules on the implementation of environmental, social and governance (ESG) aspects will apply as a factor for insurance companies developing new insurance products in Denmark. The rules will also impose ongoing supervision of these products through product oversight and governance (POG) requirements. The purpose of the new rules on ESG is that insurance companies and other insurance facilitators that develop insurance products will have to consider sustainability factors in the product approval process, etc, for each individual insurance product distributed to clients seeking insurance products with a sustainability profile. It is therefore no longer sufficient for an insurance company to generally declare an insurance product sustainable. The new rules will apply to damage and life insurance companies and facilitators. The impact of ESG on the Danish insurance industry is further explored in the Denmark Trends and Developments article in this guide.

8.2 Data Protection Laws

Like most other industries, the newer EU regulation on Data Protection affects the insurance industry at its core. Given the substantial data volumes (including sensitive information) inherent in insurance operations, the industry has been faced with the task of updating and restructuring its systems of data storage and exchange. Another aspect of data storage revolves around the protection of data against cyber-attacks. Furthermore, the widespread influence of the Data Protection Regulation has amplified the need for insurance policies covering breaches of the Regulation and associated liabilities. This surge in demand is a direct consequence of the Regulation's sweeping impact on multiple industries, including insurance.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

As stated in **8.1 Impact of ESG on Underwriting and Litigating Insurance Risks**, the new EU rules on the implementation of ESG aspects are a significant new regulatory development.

Trends and Developments

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Bech-Bruun is a market-oriented law firm offering a wide range of specialist advisory services to large sections of the Danish corporate and public sectors, as well as to global enterprises. Counting almost 600 experienced and highly specialised employees, of which 64 are partners, it is one of Denmark's leading full-service law firms.

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The Danish insurance litigation scene is undergoing somewhat of a transformation, reflecting a blend of influences that are reshaping the industry. This article will examine some of the shifts within the industry and highlight how these shifts will in turn have an impact on insurance litigation. Insurers are not only finding their footing with the new environmental, social and governance (ESG) responsibilities, but are also pushing to keep up and offer a more diversified range of products.

Furthermore, with case law setting new precedents, the Danish industry has been pressed to reconsider its insurance terms and policies.

ESG Responsibilities

Together with achieving a far more prominent legal status, ESG has reached new levels of popularity in recent years as it provides a method of measuring companies' sustainability. Although specific valuations and methods differ depending on the data vendor, it still provides an insight into companies' sustainability that previously has not been possible.

The environmental part of ESG covers what would traditionally be thought of as sustainability – pollution, waste, greenhouse emissions, etc. The social aspect covers a business' impact on people, both internally and externally, and is closely linked with human rights. Lastly, governance relates to how the specific company is managed, the use of accurate and transparent accounting methods, compliance, and anti-bribery and anti-competitive practices.

Simultaneously, there has been a growing focus on establishing legal regulations for ESG. The EU recently introduced the Corporate Sustainability Reporting Directive (CSRD), which implements new standards and requirements for how companies disclose information about sustainability. The Directive entered into force on 5 January 2023 with additional rules tailored for various industries set to follow. Furthermore, Regulation (EU) 2021/1257 of 21 April 2021 on the integration of sustainability factors and sustainability preferences for insurers and insurance distributors, which applied with direct effect from 2 August 2022, also contains ESG requirements.

The CSRD will have a direct impact on the insurance industry, and will not only entail greater and stricter reporting requirements but will also encourage a shift towards offering sustainable solutions. The CSRD requirements will apply:

- to publicly listed companies with more than 500 employees from the financial year 2024; and
- to publicly listed companies with more than 250 employees from the financial year 2025.

Additionally, insurance companies will need to be mindful of their partnerships and collaborations, as they can also influence their own ESG ratings.

The shift holds insurance companies to new standards, and thus a lack of adaptation could affect them negatively and harm their reputations. To prevent this, it is to be expected that insurance companies will start to launch sustainable initiatives, such as alternative ways of insuring their clients. Instead of merely replacing items, they could offer options for repair or recycling. For instance, if an industrial machine malfunctions, rather than acquiring new parts, they might suggest using recycled components. This approach benefits both the environment and the customer's ESG rating, making it appealing to companies aiming for greater sustainability.

However, when a sustainable solution incurs greater costs, questions arise about who will bear the financial burden. When damage occurs, the insurance company could face the dilemma of paying out the insurance sum and fixing the damage in the most cost-effective way, or delivering a solution that is more sustainable and that will provide a higher ESG rating. If insurance premiums are already fixed, the company might need to absorb the additional costs to enhance its ESG rating. Conversely, new customers might be presented with more sustainable insurance options, albeit at a higher premium.

Regulation (EU) 2021/1257 of 21 April 2021 stipulates that insurance companies cannot simply claim that their products are sustainable. Instead, it requires that they review their customers' own goals, needs and ESG goals. The aim is to achieve conformity with a customer's sustainability profile, as well as to be transparent about which factors of the product are sustainable. Furthermore, the Regulation discourages insurance companies from "greenwashing" the insurance products they offer.

From the perspective of the insured, the new ESG requirements prompt a need to consider whether their insurance providers will cover the expenses linked to sustainable restoration – even if it comes with a higher cost.

Furthermore, as many Danish companies find themselves obligated to follow the newly established CSRD regulations, a surge in demand for insurance policies that provide coverage for potential liabilities and damages is sure to follow. These types of policies will be relevant in situations where companies fail to meet the stipulated reporting requirements. The rationale behind this is that failure to meet ESG objectives and to fulfil reporting mandates could affect a given company's reputation, and thus pose a risk to its share price. Consequently, this could lead to the emergence of claims seeking compensation for incurred damages.

However, it remains uncertain whether the coverage provided by standard operational loss insurance in cases of breaches of the current reporting standards will cover such damages, or whether new insurance policies will be required.

Nonetheless, the introduction of legal regulation is expected to generate a heightened demand for safeguards against non-compliance with its provisions, as well as more claims for damages stemming from ESG-related issues. Similarly, it is expected that insurance providers will diversify their coverage.

Climate Change

With the ongoing challenge of climate change, it has been increasingly relevant to consider physical risk exposure to natural disasters. The insurance industry is highly familiar with the consequences of unanticipated events, and the increase in natural disasters means the industry must prepare for more events to come. In Denmark, this mainly pertains to belongings and valuables damaged in storms, torrential rain or flooding.

The Danish Meteorological Institute has stated that Danish citizens can expect more extreme weather conditions in future, and for these to occur more often. This poses a threat not only to properties and the valuables stored therein, but also to production and supply chains. The weather conditions and subsequent damages will in turn press insurance premiums higher.

This changing landscape has a direct connection to the evolving Danish insurance litigation scene.

As the instances of natural disasters become more frequent, insurance-related legal cases might take on new dimensions, raising questions about coverage adequacy, assignment of responsibility for the damages, and how claims are resolved in this changing climate reality.

These changes may also push insurance companies to invest in solutions that mitigate climate-related damages. This would not only enhance their ESG rating but might also curb the frequency of insurance claims triggered by climate-induced incidents. Ultimately, ESG's transformative influence calls for insurance companies to recalibrate strategies, aligning with both regulatory shifts and with changing climates.

W&I

Warranty and indemnity (W&I) insurance has gained considerable traction, especially in transactions involving international buyers and sellers. As a relatively new offering in the Danish market, W&I insurance is evolving based on practical experiences and significant claims. Often utilised by private equity funds, W&I insurance allows such funds to meet investor obligations and efficiently manage purchase price allocation.

W&I insurance safeguards against financial losses arising from breaches of warranties in transfer agreements. However, it does not guarantee issues already known to the buyer through due diligence. Policies address undisclosed conditions that are uncovered post-closing.

This insurance model offers sellers the advantage of providing buyer guarantees without retaining a portion of the purchase price. It thus helps to facilitate a "clean exit", and enables buyers to address claims primarily with the insurer, fostering a co-operative buyer-seller relationship.

Although W&I insurance can help to streamline the transaction process, insurance companies can be expected to increase their requirements and demands regarding the complexity of the due diligence procedure as a prerequisite for coverage. Parties should, therefore, always consider a W&I insurance's suitability for their transaction, weighing benefits against costs.

Recent Case Law Regarding Damages Sustained During Childbirth

How insurance companies and the courts precisely define what constitutes an accident has traditionally been a contentious subject. Recently, Danish case law has delved into the nuances of what constitutes an accident in the context of childbirth. In two distinct cases, the Danish Insurance Appeals Board examined the question of whether injuries sustained during childbirth could be considered accidents warranting insurance coverage.

In both cases, the women had initially been denied insurance coverage for injuries sustained during childbirth. In response, they brought their cases before the Insurance Appeals Board, which ultimately ruled in favour of the insured parties, establishing their entitlement to insurance benefits. Naturally, injuries sustained during childbirth could potentially be relevant for a substantial number of individuals each year.

The insurance companies claimed that such injuries from childbirth did not fall under the definition of an accident within the field of insurance. Rather, they contended that such injuries should be assessed in light of what could reasonably be expected as part of a typical childbirth process. For instance, in one of the cases the insur-

ance company justified the denial of coverage by arguing that pressure and pushing on the surrounding bones are necessary, natural and unavoidable.

Nonetheless, the board ruled in favour of the plaintiffs, and the case marked a paradigm shift. These verdicts established a precedent whereby injuries that occur in connection with childbirth or pregnancy are to be treated on par with injuries resulting from any other form of physical exertion. This stands in contrast to the legal position prior to the cases, where women who sustained an injury during pregnancy were excluded from insurance companies' accident coverage. Moreover, permanent injuries resulting from pregnancy had historically not been covered by insurance policies.

However, the terms of insurance coverage have subsequently changed, which can be attributed to the recent cases. As now follows from case law and the Insurance Equality Act, women must not be placed at a disadvantage due to pregnancy or maternity leave.

These pivotal cases followed in the footsteps of cases in 2021 before the Board of Equal Treatment, which ruled on the initial case concerning insurance and pregnancy. There, the insurance companies were found to have breached the Equal Treatment Act for Insurance by excluding insurance coverage in cases of pregnancy. Following these proceedings, 14 insurance companies were reported to authorities for gender discrimination, leading to subsequent fines being imposed on all 14 companies.

The legal development underscores the shift in insurance coverage in relation to pregnancy and childbirth, highlighting that insurance companies must be attentive to exercising fair treatment and non-discrimination in their practice of policies.

Recent Landmark Decisions Regarding Change-of-Ownership Insurance

In a recent case between two prominent Danish insurance companies, the Danish Eastern High Court ruled on an issue regarding dual coverage within home and property insurance. The case concerned the questions of whether a specific claim was covered both by a house insurance policy and by a change-of-ownership insurance policy. Additionally, the case explored whether the provisions related to dual insurance in Sections 41–44 of the Insurance Contract Act applied to change-of-ownership insurance policies, necessitating a division of claimed costs between the insurers.

Traditionally, the insurance industry has maintained that, in such instances, the home insurance policy should address any subsequent damages covered by both policies. However, in its judgment, the Eastern High Court established that the particular damage was eligible for coverage both under the home insurance and under the change-of-ownership insurance. Consequently, the court concluded that damages covered by both types of insurance could potentially fall within the scope of the Danish Insurance Contract Act's regulations on dual insurance. The Eastern High Court thus ruled in favour of the house insurer that the costs of the specific damage should be divided between the two insurance companies.

The decision sets a new precedent for the entire housing insurance industry and, furthermore, presents the substantial risk that the change-of-ownership insurance company might seek reimbursement from the house insurance company for all the years during which they

failed to contribute their portion of compensation in instances of dual coverage. The decision may also lead to a sharp increase in the prices for change-of-ownership insurance.

GERMANY

Law and Practice

Contributed by:
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Contents

Kennedys is a global law firm with expertise in dispute resolution and advisory services, and over 2,300 people in 24 countries around the world. The firm handles both contentious and non-contentious matters and provides a range of specialist legal services, including corporate and commercial advice, but with a particular focus on defending insurance and liability claims. Defendant claims work is at the heart of Kennedys' practice, and accounts for more than half of the firm's business. This is a global practice with unsurpassed capabilities and expertise that can deal with any type of claim in any country, from high-volume or catastrophic personal injury claims, to settling the largest multibillion-dollar property, casualty, financial lines, marine or aviation claims.

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Kennedys

1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

Insurance disputes in Germany are governed by the same rules as other civil law disputes, namely the Civil Procedure Rules (*Zivilprozessordnung*).

1.2 Litigation Process and Rules on Limitation

The Litigation Process

The litigation process in Germany is fairly contained.

Pleadings are comprehensive and append any documents relied on. They also provide the identity of any witness and identify the category of any expert evidence the party wishes to rely on.

Following exchange of pleadings, the court will consider which witnesses it needs to hear from and/or expert evidence it needs to take and will make the appropriate orders.

Appeals are common in Germany.

Unlike in many other jurisdictions, it is incumbent on the court to actively explore settlement options with the parties in court.

Rules on Limitation

The general limitation period is three years, beginning at the end of the year in which the claim comes into existence, see Section 195 of the German Civil Code (BGB). Where a claim is notified to insurers, limitation is suspended until the insurer communicates its decision on the claim in writing, see Section 15 of the Insurance Contract Act (VVG).

1.3 Alternative Dispute Resolution (ADR)

The German Civil Procedure Rules impose a duty on judges to explore settlement options between the parties. As a result, parties are encouraged to settle their dispute in court and formalised ADR, such as mediation, which runs parallel to court proceedings, is far less common than it is, for example, in England and Wales.

Consumers can refer coverage issues to the insurance ombudsman. Such referrals are free of charge for the consumer.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Jurisdiction

Articles 10–16 of the Brussels Regulation (recast) provide the framework for insurance disputes with a European cross-border element.

Roughly speaking, those rules provide that an insured party can sue the insurer at its own or the insurer's domicile or branch in the EU, or at the place where the harmful event occurred. The insurer can sue the policyholder, insured party or beneficiary only at the place of that party's domicile.

There are restrictions on choice of jurisdiction. Article 16 clarifies that those restrictions will not apply to certain types of insurance, such as marine, cargo, and large risks.

For cross-border disputes outside the remit of the Brussels Regulation (recast), and where the defendants are based in Switzerland, Norway or Iceland, the Lugano Convention will apply, containing similar rules.

In all other cases, the German Civil Procedure Rules, together possibly with international treaties, and Section 215 of the Insurance Contract Act will provide the German courts with the answer as to whether they can accept jurisdiction. Overall, that framework is roughly similar in that it also provides jurisdiction at the place of domicile of the policyholder/insured party, albeit with exceptions.

Choice of Law

Germany applies Regulation (EC) 593/2008 ("Rome I"). Its Article 7 sets out which law governs contracts covering large risks – whether or not the risk covered is situated in an EU member state – and which law applies to all other insurance contracts covering risks situated inside the territory of the member states. Rome I does not apply to reinsurance contracts.

Large Risks

Parties to an insurance contract covering large risks can freely agree which law should govern the contract.

If the parties do not choose the applicable law, the insurance contract will be governed by the law of the country where the insurer has its habitual residence, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, in which case the law of that other country will apply.

Risks Other than Large Risks

Parties to other insurance contracts are restricted in their choice, in that the chosen law can only be one out of a set number of options favouring the place where the risk or policyholder is situated.

Where the parties do not choose the law, the law governing the contract will be the law of the member state in which the risk is situated at the time of conclusion of the contract.

Reinsurance Contracts

Parties to reinsurance contracts are free in their choice of law.

2.2 Enforcement of Foreign Judgments

Foreign judgments against insurers follow the same regime as other foreign civil law judgments.

Judgments from other EU countries will be recognised pursuant to Regulation (EU) No 1215/2012.

For judgments emanating from Iceland, Switzerland and Norway, the Lugano Convention will apply.

Where the EU Regulation does not apply, and where no international treaty provides different requirements, the recognition of foreign judgments will be governed by Section 328 of the German Civil Procedure Rules and their enforcement by Sections 722 and 723 of the German Civil Procedure Rules.

Pursuant to that domestic regime, a foreign judgment will be recognised and subsequently enforced if:

- the foreign court had jurisdiction;
- the defendant was notified of the foreign court proceedings in such a manner as to enable it to properly defend the claim;
- the judgment is not irreconcilable with another judgment;
- the judgment does not violate essential principles of German law; and

- there is reciprocity – ie, the state from which the judgment emanated would likewise enforce a German judgment.

2.3 Unique Features of Litigation Procedure

Features of the German Civil Procedure Rules which may come as a surprise to foreign parties include the following.

- Each individual court hearing can be the final hearing if the court decides that it does not require (further) factual evidence. In other words, any "early" or "preliminary" hearing can in fact be the hearing in which, or following which, judgment is rendered.
- Judges are under a statutory duty to explore settlement avenues and might sketch out the terms of settlement, taking into account the strength of the parties' pleaded cases and evidence already obtained at that point. In high-profile cases, a court's settlement proposals will often be reported in the media, increasing pressure on the parties to accept such terms.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

German courts will reject jurisdiction to hear a dispute if they find that the parties had validly agreed to refer the dispute to arbitration.

3.2 The New York Convention

Germany is a party to the New York Convention, with no reservations.

Therefore, foreign arbitral awards are recognised and enforced in Germany unless a party establishes that one of the grounds for refusal listed in Article V of the New York Convention applies.

In order to enforce a foreign arbitral award, an application must first be made to the Higher Regional Court (*Oberlandesgericht*) for the judicial district where enforcement is sought.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Prevalence of Arbitration Agreements for the Resolution of Insurance Disputes

Arbitration is commonplace in reinsurance but less commonly seen in direct insurance, where one would expect to see arbitration agreements typically only in large international programmes and, to some extent, in financial lines policies.

Given restrictions on arbitration agreements with consumers, mass insurance policies will not contain arbitration clauses.

Rules Governing Arbitration

Sections 1025 to 1066 of the German Civil Procedure Rules set out the legal framework that applies to all arbitrations that have their place of arbitration in Germany. The parties may agree to submit themselves to the rules of, for example, the German Arbitration Institute (DIS), or similar institutions which provide more detail.

Confidentiality

There is no provision imposing the confidentiality of arbitration in the German Civil Procedure Rules. So, while arbitrations are not public, the parties will not be bound by a duty of confidentiality as a matter of statutory law. That said, the DIS Rules, as well as other comparable rules, do contain confidentiality provisions. Where none of those rules apply, it is common to agree confidentiality between the parties.

Appeal

There is no appeal against an arbitral award. However, Section 1059 of the German Civil Procedure Rules provides some limited grounds for setting aside an arbitral award – eg, where the award strays outside the remit of the arbitration agreement.

4. Coverage Disputes

4.1 Implied Terms

German law implies terms from various different statutes into contracts, including contracts of insurance.

The most important provisions that affect contracts of insurance are contained in the BGB and, more specifically, the VVG.

Various provisions in the BGB and VVG will be implied if the contract of insurance is silent on particular issues. The VVG also contains many norms which will apply to the contract of insurance and from which the parties may derogate only to the advantage of the insured party in its specific contract, but not to its disadvantage.

Provisions in contracts of insurance are also subject to reasonableness tests under Sections 305 et seqq of the BGB.

4.2 Rights of Insurers

Pursuant to the provisions of the Insurance Contract Act, the policyholder is under an obligation prior to the inception of the policy to disclose to the insurer all risk circumstances that are relevant for the insurer's decision to conclude the contract with the agreed content. However, the policyholder only needs to respond to questions put to it in so-called text form. It does not need to give information for which it is not asked.

If the policyholder breaches that obligation, the remedy will depend on the severity of the breach. The insurer may step back from the contract of insurance, or, if the policyholder acted merely with a minor degree of negligence, the insurer may terminate the contract or amend its terms.

4.3 Significant Trends in Policy Coverage Disputes

Over the last 12 months, as has been the case for the last two years, the courts have had to consider the scope of insuring clauses in infectious disease cover policies, namely business closure insurance policies, to decide whether losses related to COVID-19 were covered under those policies, see **7.3 Coverage Issues and Test Cases**.

Beyond such case law, there have been no particularly noticeable trends over the past 12 months.

4.4 Resolution of Insurance Coverage Disputes

Insurance disputes may be litigated. However, overall, coverage disputes are far less common than they are, for example, in the London market. One reason might be that most of the wordings used on the German market follow long-standing model wordings where the understanding of how the clauses operate is fairly settled among market practitioners.

There is no reinsurance coverage litigation. Parties to reinsurance contracts will refer matters to mediation or arbitration, if necessary. Most reinsurance issues are, however, settled without recourse to formal means.

4.5 Position if Insured Party Is Viewed as a Consumer

Consumers can refer coverage disputes to the insurance ombudsman, and will do so if no agreement can be found with the insurer. To be able to file a complaint with the ombudsman, the insurer in question needs to be a member of the Insurance Ombudsman Association, which German insurers generally are. Furthermore, the consumer must have raised a complaint with the insurer first, at least six weeks before referring the matter to the ombudsman, and the complaint must not have a value exceeding EUR100,000.

4.6 Third-Party Enforcement of Insurance Contracts

Third parties cannot normally enforce an insurance contract or sue an insurer directly.

There are exceptions to this general principle for mandatory insurance only, where Section 115 of the Insurance Contract Act provides the basis for direct claims against insurers:

- where the claim is for performance of an insurance obligation pursuant to the Compulsory Insurance Act (eg, motor insurance);
- in the case of insolvency of the insured party; or
- where the insured party's whereabouts are unknown.

4.7 The Concept of Bad Faith

While principles of good faith are implied into all contracts, Germany does not have a concept of bad faith in its laws.

4.8 Penalties for Late Payment of Claims

If the insurer does not fulfil its obligation to pay after a reasonable period of time, the insurer will be obliged to pay for the damage caused by the delay. The damage caused may include the fee for the lawyer reminding the insurer of its obligation to pay.

4.9 Representations Made by Brokers

The broker represents and acts for the insured party as its agent. If the insurance broker exceeds the scope of its instructions, the insured party will normally be bound by representations made by the broker and may be able to take recourse against the broker where appropriate. However, if the broker in fact acted as the insurer's agent, then the insurer will also be treated as if the broker had been instructed by the insurer as its agent rather than as the insured party's agent. In such cases, knowledge or misrepresentations of the broker will be attributable to the insurer (see OLG Karslruhe, 2 August 2011 – 12 U 173/10).

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Germany has various types of insurance intermediaries. Section 59 of the Insurance Contract Act defines an "insurance agent" as anyone who is entrusted by an insurer or by another insurance agent on a professional basis to negotiate or conclude insurance contracts.

Insurance agents are common across all lines of business. A sub-type of insurance agent is the *Assekuradeur*. Originally, the term stood for an insurance agent acting for multiple insurers mainly active in marine insurance. Nowadays, an *Assekuradeur* typically has far-reaching underwriting authority not only in marine insurance, but also property insurance and has the right to collect premiums, underwrite risks and settle claims on behalf of the insurer.

Delegated claims handling is less common than in many other markets.

While such arrangements have given rise to litigation, primarily around calculation and payment of agents' provisions, the German courts have seen far more litigated cases relating to the role and scope of duties of the insurance broker – ie, the intermediary who acts and concludes the insurance contract on behalf of the insured party (see **4.9 Representations Made by Brokers**).

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

Insurers have a duty to fund the defence in all types of liability insurance. The insurer's general obligations are set out in Section 100 of the Insurance Contract Act. Lawyers' fees, court fees, out-of-court fees and legal expenses are generally covered, provided the costs incurred are reasonable.

5.2 Likely Changes in the Future

No change is expected in relation to the funding of defence costs.

5.3 Trends in the Cost or Complexity of Litigation

Court and lawyers' fees in litigation follow fixed scales that seek to ensure that the cost of pursuing or defending a civil claim is proportionate to the value at stake. The scaled fees are amended from time to time.

5.4 Protection Against Costs Risks

Protection against costs risks is readily available and legal expense insurance is very common in Germany. The German data company Statista reported the existence of 23.1 million legal expense insurance policies in 2020 – in a country with 83 million inhabitants and 45.5 million households.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

Where and to what extent an insurer pays under an insurance policy is regulated by the German Insurance Contract Act, which provides for an automatic statutory assignment to the insurer of any claim the insured party may have against third parties in respect of the loss.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

The insurer's right to pursue third parties is set out in Section 86 of the German Insurance Contract Act, which provides for the assignment to the insurer. The provision also imposes a duty on the policyholder to protect the claim against the third party and to assist the insurer in pursuing it.

The claim by the insurer against the third party is pursued in the insurer's own name. Where there is a combination of insured and uninsured losses, insurer and insured will therefore appear as co-claimants.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

The impact of macro-economic factors such as COVID-19 or the war in Ukraine on litigation, including insurance-related litigation, has been surprisingly contained. That said, the courts have seen a number of cases relating to business closure insurance – see **7.3 Coverage Issues and Test Cases**.

7.2 Forecast for the Next 12 Months

Emergency legislation that sought to contain the economic impact of the COVID-19 lockdowns meant that companies' duty to file for insolvency, where such insolvency was due to the effects of COVID-19, was suspended, in some cases until 30 April 2021. Although such businesses were typically able to access other relief, which was kept in place until 30 September 2021, it was expected that Germany would see an increase in insolvencies in the following months. Overall, the number of insolvencies has, however, stayed behind 2019 levels. It remains to be seen whether the impact of fuel prices and inflation can be managed similarly.

7.3 Coverage Issues and Test Cases

In light of the pandemic, the courts had to grapple with the scope of cover granted by one particular type of insurance cover, namely that of business closure insurance policies. These policies had been sold primarily to businesses that provide food on their premises, including healthcare providers, nurseries and restaurants.

Several cases were presented in the courts, with mixed results.

The key question in these cases was whether reference to diseases and/or pathogens listed in the German Infectious Disease Protection Act ("the Act") was sufficient. The Act's lists contain various pathogens and diseases but did not contain SARS-CoV-2/COVID-19 until 23 May 2020. From 1 February 2020 until 22 May 2020, a regulation – but not the Act itself – stated that the new pathogen and disease were equivalent to those listed in the Act. Before then, there was obviously no mention of either.

Insuring clauses in infectious disease policies came typically:

(a) with a specific list of pathogens and/or diseases – to the exclusion of others;
(b) with a "static" reference to the Act's lists – ie, to the lists as of a particular date; and
(c) with a "dynamic" reference to the Act's lists – ie, to the lists as applicable at any given time, meaning the number of pathogens/diseases covered by the policy could change during the policy period.

It is now settled that insurance policies with clauses of type (a) above did not provide cover.

On the basis that a reasonable policyholder would not understand the subtleties of static or dynamic references, the courts have typically found for insured parties when interpreting clauses of type (b) and (c) above, although there have been conflicting decisions.

Eventually, on 26 February 2022, the Federal Court of Justice found for insurers in a case involving a static reference.

In its second ruling from January 2023, the Federal Court of Justice stated that dynamic reference can be understood by the insured to mean that either the situation at the time of the conclusion of the contract or at the time of the occurrence of the insured event applies. Thus, policyholders were entitled to compensation for the period of the second lockdown.

7.4 Scope of Insurance Cover and Appetite for Risk

In response to the emerging court decisions on the scope of business closure insurance, the German Insurance Association (GDV) published new model conditions for such policies. Pursuant

to these new model terms, only closure of a business because of individual administrative orders to prevent the spread of local infection will be covered. The new wording makes it abundantly clear that closure as a result of a national or statewide shutdown of businesses ordered by general administrative decree is not covered.

German cargo transport insurers have reacted to the pandemic with new exclusion clauses that use the administrative decree or declaration rather than the outbreak of a disease as the basis of the exclusion.

The German insurance market has also reported a higher demand for cyber-insurance products – partly as a result of an increase of working from home

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

Picking up, as it does, losses that are the result of climate events, the insurance industry has by its nature been at the heart of the discussion around climate change, and underwriting decisions have been encouraging/discouraging behavioural patterns in that respect for many years.

It is expected that the increasing frequency of extreme weather events will bring significant financial burdens for the German economy in the coming years. The German Institute for Economic Research (DIW) estimates costs of almost EUR290 billion by 2050.

On 14 April 2021, the German Actuarial Society published its report on the actuarial implications of climate change. It collates information on how climate change affects motor, liability, property, credit, and speciality risks.

The report highlights how the effects of climate change on insurance do not only vary from region to region, but how different facets of climate change affect different lines of business to varying degrees and therefore need to be taken into account in some form in all lines of business. For instance, rising average temperatures and the increase in days of extreme heat affect health insurance (increased incidence of illness), life insurance (risk increase for insurance with mortality risks, risk reduction for insurance with longevity risks) and property/casualty insurance (eg, crop failures).

Climate change has had less of an impact on litigation as such, although there have been some significant cases in this field. For instance, the Federal Constitutional Court ordered the German legislature to correct and to significantly tighten up existing climate law provisions.

8.2 Data Protection Laws

The General Data Protection Regulation (GDPR) became effective on 25 May 2018 and sets uniform data protection rules across all EU member states. In Germany, the GDPR was implemented into domestic law through the German Federal Data Protection Act. For insurers, Article 82(1) has given rise to data protection disputes. Article 82(1) provides that any person who has suffered material or non-material damage as a result of a GDPR infringement has the right to receive compensation from the controller or processor in respect of the damage suffered. There has been a series of individual court decisions on the application of Article 82(1) GDPR, albeit with mixed outcomes, with some courts awarding compensation for non-material damages. For

insurers, the risk of collective data protection litigation is expected to increase as Germany implements the EU Representative Actions Directive – which sets minimum standards for collective redress across EU member states – into domestic law.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

Brexit has seen various UK insurers establish subsidiaries in the EU. The German Insurance Association reported on 21 December 2020 that 35 UK insurers had founded branches in the EU and an estimated 29 million insurance contracts had at that point in time been transferred to the new offices, including German ones.

On 10 December 2020, amendments to the German Insurance Tax Act came into force. The overall effect is expected to be an increase in administrative burden for insurers and higher tax rates for policyholders with affiliates outside the EEA.

HONG KONG SAR, CHINA

Law and Practice

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Contents

Kennedys established its Hong Kong office in 2000, and this has since grown to ten partners and more than 27 lawyers. The office is part of a growing network of over 2,300 people from 64 offices and associated offices across Asia Pacific, the UK and Europe, the United States and Bermuda, Canada, Latin America and the Middle East. Kennedys is a first-choice firm for large and complex insurance and reinsurance disputes in the market, in particular those with a multi-jurisdictional dimension. The firm excels in work that is high value, high profile, precedent-setting and important to the industry as a whole, and handles many of the market's biggest and most significant insurance disputes. The team regularly advises on coverage and monitoring in respect of large-scale regulatory investigations and litigation against directors and officers, and financial institutions, supervising multiple defence teams and reporting to multiple stakeholders.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

The Insurance Complaints Bureau (ICB) handles complaints from policyholders arising from personal insurance contracts of a monetary nature by way of mediation.

Policyholders are not bound to refer their disputes or complaints to the ICB. If they choose to litigate or arbitrate their case instead, the ICB does not have jurisdiction unless and until those proceedings are resolved.

There is no specialist insurance court or civil litigation procedure for resolving insurance disputes. The Hong Kong International Arbitration Centre has no specialist rules for these disputes, although it provides a list of arbitrators, some of whom have specialist insurance knowledge.

1.2 Litigation Process and Rules on Limitation

There is no special process for insurance litigation; general civil procedure rules apply to insurance litigation.

Limitation periods are governed by the Limitation Ordinance (Cap. 347 of the Laws of Hong Kong). Under a liability policy, the insured generally has six years to issue proceedings against the insurer. The time starts to run from the date liability is established by a judgment, arbitral award or binding settlement. However, the parties can agree to a shorter or longer limitation period, and the courts generally enforce such an agreement.

1.3 Alternative Dispute Resolution (ADR)

ADR is prevalent and encouraged in Hong Kong. Arbitration is a popular form of ADR for insurance disputes. With the introduction of the Civil Justice Reforms in April 2009, there has been a greater focus on the early settlement of disputes, particularly through mediation. The most common ADR method used to settle insurance claims is, however, arbitration.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

There are no specific provisions regulating the choice of forum, venue or applicable law clauses in insurance contracts. The usual common law principles apply, in that such clauses will be recognised, provided they are not considered by the courts to be unfair or unreasonable.

In the absence of a choice of forum, Hong Kong courts would consider the system of law with which the transaction has the closest and most real connection as the applicable law.

2.2 Enforcement of Foreign Judgments

Foreign judgments may be enforced in Hong Kong pursuant to the following.

Statutory Registration Schemes

The Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap. 319 of the Laws of Hong Kong) and Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap. 597 of the Laws of Hong Kong) provide statutory registration schemes that facilitate reciprocal recognition and enforcement of foreign and Mainland China judgments respectively.

Common Law

Other foreign judgments may be enforced by way of common law action. In a common law action for enforcement of a foreign judgment, the judgment creditor has to prove that the foreign

judgment is a final judgment conclusive upon the merits of the claim. Such a judgment must be for a fixed sum and must also be delivered by a "competent" court as determined by private international law rules.

2.3 Unique Features of Litigation Procedure

Hong Kong courts follow the previous decisions of courts of the same or a higher level. For example, judgments of the Hong Kong Court of Final Appeal (CFA) are binding upon the High Court as the CFA is a higher level court than the High Court.

Judgments of the UK Privy Council delivered before 1 July 1997 in cases on appeal from the Hong Kong courts have, to the extent they are consistent with the Basic Law, the same status as judgments of the CFA.

In addition, case law from other common law jurisdictions, including England and Wales, Australia and New Zealand, is frequently referred to in insurance disputes in Hong Kong, even though Hong Kong courts are not bound by them.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Arbitration clauses in insurance and reinsurance agreements are generally enforceable by the parties, provided that the obligation to arbitrate is expressed in unqualified and mandatory terms.

3.2 The New York Convention

The New York Convention extends to Hong Kong by reason of Mainland China being a party to the New York Convention. Arbitral awards made in jurisdictions that are signatories to the New York Convention can therefore be enforced in Hong Kong in the same manner as a judgment, upon a successful court application.

Meanwhile, the Arrangement Concerning Mutual Enforcement of Arbitral Awards that has been entered into between Mainland China and Hong Kong sets out the framework for enforcement of arbitral awards of Mainland China in Hong Kong.

The Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong) governs the enforcement in Mainland China of arbitral awards made in jurisdictions that are signatories to the New York Convention, as well as awards in jurisdictions that are non-signatories to the New York Convention.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Arbitration is a prevalent form of insurance dispute resolution in Hong Kong across all lines of insurance, but particularly where the amount in dispute is significant, given the need for the parties to fund arbitration and tribunal fees.

The drafting of the Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong) was largely based on the UNCITRAL Model Law. It includes a number of additional provisions that supplement or modify the UNCITRAL Model Law, including provisions on confidentiality.

Generally, arbitration proceedings in Hong Kong are private and confidential, unless the parties agree otherwise.

While an arbitral award is generally final and binding, it may be challenged if the court is satisfied that the conditions set out in Schedule 2 to the Arbitration Ordinance have been met. The

court also has the power to set aside an arbitral award on procedural or public policy grounds under Section 81 of the Arbitration Ordinance.

4. Coverage Disputes

4.1 Implied Terms

A duty of utmost good faith is specifically incorporated into marine insurance contracts (Section 17, Marine Insurance Ordinance (Cap. 329 of the Laws of Hong Kong)) and also applies to all other Hong Kong insurance contracts. This duty means that the insured must disclose to the insurer all facts of which the insured is aware (and of which the insurer is not aware or deemed to be aware) which may affect the insurer's decision to enter into the insurance contract or the terms on which it is prepared to do so. It also means the insured:

- must not make misrepresentations before entering into the insurance contract (English legal misrepresentation principles apply); and
- must avoid material non-disclosure.

Breach of this duty allows the insurer to avoid the policy (provided it establishes inducement to enter into that policy by a material false statement). While in many jurisdictions the availability of this draconian measure has been removed or amended by legislation, in Hong Kong, there has been no such legislative reform and it is still possible for an insurer to avoid the policy.

The insurer owes the same duty to the insured (although under the scope of that duty, it is harder to define what is material to the insured).

Other terms implied into an insurance contract are:

- the insured must have an insurable interest;
- the existence and identification of the subject matter of the insurance; and
- the insurer's subrogation rights.

An insurer cannot exclude or limit its liability for the actions of its appointed insurance agent in the agent's dealings in respect of the issuance of an insurance contract and insurance business relating to that contract (Section 68(2) of the Insurance Ordinance (Cap. 41 of the Laws of Hong Kong)).

4.2 Rights of Insurers

See **4.1 Implied Terms**.

4.3 Significant Trends in Policy Coverage Disputes

While not necessarily a feature available under Hong Kong law, there has been an increase in the number of claims by policyholders for entity cover under Hong Kong policies in respect of actions commenced by shareholders, who dispute the adequacy of a merger's share price, under either Delaware law or Cayman Islands law, for the appraisal of the fair value of their shares sold by merger.

There have also been a number of directors' and officers' liability (D&O) insurance coverage disputes in Hong Kong in this regard. However, unlike in the US, these cases are mostly arbitrated and the arbitral awards, and the rationale behind them, do not reach the public domain.

4.4 Resolution of Insurance Coverage Disputes

The principal dispute resolution methods used to settle insurance and reinsurance claims are arbitration and litigation.

4.5 Position if Insured Party Is Viewed as a Consumer

See **1.1 Statutory and Procedural Regime** with respect to the ICB.

The position is otherwise no different where the law views the insured party as a consumer.

4.6 Third-Party Enforcement of Insurance Contracts

Under common law, where a person (the insured) is insured against liabilities to a third party, that third party cannot claim directly against the insured's liability insurer. If the insured is insolvent, the insurance proceeds will form part of the insured's assets and the third party will have to prove that they are an unsecured creditor in that insolvency.

However, the Third Parties (Rights Against Insurers) Ordinance (Cap. 273 of the Laws of Hong Kong) allows a third party to claim directly against the insured's liability insurer, by transferring the insured's rights against the insurer to, and vesting them in, the third party if:

- the insured is an individual who has become bankrupt; or
- the insured is a company that has had a winding-up order made against it, or its members have passed a resolution for a voluntary winding-up (unless for the purposes of reconstruction or amalgamation), a receiver or manager has been appointed to take control of its property or a debenture holder has taken possession of its property as subject to a floating charge; and
- before or after the bankruptcy or insolvency event in question, the insured has incurred a liability to the third party.

The CRTP

The Contracts (Rights of Third Parties) Ordinance (Cap. 623 of the Laws of Hong Kong) (CRTP) provides that if a term of a contract expressly, or under proper construction, purportedly grants benefits to a third party expressly identified in the contract, the third party can enforce the terms of the contract against the parties to the contract, provided the parties have not expressly excluded the application of the legislative scheme.

The CRTP applies to an insurance contract, but an insurer can expressly exclude the application of the CRTP. If an insurer does not expressly exclude the application of the CRTP, however, a third party that is granted a benefit under that policy can, despite not being a party to the policy, directly enforce the term of the policy granting that benefit against the insurer. The insurer is entitled to raise the same defences and claim the same set-off rights which would have been available to it had the insured brought the action seeking to enforce that term of the policy.

Many types of insurance policies (eg, third-party liability motor insurance policies) confer benefits on third parties, so insurers will often expressly exclude the application of the CRTP.

4.7 The Concept of Bad Faith

A contract of insurance in Hong Kong is based on the principle of utmost good faith. A duty of good faith is imposed on both parties to an insurance contract; however, these good faith duties are significantly more onerous for the

insured than they are for the insurer. See **4.1 Implied Terms**.

There are no actionable damages in Hong Kong for breach of an insurer's duty of good faith, including acting in bad faith; however, depending on the circumstances of that breach, an insured may be entitled to remedies for deceit or misrepresentation.

4.8 Penalties for Late Payment of Claims

An insurer is not liable for any loss or damages for paying claims late under Hong Kong law. However, the Insurance Authority may take regulatory action if it receives complaints indicating perpetual late payment of claims by an insurer.

4.9 Representations Made by Brokers

An insured is bound by representations made by its broker within the scope of the broker's authority.

There are four types of authority recognised at law:

- actual authority;
- usual authority;
- apparent authority or agency by estoppel, which arises if the broker exceeds its actual or usual authority, but the insured has made a representation to the relevant third party to the effect that the broker has the authority to perform the act concerned; and
- authority gained from custom or trade usage.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Delegated underwriting or claims handling authority arrangements are used but are not common in Hong Kong. While disputes do arise out of such arrangements, they seldom reach the public domain in Hong Kong as they are generally resolved by the parties themselves.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

Insurers' rights and duties in respect of funding the defence of insureds depend upon the wording of the relevant insurance policy. Liability insurance policies generally include provisions for reimbursing the costs of defending or settling a claim made against the insured. Such liability insurance includes compulsory liability insurance under Hong Kong law – eg, road traffic liabilities under the Motor Vehicles Insurance (Third Party Risks) Ordinance (Cap. 272 of the Laws of Hong Kong) and employers' liability under the Employees' Compensation Ordinance (Cap. 282 of the Laws of Hong Kong). Other liability insurance includes employment practices' liability insurance and product liability insurance.

D&O insurance continues to be an area with relatively significant defence costs exposure. In Hong Kong, companies are permitted to purchase D&O insurance for their directors and officers. In fact, for listed companies, the Listing Rules of the Stock Exchange of Hong Kong (HKEx) expressly provide that a listed company should arrange appropriate insurance cover in respect of legal actions against its directors. Companies are also allowed to indemnify their directors and officers provided that they do so within the ambit of Sections 468 and 469 of the Companies Ordinance (Cap. 622 of the Laws of Hong Kong), which set out the types of indemnities that are valid and permissible. Hong Kong has seen its fair share of large regulatory actions involving directors and officers.

- In 2014, after lengthy and expensive investigations by the Securities and Futures Commission (SFC), the SFC commenced proceedings against CITIC Limited and its former directors for over HKD800 million in compensation to investors. The SFC alleged that CITIC and its five directors engaged in market misconduct involving disclosure of false and misleading information about CITIC's financial position. In 2017, the Market Misconduct Tribunal (MMT) cleared the company and its directors of misconduct.
- In 2018, Qunxing Paper Holdings Company Limited and its former chairman and his son were ordered to compensate investors who subscribed for Qunxing shares in its IPO or who purchased them in the secondary market between 2007 and 2011. The court found that they had disclosed false or misleading information in Qunxing's IPO prospectus in 2007 and in announcements, by materially overstating its turnover and understating its bank borrowings. The defendants were ordered to pay HKD1.42 billion.
- In 2019, after extensive investigations by the SFC and the Independent Commission Against Corruption, a number of former senior executives of Convoy Financial Holdings Limited were charged with conspiracy to defraud the HKEx and its directors and shareholders.
- To date, the SFC continues to pursue claims against directors and officers in listed companies in relation to insider dealing and false trading at the MMT. The MMT has the power to impose fines of up to HKD8 million against companies and directors, although the highest fine imposed to date has not been as significant.

5.2 Likely Changes in the Future

Hong Kong continues to be less litigious than other common law jurisdictions or the USA. In particular, there is currently no mechanism for shareholders to bring class action claims, although the SFC can act like a lead plaintiff to pursue companies and directors for compensation on behalf of shareholders for market misconduct. The SFC would fund the litigation.

Litigation funding is also only allowed in respect of arbitrations and insolvency proceedings. See, however, **9.1 Developments Affecting Insurance Coverage and Insurance Litigation**.

Shareholder Derivative Actions or Petitions

There has been an increasing number of claims for unfair prejudice and derivative actions brought by shareholders who feel aggrieved by the management of a company. Sometimes these are purely shareholder driven, but other times, these are driven by the existence of a regulatory investigation against the company. These are often difficult to resolve out of court, because while the shareholders may feel aggrieved, the directors may not view themselves as having acted against, or contrary to, the interests of the company.

Employment Practices' Liability

Traditionally, in Hong Kong, this was not an area of much exposure for insurers. In recent times, however, there have been many more cases of alleged workplace discrimination. In the era of the "Me Too" movement, and the general heightened awareness among the Hong Kong public of their rights in relation to their employers, this trend shows no sign of slowing down.

5.3 Trends in the Cost or Complexity of Litigation

Although publicly available statistical information is not available to show how and to what extent defence costs might have increased throughout

recent years, the general perception is that litigation and regulatory claims are becoming more costly to defend for the following reasons:

- lawyers and barristers want to increase their hourly rates as they gain year-on-year experience, which is not unreasonable;
- access to senior counsel with extensive regulatory experience is limited to a select few in the Hong Kong legal profession and those that have the experience command increasingly higher hourly rates;
- in light of the increased Solicitors' Hourly Rates for Party and Party Taxations, law firms generally try to apply an hourly rate that is in line with such hourly rates and not below them; and
- the scale of investigations by regulatory bodies has become larger and more extensive, involving voluminous documentation that requires review, and therefore requiring more manpower and fee-earning hours to be spent.

5.4 Protection Against Costs Risks

Under Hong Kong law, maintenance is "directed against wanton and officious intermeddling with the disputes of others in which the defendant has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse", while champerty is "a form of maintenance, and occurs when the person maintaining another takes as his reward a portion of the property in dispute".

Third-party funding of litigation and arbitration may now be common practice in a number of common law jurisdictions, but in Hong Kong, funding of litigation by a third party may constitute maintenance and champerty as criminal offences and torts, as a result of which, Hong Kong continues to maintain a conservative regime in respect of third-party funding. This is the case, even though third-party funding is allowed in arbitration and insolvency proceedings in Hong Kong.

Claimants in litigations in Hong Kong are therefore seldom, if ever, able to insure against costs risks in connection with their own claims. That said, the introduction of outcome-related fee structures for arbitration proceedings may open the door to new ways for claimants to mitigate costs risks. See **9.1 Developments Affecting Insurance Coverage and Insurance Litigation**.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

An insurer can pursue, by way of subrogation and in the name of the insured, third parties that have caused loss to the insured. Under common law and equitable principles, the insured must be fully indemnified before the insurer can exercise its subrogation rights.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

See **6.1 Right of Action to Recover Sums from Third Parties**.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

Aviation

According to the Airport Authority of Hong Kong, for the fiscal year ended 31 March 2023, Hong Kong International Airport handled 12.4 million passengers and 161,160 flights, which were seven times and 11.5% more than the previous

year, respectively. With most if not all travel restrictions in relation to the pandemic being lifted, it is likely that the number of aviation claims will steadily return to pre-pandemic levels.

Construction

COVID-19 has contributed to the hardening of the professional indemnity insurance market, and big contractors are finding it extremely difficult to purchase insurance on an "each and every" basis. As a result, there will likely be a rise in project-specific professional indemnity insurance.

Financial Lines

The COVID-19 pandemic not only exposed the vulnerabilities of a modern globalised world, but also amplified existing risks such as cyber-threats and rising insolvencies. The unexpected shift to home working has already led to an increase in fidelity claims, in part as a direct result of the weakening of internal controls.

Another direct result of COVID-19 has been an increase in insolvencies, despite the government assistance provided, with the bulk still probably yet to come.

Advancing technology continues to present both opportunities and challenges, and cyber-risks remain a concern for all businesses. Cybercrime and data breaches continue to be prevalent, as criminals take advantage of security loopholes and miscommunications arising out of hybrid working arrangements. As cyber threats become a bigger issue in Hong Kong, it is likely that claims on cyber insurance will continue to grow in the near future. See also **8.2 Data Protection Laws**.

Political Risk and Trade Credit

Most industries have been negatively impacted by COVID-19, and the effects persist despite the global pandemic being over. Insured losses arise from:

- increased government intervention; and
- rising insolvencies in businesses with insufficient capital to withstand supply chain disruptions.

With respect to political risk insurance, claims could emerge under contract frustration policies in particular. Broadly speaking, contract frustration insurance covers the risk of default under contracts with sovereign entities and state-owned obligors. As well as non-payment and non-delivery by the obligor, it can cover risks such as licence cancellation, import and export embargo, and non-certification of invoices. The recent Russo-Ukrainian conflicts have also raised concerns with regards to potential future escalations of political tensions on a global basis.

Trade credit insurers are also expecting an uptick in claims activity. Trade credit insurance policies cover the risk of private buyer default or insolvency. Given that the global economy remains lukewarm in growth, and with recent inflation and interest rate surges, it is expected that the shutting of service and manufacturing operations as an aftermath of pandemic will prolong the rise in insolvencies and, in turn, claims under trade credit insurance policies.

Business Interruption (BI)

The pandemic and the recent natural disasters in Hong Kong (see **8.1 Impact of ESG on Underwriting and Litigating Insurance Risks**) have resulted in insurers facing claims under their BI wording. The former came as a shock to

many insurers who did not intend their policy to respond to this kind of pandemic. Understandably, most insurers have reviewed their policies to provide more restrictive cover to avoid liability for future pandemics, or charge higher premiums for the same cover.

7.2 Forecast for the Next 12 Months

See **7.1 Type and Amount of Litigation**.

7.3 Coverage Issues and Test Cases

See **7.1 Type and Amount of Litigation**.

7.4 Scope of Insurance Cover and Appetite for Risk

The most significant change in terms of appetite for risk is the reduction of appetite for:

- professional indemnity insurance on an "each and every" basis;
- cyber-risks (in particular, in respect of ransomware events); and
- US securities class action risk exposure.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

Casualty Coverage

Climate change litigation continues to develop, predominantly in the US, but is also beginning in other jurisdictions.

General liability insurers will be watching these developments with particular interest because the US claims to date, which seek multibillion-dollar compensation for the rising costs of climate change (including the cost of state actors making improvements to flood defences, employing additional firefighters to tackle wildfires, and upgrading of municipal drainage), have been presented as product liability claims – mainly against carbon majors – on the basis that petroleum is a "defective product". The most recent claims also make allegations of nuisance and that the defendants deceived the public.

Some claims continue in Europe against utility companies and oil majors either for positive action tantamount to enforcement of climate change standards (France) or for damages claimed for flood prevention measures alleged to be necessary as a result of global warming (Germany).

This has already spawned the argument that the claims attract cover under the defendant energy companies' general liability insurance. The number of climate change liability claims is only likely to increase over the coming decade, as climate science improves and extreme weather events become more frequent, resulting in potentially massive liabilities for the insurance sector and posing new challenges for the insurability of climate-related events.

Construction

As COP28 approaches, there has been a significant increase in zero carbon target pledges which will see fruition via green construction projects utilising green materials. In recent years, there has been an increase in claims involving renewable energy, due to component vulnerability, defective design and lack of maintenance. To combat this, the industry is developing data-sharing processes, infrastructure and standards for all stakeholders. It is anticipated that this will also help to produce more realistic underwriting and contribute to the softening of the renewable insurance market.

Financial Lines

A rise in climate change litigation against companies and their executives is expected. Consumers and shareholders are increasingly demanding "green" finance/action. Shareholder activists are now focusing on financial institutions who provide financial services to "carbon majors" – ie, oil and gas companies. Prudent directors and officers will need to assess and manage a company's activities from an environmental perspective. There has already been an increase in the US in the filing of claims seeking remediation from those companies which have allegedly contributed to climate change. See also **9.1 Developments Affecting Insurance Coverage and Insurance Litigation**.

Property Damage

Climate change also continued to dominate 2022 and 2023. Hurricane Ian, in September 2022, was the first Category 5 hurricane, the most severe under the Saffir-Simpson Hurricane Wind Scale, in the Atlantic Ocean since 2019. The total damage was at an estimate of USD112.9 billion, making Hurricane Ian the third-costliest hurricane in recorded history.

Closer to home, Hong Kong was hit by Super Typhoon Saola in early September 2023, followed by a rainstorm one week later with the highest rainfall rate ever recorded in Hong Kong. While the amount of direct economic loss arising out of such events is still being ascertained, such loss will likely be significant.

8.2 Data Protection Laws

The PDPO

The privacy law regime in Hong Kong is governed by the Personal Data (Privacy) Ordinance (Cap. 486 of the Laws of Hong Kong) (PDPO). Currently, data users only need to notify affected individuals and the Privacy Commissioner for Personal Data (Commissioner) of a personal data breach on a voluntary basis. The Commissioner can issue enforcement notices regarding breaches under the PDPO and prosecute in limited circumstances.

Earlier this year, the Commissioner indicated that there will be substantive amendments to the PDPO to the effect that data users will be required to make mandatory data breach notifications and to formulate a data retention policy. The Commissioner will also be empowered to impose administrative fines with regards breaches of the PDPO. There may also be new direct regulations targeted at data processors.

Separately, there is a surging trend in cyber attacks globally. According to the Hong Kong Computer Emergency Response Team Co-ordination Centre, as at 2022, the number of cyber security incidents has risen by 9% since 2021.

The GDPR

Ever since its implementation in 2018, the General Data Protection Regulation (GDPR) continues to have significant impact on the use of personal data among multinational corporations. In September 2023, TikTok was fined EUR345 million by the Irish Data Protection Commission for its mishandling of children's data. With personal data becoming a more prominent contemporary issue, it is likely that transnational litigation in relation to data breach and misuse of personal data will continue to thrive.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

Class Action

In 2012, the Law Reform Commission of Hong Kong published a consultation paper proposing that a mechanism for class actions be adopted in Hong Kong. In 2017, the Department of Justice formed a working group to prepare for a consultation. In August 2021, the working group commissioned a consultancy study on the potential impact of a class action regime, starting with the introduction of a pilot scheme restricted to consumer class actions only.

Outcome-Related Fee Structures for Arbitration

On 30 June 2022, the Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Ordinance 2022 (ORFSA Ordinance) was gazetted, with some parts of the legislation being effected on the same day. Subsequently, the ORFSA Ordinance came into full operation as part of the Arbitration Ordinance on 16 December 2022, along with the Arbitration (Outcome Related Fee Structure for Arbitration) Rules (Cap. 609D of the Laws of Hong Kong) (ORFSA Rules).

Generally speaking, the ORFSA Ordinance and the ORFSA Rules establish a legal framework in Hong Kong on the use of a broad range of outcome-related fee structures (ORFSs), including conditional fee agreements, damages-based agreements and hybrid damages-based agreements in arbitration proceedings taking place in and outside of Hong Kong. These changes may have an impact on claims handling and defence, as well as how parties approach insurance coverage disputes, which are often resolved by way of arbitration.

ESG Framework Under the Listing Rules of the HKEx

On 14 April 2023, the HKEx issued a consultation paper (Consultation Paper on Enhancement of Climate-related Disclosures Under the Environmental, Social and Governance Framework) soliciting input on plans to enhance climate-related disclosures within the ESG framework under the Listing Rules of the HKEx. The HKEx proposes the mandatory inclusion of climate-related disclosures in all issuers' ESG reports and the introduction of new climate-related disclosures aligned with the International Sustainability Standards Board Climate Standard. These initiatives align with the commitment to mandate the Task Force on Climate-related Financial Disclosures-aligned disclosures by 2025, as announced by the Hong Kong Green and Sustainable Finance Cross-Agency Steering Group. Recognising issuer readiness and concerns, the HKEx also suggests interim provisions for specific disclosures during the first two reporting years beginning 1 January 2024. The proposed climate-related disclosure requirements encompass governance, strategy, risk management, metrics, targets and remuneration. The consultation ended on 14 July 2023.

Protection of Personal Data

See **8.2 Data Protection Laws**.

INDIA

Law and Practice

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Tuli & Co

Contents

Tuli & Co was established in 2000 to service the Indian and international insurance and reinsurance industry. It is an insurance-driven commercial litigation and regulatory practice, which has working associations with firms in other Indian cities as well as globally via its association with Kennedys. While Tuli & Co's principal office is in Noida and it has another office in Mumbai, the firm has a pan-Indian presence with insurance/reinsurance and complex commercial disputes before High Courts and tribunals across the country. Currently, 46 lawyers work for the firm.

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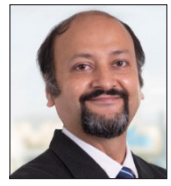
Neeraj Tuli is the firm's senior partner. Before setting up Tuli & Co in 2000, Neeraj was a partner at Kennedys in London. Neeraj's contentious work and coverage advice range across a wide variety of policies, including trade credit, property policies, errors and omissions, D&O, commercial general liability, product liability, public liability, delay in start up, advance loss of profit, erection all risks and corrective action requests. Neeraj has consistently been recognised as a leading lawyer by prominent legal directories in the insurance space. He is featured as a Band 1 practitioner for insurance by Chambers Asia-Pacific.



Rajat Taimni joined Tuli & Co in 2001 and heads the dispute resolution practice. He has more than 20 years of experience and his core practice is litigation and arbitration disputes, specialising in high-profile and complex ad hoc and institutional arbitrations. He focuses on matters involving insurance and reinsurance, private equity funds, investment treaties, sovereign funds, sports and media, white-collar crimes, construction, railways, insolvency proceedings and defence contracts. Rajat is recognised as a ranked lawyer in dispute resolution in the Chambers Asia-Pacific guide.

Mandakini Khanna has more than 13 years' experience in advising insurance and reinsurance clients (both in India and overseas) on claims and coverage aspects under various types of policies. At Tuli & Co, she deals with errors and omissions, D&O, employment practices liability insurance, media, clinical trials, public liability, product liability, project liability, commercial general liability, advance loss of profit, erection all risks, corrective action requests, and cyber, life, trade credit, crime and venture capital policies, etc. She also lectures on policy coverage, claims handling, and claims trends. She is recognised by prominent legal directories in the insurance space, such as the Chambers Asia-Pacific guide.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

The insurance sector in India is regulated by the Insurance Regulatory and Developmental Authority of India (IRDAI), and there are, in addition, several consumer-centric regulations setting out various practice directions and guidelines to be followed by insurers, reinsurers and insurance intermediaries.

The IRDAI can investigate, either on its own motion or following a complaint or any other information received from policyholders/third parties, any alleged breach by insurers, reinsurers or insurance intermediaries, and the punishment can include a monetary penalty of up to INR10 million (approximately USD123,000) for each breach, resulting directions and/or cancellation of the relevant registration.

Apart from supervisory proceedings before the IRDAI and proceedings before any other regulators, such as the Securities and Exchange Board of India (SEBI), the Competition Commission of India (CCI) or the Central Consumer Protection Authority (CCPA), insurance and reinsurance disputes are generally adjudicated in the following forums:

- Arbitration – Most commercial general insurance contracts typically have a standard arbitration clause where any dispute on quantum – liability already having been admitted – can be referred to arbitration.
- Civil courts – Retail general insurance contracts, life insurance and health insurance contracts usually contain a jurisdiction clause in favour of the courts. For commercial general insurance contracts with an arbitration clause, insureds can approach a civil court when the dispute falls outside the scope of the arbitration clause.
- Consumer forums – Insureds can approach consumer forums with the relevant monetary and territorial (if applicable) jurisdiction. The right to approach a consumer forum is an independent option/remedy which cannot be curtailed even by an existing arbitration clause.

1.2 Litigation Process and Rules on Limitation

Litigation Process

An insured may, depending on the underlying facts, raise a dispute before an arbitral tribunal, an appropriate civil/commercial court or a consumer forum. See **1.3 Alternative Dispute Resolution (ADR)** for a discussion on arbitration.

Disputes before a civil/commercial court

The Commercial Courts Act 2015 (the "CCA 2015") prescribed the constitution of commercial courts for adjudicating commercial disputes of a specified value. The commercial courts have been set up at the district level as well as at the High Court level with the objective of having a more streamlined process for speedier adjudication of commercial disputes. It is mandatory to undergo a pre-mediation exercise before filing a commercial suit.

These courts are, effectively, civil courts with a specific mandate to hear only commercial matters. Insurance and reinsurance have been classified as "commercial disputes" under the CCA 2015. The pecuniary threshold for a dispute to be classified as "commercial" is INR300,000 (approximately USD3,700).

The commercial courts are governed by the Code of Civil Procedure 1908 (CPC) and the

CCA 2015. If there is a conflict between the two, the CCA 2015 will generally prevail.

Civil courts in India are divided into district courts, high courts and the Supreme Court, in ascending order of hierarchy. There are approximately 688 district courts, 25 high courts and the Supreme Court, which is the highest court of law in India.

Out of the 25 high courts in India, the high courts at Calcutta, Bombay, Madras, Delhi and Himachal Pradesh have original jurisdiction to decide matters, including commercial matters, where the quantum of dispute is higher than an ascertained pecuniary value and, in relation to Calcutta and Madras, within a designated territorial limit from the High Court. Disputes below the prescribed monetary value would go to the commercial court with appropriate territorial jurisdiction at the district level or an ordinary civil court where the value is lower than INR300,000 (approximately USD3,700).

In all other cases, commercial courts at the district level with the necessary territorial jurisdiction can hear insurance/reinsurance disputes which are valued at INR300,000 (approximately USD3,700) and above. The hierarchy and designations of commercial/civil courts at the district level may be different across states in India.

Disputes before a consumer forum

The consumer commissions have a three-tier hierarchy, with District Commissions at the lowest rung, followed by a State Commission (for every state) and a National Commission at the apex level. District Commissions have the jurisdiction to deal with complaints arising out of contracts for services or goods involving allegations of "deficiency in service", where the consideration does not exceed INR5 million (approximately USD61,000). For the State Commission, the threshold is over INR5 million (approximately USD61,000) up to INR20 million (approximately USD244,000), whereas the National Commission can take up original complaints where the consideration is above INR20 million (approximately USD244,000). The District Commission and the State Commission must also have the necessary territorial jurisdiction.

Rules on Limitation

Limitation periods are generally governed by the Limitation Act 1963 (the "Limitation Act"), save for the limitation period to approach a consumer forum which is prescribed under the Consumer Protection Act 2019 (the "Consumer Act 2019").

According to Schedule 55 of the Limitation Act, the limitation period of three years is calculated either from:

- the date of the occurrence causing the loss; or
- the date of denial of the claim under the policy.

Under the Consumer Act 2019, the limitation period is two years instead of three years.

Some insurance contracts specify timelines to report claims and others require the reporting to be "as soon as reasonably practicable", both forms of which are typically expressed as conditions precedent to the insurer's liability. Therefore, the court may refuse to impose liability on account of a delay in notification of a claim, even if some portion of the limitation period still remains available to the insured.

In situations where a loss has been notified to the insurer, and the claim has been rejected or the policy avoided, the limitation period of three years

will commence from the date of communication of such denial. However, it may not be necessary to wait for a rejection or denial to be communicated if there is a breach of the timelines provided for closure of an assessment/claim under the IRDAI (Protection of Policyholders) Regulations, 2017 (the "PPI Regulations 2017") or any other guidance specifying such time periods or other requirements.

1.3 Alternative Dispute Resolution (ADR)

Mediation

Mediation, conciliation and arbitration are recognised as ADR mechanisms. High courts and district courts generally have mediation cells and mediation has particularly gained traction following the introduction of the CCA 2015, which makes mediation a prerequisite to bringing a suit.

Arbitration

On the adjudicatory front, arbitration is preferred for commercial disputes and most commercial contracts have an arbitration clause. The Arbitration and Conciliation Act 1996 (the "Arbitration Act") has been amended over the years with the aim of making arbitration a more effective and attractive alternative to court proceedings.

There are set timelines for completing domestic arbitrations, while in international commercial arbitrations there are guidelines/best practices in relation to timelines.

There is also an option for "fast track " arbitration, where an award may be passed within six months if the requirements are met.

Settlement Outside Courts

Independently, where a court is of the view that there are elements of settlement that may be acceptable to parties before it, it may formulate the possible terms of settlement, take the view of the parties and refer the parties to either:

- arbitration;
- conciliation;
- judicial settlement, including settlement through *Lok Adalat* or
- mediation.

This power is derived from Section 89 of the CPC.

Such reference will require the consent of the parties where such consent/agreement is otherwise required under law, for instance in the case of arbitration.

Insurance-Specific ADR

Specifically for insurance disputes, the government of India has created the Insurance Ombudsman Scheme, which enables individual policyholders to settle their complaints out of court in a cost-effective and efficacious manner. An aggrieved policyholder can approach the Insurance Ombudsman provided their claim value is under INR3 million (approximately USD36,500).

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Retail general insurance, life insurance and health insurance contracts usually contain a jurisdiction clause in favour of the courts. Typically, standardised arbitration clauses are mostly found in commercial general insurance contracts where any dispute on quantum, liability having been admitted, can be referred to arbitration.

2.2 Enforcement of Foreign Judgments

The enforcement and recognition of foreign judgments and decrees in India are governed by, inter alia, Section 44-A and relevant orders of the CPC. Only a foreign judgment of a superior court of a reciprocating territory, as notified by the government of India, can be enforced before the appropriate court in India.

In this regard, the Indian government has notified several reciprocating jurisdictions, including Bangladesh, Canada, the Colony of Aden, the Colony of Fiji, Hong Kong SAR, the Republic of Singapore, Malaysia, Myanmar, New Zealand and the Cook Islands, Samoa, Papua New Guinea, Trinidad and Tobago, the UAE and the UK.

2.3 Unique Features of Litigation Procedure

Case Load

In India there are about 11,046,037 civil cases pending before various district and lower courts, about 4,355,597 before the high courts and 69,766 before the Supreme Court.

These statistics may not provide a completely accurate current position given that several of these matters may not even be in a position to be heard on account of the parties' non-compliance.

Nonetheless, it is generally accepted that the disposal rate of individual judges and courts is on the higher side.

Court proceedings in India can often be time-consuming and potentially expensive. The establishment of commercial divisions has somewhat reduced the length of time, but the process is still lengthy and potentially expensive.

Domestic arbitrations have specified timelines for completion. According to Section 29A of the Arbitration Act, arbitration proceedings are required to be completed within 12 months from the date of completion of pleadings (a maximum period of six months for completing pleadings). Parties may, by mutual agreement, extend the 12-month period by another six months. Any further extension can only be granted by a court upon an application by a party.

There are no specific mandatory timelines for concluding an international commercial arbitration (arbitration seated in India with one non-Indian party), but Section 29A of the Arbitration Act states that the tribunal will endeavour to conclude such proceedings within 12 months from the completion of pleadings.

Arbitration-related court proceedings are generally disposed of relatively expeditiously.

There are limited grounds to challenge a purely domestic arbitral award. The grounds available for challenging an award arising out of an international commercial arbitration are further limited, as the ground of "patent illegality" is not available.

Costs of Proceedings

Courts in India refrain from awarding actual costs, and if costs are awarded in court proceedings, they are nominal.

In arbitration proceedings, Section 31A of the Arbitration Act gives the discretion to the arbitral tribunal to award costs to a party. The Arbitration Act defines costs as fees and expenses of the arbitral tribunal and lawyers, administrative fees and any other expenses incurred in connection with the arbitration proceedings. The costs

awarded are typically "reasonable costs" as opposed to actual costs.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Indian courts generally strictly enforce arbitration clauses. This position holds true for insurance and reinsurance contracts as well.

The principle of party autonomy has been re-affirmed by the Supreme Court in a number of cases, and the scope of interference with foreign-seated arbitrations is extremely limited.

In a recent landmark judgment, the Supreme Court considered the enforceability of an arbitration agreement in an unstamped instrument. It was held that an unstamped agreement is not enforceable in law and that the arbitration clause contained therein would also not be enforceable in law.

The Supreme Court has also ruled in favour of party autonomy and held that parties have the right to have their dispute(s) decided in accordance with institutional rules, which can include an emergency arbitrator delivering interim orders, where such awards would be, generally speaking, enforceable by the courts in India.

3.2 The New York Convention

India is subject to the New York Convention as well as the Geneva Convention. Enforcement of an arbitral award rendered in a recognised jurisdiction is governed by Part II of the Arbitration Act.

The party applying for enforcement of a foreign award is required to produce, as evidence:

- the original award or a duly authenticated copy of the award;
- the original arbitration agreement or a duly certified copy of the same; and
- such other evidence as is necessary to prove that it is a foreign award.

Refusal to Enforce a Foreign Award

Enforcement of a foreign award may be refused on any of the following grounds (among others):

- a party to the arbitration is under some incapacity or the arbitration agreement is not valid under the law to which the parties have subjected it or under the law of the country where the award was made;
- no proper notice of the appointment of an arbitrator or of the arbitration proceedings was served, or a party was otherwise unable to present its case;
- the arbitral award is beyond the scope of the arbitration agreement;
- the composition of the arbitral tribunal was not in accordance with the parties' agreement or the law of the country where the arbitration took place;
- the award has not yet become binding on the parties, or has been set aside or suspended at the seat of the arbitration;
- the subject matter of the arbitration is not arbitrable under the law of India; and
- the enforcement of the award would be contrary to the public policy of India.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Most commercial general insurance contracts typically have a standard arbitration clause where any dispute on quantum, liability having been

admitted, can be referred to arbitration. Under such limited arbitration clauses, the insured would be precluded from arbitrating disputes where the claim has been rejected in entirety as not being covered under the policy or the policy has been repudiated. However, the insured may also choose to approach the consumer forum (if applicable), which is a summary procedure, or the relevant civil/commercial court.

The Supreme Court has recently settled the question of whether corporate insureds can be considered as "consumers" under the Consumer Protection Act 1986 (the "Consumer Act 1986"). The Supreme Court held that since insurance contracts are contracts of indemnity there exists no element of profit generation and therefore insurance disputes come within the purview of the Consumer Act 1986.

Applicable Rules

The arbitration clauses must be standardised and the arbitration is governed by the provisions of the Arbitration Act, including in relation to the procedural rules for conducting the arbitration. That being said, an arbitrator/arbitral tribunal, with the consent of the parties, may adopt its own procedural rules for conducting the proceedings as long as such rules are not in contravention of any non-derogable provisions of the Arbitration Act. The Arbitration Act is based on the principles of party autonomy, and the power to determine procedural rules governing the arbitration proceedings is enshrined in Section 19 of the Arbitration Act.

Challenge to an Award

Section 34 of the Arbitration Act provides a party with a right to approach a court to set aside an arbitral award. A court hearing a challenge of an award does not sit as a first appellate court over the decisions of an arbitral tribunal, and therefore, it cannot re-examine the evidence/merits to arrive at a different possible conclusion or finding.

The court's scope of interference is limited to the grounds laid out in Section 34, which includes incapacity of a party to enter into arbitration, improper notice of arbitration, ultra vires jurisdiction, invalid composition of the arbitral tribunal, a conflict with the public policy of India, and patent illegality appearing on the face of the award. Also, by way of the amendment to the Arbitration Act in 2015, the scope of "public policy" has been narrowed down to include only those instances where:

- the making of the award is fraudulent or corrupt;
- the award is in contravention of the fundamental policy of Indian law; or
- the award is in conflict with the most basic notions of morality or justice.

The scope of interference is further restricted where an arbitral award has been passed in an international commercial arbitration, in which case the ground of "patent illegality", which includes perversity, is not available.

An application for setting aside an award must be made before the expiry of three months from the date on which the award was received by the party concerned. The courts can entertain the application beyond three months, but within 30 days, if the party concerned is able to demonstrate sufficient cause.

The order by the court under Section 34 of the Arbitration Act can be appealed, under Section 37, to the court with the necessary jurisdiction to hear appeals from the court in question. There is no statutory right to appeal from an order passed

under Section 37. However, a party may prefer a special leave petition, under Article 136 of the Constitution of India to the Supreme Court. It is at the discretion of the Supreme Court to entertain such a petition, which it does sparingly.

4. Coverage Disputes

4.1 Implied Terms

Under Indian law, there are a number of terms that are implied into a contract of insurance. For instance, even though a policy may not expressly say so, all contracts of insurance are of utmost good faith and insurers are entitled to a fair presentation of the risk before its inception. The duty of utmost good faith places an obligation on the insured to voluntarily disclose all material facts relevant to the risk being insured. If there has been a misrepresentation or non-disclosure of a material fact, then an insurer can avoid the policy from its inception.

Another implied term is the right of subrogation, for which there is also statutory and judicial recognition. While there may not be a need for a separate contractual clause to trigger it, in practice, policies do contain subrogation clauses. The PPI Regulations 2017 also require an insured to assist the insurer in recovery proceedings.

4.2 Rights of Insurers

Insurers are entitled to a fair presentation of the risk before a policy's inception and this entitlement is derived from the fundamental principle of insurance law that utmost good faith must be observed by the contracting parties. This forbids the insured from concealing what they privately know, with a view to drawing the insurer into a bargain based on their ignorance of that fact. Insurers can avoid the policy if there is fraud, misrepresentation or non-disclosure by the insured prior to the inception of the policy.

4.3 Significant Trends in Policy Coverage Disputes

In the past year, the courts have addressed a significant number of insurance-related issues, particularly in relation to interpretation of insurance policies, disclosure of material facts, and repudiation of claims by insurers on grounds of non-production of documents. There has been a trend towards stricter interpretation of terms and conditions of policies. The Supreme Court has held that the terms of an insurance policy should be strictly construed, without altering the nature of the contract, as it may adversely affect the interest of the parties.

In terms of disclosure requirements for health insurance policies, the Supreme Court has held that if any query or column in a proposal form is left blank, then the insurer should ask the insured to complete it.

On the issue of overlapping insurance policies, the Supreme Court has held that a contract of insurance is one of indemnity. Double insurance is when an insured is indemnified by two or more insurers for the same risk. In instances where the insured has been fully indemnified for the loss by one insurer, the second insurer can decline the claim regarding the same incident.

4.4 Resolution of Insurance Coverage Disputes

Insureds in India can:

- resort to the dispute resolution mechanism set out in the policy document (usually arbitration in the context of commercial general insurance contracts); or

- approach the internal grievance redressal mechanism of the insurer, the grievance cell of the IRDAI or the insurance ombudsman under the Redress of Public Grievance Rules 1998 (depending on the nature of the grievance); or
- initiate formal legal proceedings against the insurer before the consumer protection forums or the Indian civil courts.

Reinsurance contracts are also contracts of insurance and, therefore, the position on these is the same. In fact, the CCA 2015 defines a commercial dispute as including both insurance and reinsurance over the value of INR300,000 (approximately USD3,700).

4.5 Position if Insured Party Is Viewed as a Consumer

By operation of law, an insured can approach a consumer forum, inter alia, in relation to any claim against an insurer in India. This forum can be approached independently of any right that the insured may have under the policy terms, including its right to initiate arbitration proceedings.

The consumer courts follow a summary procedure, which does not usually involve detailed evidence or cross-examination of witnesses. The fee for filing a complaint before a consumer forum is also nominal, as opposed to before a civil court, where the fee is ordinarily determined based on the claim amount.

4.6 Third-Party Enforcement of Insurance Contracts

There is no equivalent law in India of the UK Third Parties (Rights Against Insurers) Act 2010. As a general rule, Indian law recognises the principle of privity of contract and consequently, a third party may not be able to bring a direct action or claim against an insurer.

That being said, it is common practice for third parties to name the defendant's insurer in motor accident-related proceedings. The Motor Vehicles Act 1988 (MVA) provides that the rights of an insured under a policy are transferred to a third party claiming against the insured in the event of the insured's insolvency. The MVA empowers the Motor Claims Tribunal to seek the insurers' involvement in a third-party action against the insured if the tribunal believes the claim is collusive or if the insured fails to contest the claim. However, Section 164 of the MVA limits the insurer's liability concerning third-party insurance with effect from 1 April 2022 in the following terms:

- in the case of death, INR500,000 (approximately USD6,200); and
- in the case of grievous hurt, INR250,000 (approximately USD3,000).

There are presently no limits on the insurer's liability in cases of permanent disability or minor injury.

4.7 The Concept of Bad Faith

Insurance bad faith does exist in India, but it is not expressly codified. Both the insurer and the insured are required to disclose material information to each other, and insurers cannot avoid reasonably clear liability by acting in bad faith or by resorting to unfair trade practices.

There is also a separate constitutional duty on government insurers to act in a fair and reasonable manner before and after inception of the insurance policy.

4.8 Penalties for Late Payment of Claims

The PPI Regulations 2017 prescribe the claims procedure that is required to be followed by insurers to ensure timely processing of claims. Insurers are required to pay interest at 2% above the prevalent bank rate, in cases where there is delayed payment of the claim amount. In addition to the higher rate of interest, other civil penalties can also be imposed on insurers, including damages for breach of contract, compensation for deficiency in service, etc.

The Consumer Act 2019 has also introduced a centralised agency called the Central Consumer Protection Authority (CCPA). The CCPA has wide powers, including the power to initiate investigations and impose sanctions and penalties as may be required and allowed in the circumstances.

4.9 Representations Made by Brokers

The relationship between an insured and a broker is that of a principal and agent. An insurance broker is an agent of the insured and whether a representation made by a broker is binding or not would depend on whether the broker was authorised by the insured to make such a representation. In the absence of such authorisation, it is unlikely that representation made by the broker will be binding on the insured. It is pertinent to note that as the insured signs the proposal form, the insured must bear all the consequences arising out of the form.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

The IRDAI (Outsourcing of Activities by Indian Insurers) Regulations 2017 ("Outsourcing Regulations") permit Indian insurers to outsource activities that would usually be undertaken by the company internally, subject to the prescribed compliance requirements being fulfilled, and provided that the activities proposed to be outsourced do not fall within the ambit of the defined "core activities". Broadly, Indian insurers are prohibited from outsourcing product design, underwriting, claim handling or actuarial functions to a third-party service provider, as these activities form a part of the company's core functions.

In terms of delegating underwriting or claims handling to external parties, an Indian insurer is prohibited under R5 of the Outsourcing Regulations from outsourcing "decision making in underwriting and claims".

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

Professional indemnity (PI), directors' and officers' liability (D&O), errors and omissions (E&O), employment practice liability (EPL) and cyber-liability policies are examples of the types of policies that provide cover for defence costs incurred by insureds provided that the policy terms and conditions are satisfied.

5.2 Likely Changes in the Future

There is unlikely to be change in this area of the law in the next few years.

5.3 Trends in the Cost or Complexity of Litigation

There is familiarity and demand for liability insurance, and over the past five years there has been a steady upward trend in claims made under PI policies. It remains the busiest claims area, followed closely by D&O. In fact, PI and D&O claims make up at least half of the total claims that this firm has seen being made under liability policies.

Not only has there been an upsurge in the frequency of claims, but there has also been a sharp increase in the quantum being claimed by the insureds under liability policies, which means that claim severity is also on the rise.

PI and D&O claims are likely to continue to make up the largest share of claims. There is also likely to be a rise in EPL – while previously claims were usually made in other jurisdictions, a number of claims have recently been made in India, with high-value settlements demanded.

The cyber-insurance sector is also seeing increasing interest and development in terms of the wording and post-claim support being offered by insurers, reflecting the increase in claim notifications and related quantum. This is specifically because of the remote working environment introduced by the COVID-19 pandemic.

5.4 Protection Against Costs Risks

An insured can avail of protection against its costs risks for third-party claims under different types of insurance policies, including PI, public liability, D&O, EPL, E&O and product liability policies.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

Under the principles of subrogation, the insurer has the same right as the insured to recover a loss from the third party responsible for the loss/the wrongdoer.

Subrogation applies in all types of insurance, except life insurance and personal accident insurance. The right of subrogation has been recognised by statute under Section 79 of the Marine Insurance Act 1963 (the "Marine Insurance Act") and case law, including Economic Transport Organization v Charan Spinning Mills Ltd ((2010) 4 SCC 114), where the Supreme Court classified subrogation into three broad categories.

Subrogation by Equitable Assignment

This is not evidenced by a document. It is based on the insurance policy and the insured receiving the claim amount. The insured cannot deny the equitable right of subrogation, even if there is no written evidence to support it.

Subrogation by Contract

This is evidenced by a document. The court recognises that insurers usually obtain a written letter of subrogation to avoid disputes about the right to claim reimbursement, or to settle the priority of claims between them or confirm the reimbursement amount under the subrogation, and to ensure the insured's co-operation. If the insured executes a letter of subrogation, the insurer's rights against the insured are governed by its terms.

Subrogation-cum-Assignment

The insured executes a letter of subrogation-cum-assignment. This enables the insurer to retain the entire amount recovered and sue in the name of the insured or in its own name if the letter so provides. The insured is then left with no right or interest and can no longer sue in its own name and for its own benefit.

A subrogation right cannot usually be waived. However, in some cases, the insurer and insured can agree to waive subrogation entirely, or in relation to specific individuals/entities.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

The right of subrogation has been recognised by statute under Section 79 of the Marine Insurance Act and the insurer can exercise this right in the name of the insured.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

Claims have been received by insurers in India where the insured has claimed for business interruption losses on account of the COVID-19 pandemic and the consequent lockdowns. However, since such policies require there to be a physical loss which, in turn, results in business interruption losses, the claims of insureds have often been rejected.

Currently, there are no authoritative rulings specific to claims of business interruption losses stemming from COVID-19 related disruptions.

7.2 Forecast for the Next 12 Months

As stated in **7.1 Type and Amount of Litigation**, there are presently no authoritative rulings on whether the COVID-19 pandemic and/or the lockdowns would amount to a physical loss, thereby enabling the consequent claim of business interruption. It is difficult to predict, particularly given the stage of the pandemic, whether any such ruling will be available in the next 12 months.

7.3 Coverage Issues and Test Cases

Unlike the Financial Conduct Authority business interruption insurance test case in the UK, there has been no test case in India. However, the COVID-19 pandemic did give rise to business interruption claims under property insurance policies. In some cases, insurers have denied liability for COVID-19 notifications on the basis that material damage to property is a prerequisite for an indemnifiable claim for business interruption, and the COVID-19 pandemic did not cause any physical damage or loss to the insured property.

Due to the COVID-19 pandemic, several regulatory changes were also introduced by the insurance regulator with the aim of stabilising the insurance market and securing the protection of policyholders' interests. In this regard, with a view to furthering the business continuity of Indian insurers and other insurance entities, and ensuring proper service to policyholders, the IRDAI issued directions on, inter alia, the handling of COVID-19 claims, extension of grace periods for premium payments, relaxation of regulatory timelines and expeditious servicing of insurance policies.

7.4 Scope of Insurance Cover and Appetite for Risk

Factors such as the war in Ukraine and the pandemic have made insurers a lot more cautious about the risk they are taking. Premiums have been revised to take account of potential losses, and the coverage afforded has been under review.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

The Indian insurance industry is a relatively new market compared to various global markets. As a result, the industry is still considered to be in a relatively nascent stage of development, particularly for various lines of insurance products which have recently been introduced in India. In

relation to these products, the insurer's underwriting is derived, to some extent, from global claims experience, in the absence of specific Indian claims experience.

Recently, the Indian market has witnessed an increase in the volume as well as the quantum of claims reported, due to various ESG factors. Additionally, there has been a significant increase in premiums, particularly for life and health insurance, attributed to adverse mortality and morbidity rates, experienced in large part as a result of the COVID-19 pandemic.

8.2 Data Protection Laws

Broadly, the norms on data security and confidentiality in India arise from statutory law, that is, the recently notified Digital Personal Data Protection Act 2023 and the Information Technology Act 2000. In addition, certain similar norms under the Indian insurance regulatory framework are set out under the PPI Regulations 2017 and the IRDAI Guidelines on Information and Cyber Security of 24 April 2023, which essentially place an obligation on insurance companies and insurance intermediaries to maintain the confidentiality of data. However, these norms also permit disclosure of data, after obtaining consent from the data owner, and remain subject to requirements to maintain data security and other similar requirements.

Typically, in terms of market practices in India, it is understood that gaining the express consent of the customers would allow insurance companies to disclose information to concerned entities, despite the existence of the confidentiality requirements under the statutory and regulatory framework. For this purpose, it is a common practice for insurance companies to request such consent in the initial proposal forms, which are signed by the customers at the time of proposing/purchasing insurance. For capturing consent, insurance companies generally incorporate a broadly worded consent provision as part of the declaration under these forms. Thereafter, once the consent of the proposer/applicant is captured, this data is typically shared with reinsurers for their own underwriting and claim settlement purposes.

Furthermore, in terms of litigation, considering that the Indian data protection framework is in a nascent stage and the provisions set out under the current statutory framework are limited, there do not appear to have been any significant disputes of note concerning data protection in the insurance industry at the time of writing.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

The Indian insurance sector is highly regulated and there have recently been many significant regulatory developments in the sector. Some of these developments are listed here.

- The IRDAI has notified the IRDAI (Payment of Commission) Regulations of 26 March 2023, in furtherance of the exposure draft with the same title issued on 23 November 2022, and it has repealed the IRDAI (Payment of Commission or Remuneration or Reward to Insurance Agents and Insurance Intermediaries) Regulations 2016.
- The IRDAI has notified the IRDAI (Expenses of Management of Insurers Transacting General or Health Insurance Business) Regulations 2023 and the IRDAI (Expenses of Management of Insurers Transacting Life Insurance Business) Regulations 2023 of 28

March 2023, in furtherance of the respective exposure drafts with the same title, and has repealed the respective regulations of 2016.

- The IRDAI has notified the IRDAI (Registration of Indian Insurance Companies) Regulations of 5 December 2022, and the Master Circular on Registration of Indian Insurance Company 2023 of 24 April 2023, which repealed the IRDAI (Registration of Indian Insurance Companies) 2000, the IRDAI (Transfer of Equity Shares of Insurance Companies) Regulations 2015 and the IRDAI (Investments by Private Equity Funds in India Insurance Companies) Guidelines 2017 of 5 December 2017. The new guidance sets out various norms in relation to the investment structures and transfer of shares norms for Indian insurance companies.
- The IRDAI has notified the Insurance Regulatory and Development Authority of India (Regulatory Sandbox) (Amendment) Regulations, 2022 of 7 December 2022, in furtherance of the exposure draft issued on 3 August 2022, to amend the IRDAI (Regulatory Sandbox) Regulations 2019.
- The IRDAI has notified the IRDAI (Insurance Intermediaries) (Amendment) Regulations, 2022 on 7 December 2022, which amend the regulations governing the registration of corporate agents and insurance marketing firms to increase the maximum number of tie-ups that are permitted with insurance companies.
- The IRDAI has issued the Guidelines on Issuance of File Reference Numbers (FRN) to Cross Border Reinsurers on 3 January 2023. These guidelines allow for auto renewal of FRN and supersede the Guidelines on Cross Border Re-insurers of 22 January 2021.
- The IRDAI has issued the Guidelines on Remuneration of Directors and Key Managerial Persons of Insurers of 30 June 2023 to bring the remuneration of other key managerial persons within its ambit.
- The IRDAI has issued the Information and Cyber Security Guidelines 2023 of 24 April 2023, which supersede the IRDAI Guidelines on Information and Cyber Security for Insurers of 7 April 2017 and various circulars issued on this subject.
- In addition, the IRDAI has also issued several exposure drafts in relation to:
  (a) Bima Vahak Guidelines;
  (b) Insurance Advertisement and Disclosure Regulations;
  (c) Reinsurance Amendment Regulations;
  (d) long-term motor products; and
  (e) issuance of e-insurance policies.

While the foregoing exposure drafts are at the deliberation stage and stakeholder comments have been invited, it is anticipated that new regulations and guidelines will be issued on these and other matters in the coming year.

JAPAN

Law and Practice

Contributed by:
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Contents

Hiratsuka & Co is a boutique law firm in Tokyo established in 1976 with four lawyers and one academic consultant, providing a full range of domestic and cross-border Japanese legal services. The firm handles various types of insurance, typical and non-typical, and has advised both insurers/reinsurers and insureds/reinsureds on matters such as fire insurance, earthquake insurance, liability insurance, marine insurance, erection insurance, satellite insurance and umbrella insurance. Another area of its expertise is recovery action in Japan based upon subrogation. Hiratsuka & Co also advises on Japanese insurance regulations and assists non-Japanese clients in obtaining insurance licences in Japan. The firm has been instructed by insurance companies and law offices from all around the globe, including Japan, the UK, the US, France, Germany, Switzerland, Italy, Spain, Norway, Russia, Singapore, Australia, Hong Kong, China and Taiwan.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

Overview

Litigation is the public system for insurance dispute resolution. If parties to an insurance policy have concluded an arbitration agreement, the courts will heed the agreement and the dispute will be resolved not by litigation but by arbitration (see **3.3 The Use of Arbitration for Insurance Dispute Resolution**). A dispute over an insurance contract may also be resolved by ADR, including court-assisted mediation and mediation by ADR institutions designated by the Insurance Business Act (see **1.3 Alternative Dispute Resolution (ADR)**). The purpose of ADR is to facilitate resolution by the agreement of both parties, and, accordingly, if no agreement is reached, the procedure ends and the dispute is resolved by litigation or arbitration.

Provisional Remedy and Compulsory Execution

Before, or in the course of, litigation or arbitration, a provisional remedy procedure is available. The claimant must submit prima facie evidence that demonstrates that their claim exists and that it is necessary to preserve it, and deposit counter-security with a Japanese court. After a judgment or an arbitral award becomes final and conclusive, a claimant may file a petition with the court to commence compulsory execution proceedings to collect its claim from a debtor's assets.

Litigation

The most important dispute resolution system is litigation. An insurance policy governed by Japanese law usually contains a jurisdiction clause whereby a specific District Court is agreed as the first-instance court. In such case, the District Court is the first-instance court, the Court of Appeal that has jurisdiction over the place of the District Court is the second-instance court and the Supreme Court is the final-instance court. The number of judges is one or three in the District Court, three in the Court of Appeal and three to five in the Supreme Court (nine to fifteen when the Supreme Court decides to hear the case en banc).

Time Until Judgment

Japanese courts have a non-mandatory target to finish the first-instance procedure as quickly as possible within a period of two years. About 75%

of all cases appealed to the Court of Appeal (not limited to insurance disputes) are finished within six months by judgment, settlement, withdrawal, etc. About 90% of all cases in the Supreme Court (again not limited to insurance disputes) are finished within six months.

1.2 Litigation Process and Rules on Limitation

Litigation Process

Up to the first hearing date

The plaintiff files a complaint with the first-instance court specifying the parties, their legal representatives (in the case of a company, a person who has legal authority to represent the company), the gist of the claim and cause of action. After the judge finds the complaint to be in order, the court effects service of the complaint and issues a summons for the first hearing date to the defendant. After the service, the defendant must submit their answer to the court. Both the complaint and the answer are treated as stated in the first hearing date for oral argument.

Up to witness examination

After the first hearing date, the plaintiff and defendant alternately submit legal briefs (a document describing its case), an evidence explanation and documentary evidence. The court may also designate the case for preparatory proceedings, where hearings are held in a meeting room without a public audience. The exchange of briefs and evidence usually continues until the issues are clarified and both parties' arguments are exhausted. If witness examinations are planned, the court confirms with the parties the facts that will be proven by witness testimony.

Evidence

When submitting documentary evidence written in a foreign language, the party must submit a Japanese translation of the relevant parts and the opponent party is entitled to object to the accuracy of the translation. If a party presents an expert's opinion to the court, their expert report should be submitted firstly and then they may be examined in witness examination. An expert retained by a party is different from an expert designated by the court. The Japanese judicial system does not adopt a discovery system such as those in place in England or the US and a party seeking disclosure of evidence in the hands of an opponent or a third party must file with the court a petition for a court order to produce documents.

Up to the first-instance judgment

If a party applies for examination of a witness and the judge considers such examination necessary, the witness submits their statement to the court a few weeks before the witness examination. The witness is then examined and cross-examined in a courtroom, with an interpreter in the case of a non-Japanese-speaking witness. Both parties submit the final brief taking account of the results of the examination. Prior to or after the examination, the court often asks both parties about the possibility of settling the case by amicable settlement. If no settlement is reached, the court renders judgment.

The second instance

A losing party in the first instance may file a petition for appeal within two weeks from the date of service of the original judgment and then must submit detailed grounds for appeal within 50 days from the appeal. The opponent may file a written counterargument by the deadline designated by the second-instance court (a Court of Appeal if the first-instance court was a

District Court). In practice, these submissions are of high importance as the judges examine them carefully in forming their initial impression of whether there are merits to the appeal. Ordinarily, the second-instance judges are not willing to have additional hearing dates for further arguments. After the conclusion of oral arguments (which may take place on the first hearing date), the court may ask both parties about the possibility of settlement before deciding to render judgment.

The third instance

Judgments of the second-instance courts may be appealed to the second appellate court, which is the Supreme Court if the second instance was presided over by a Court of Appeal. However, the grounds of appeal to the Supreme Court are very narrow and are limited to errors in the construction of the Constitution, among other barriers.

Rules on Limitation

General

Under Japanese conflict of law rules, limitation is considered not as a matter of procedural law but of substantive law. Accordingly, if an insurance policy is governed by Japanese law:

- the right to claim an insurance payment, the right to claim a refund of insurance premiums and the right to claim a refund of a premium reserve is subject to a three-year limitation period from the time the right becomes exercisable;
- the right to claim insurance premiums is subject to a one-year limitation period from the time the right becomes exercisable; and
- limitation is effected when a party invokes the limitation after the expiry of the limitation period.

If an insurance policy is governed by a foreign law, the rights expire according to the limitation provisions set out in the foreign law.

Expiry of limitation period

It is possible to postpone the expiry of, or renew, the limitation period through certain events. For example:

- if a party commences litigation, the limitation period does not expire until the litigation is completed;
- if an agreement to hold negotiations on a claim is made in writing, the limitation period does not expire until one year (or an agreed time period of less than one year) has passed from the time of the agreement (or six months from the time of the notice of refusal of the negotiation); and
- if a demand is made, the limitation period does not expire for six months from the time of the demand.

Limitation is one of the most complicated areas of law and a Japanese lawyer's advice should be sought for specific cases.

1.3 Alternative Dispute Resolution (ADR)

ADR is widely used in the insurance field. Japan has three ADR institutions designated by the Prime Minister based upon the Insurance Business Act, namely:

- the Sompo ADR Centre (for a dispute against a Japanese non-life insurance company);
- the Insurance Ombudsman (for a dispute against a foreign non-life insurance company); and
- the Life Insurance Counselling Office (for a dispute against a life insurance company).

All three institutions have complaint resolution procedures and dispute resolution procedures. Their systems are basically the same, as follows.

Complaint Resolution Procedure

An insured or a policyholder files a complaint with the ADR institution. The ADR institution provides necessary advice, notifies the relevant insurer of the complaint and requests them to respond swiftly. The insurer makes contact with the insured or the policyholder and holds negotiations for resolution of the dispute. If the dispute is not settled within a certain period, the institution may refer the insured or the policyholder to a dispute resolution procedure and the complaint resolution procedure ends.

Dispute Resolution Procedure

An insured or a policyholder files a petition for dispute resolution with the ADR institution. The ADR institution appoints one or more committee members for handling the dispute resolution process. In the case of the Life Insurance Counselling Office, its internal permanent committee handles the dispute resolution process. The committee hears both parties' arguments and, if they consider it appropriate, proposes settlement terms. In principle, the insurers owe an obligation to accept certain settlement terms (special mediation terms in the case of the Sompo ADR Centre and the Insurance Ombudsman, and settlement terms in the case of the Life Insurance Counselling Office), while the insured or the policyholders do not.

Number of Cases

For the period from 1 April 2022 to 31 March 2023, the Sompo ADR Centre newly accepted about 3,490 complaint resolution cases and about 500 dispute resolution cases, the Insurance Ombudsman about 130 complaint resolution cases (the number of dispute resolution cases is not disclosed) and the Life Insurance Counselling Office about 5,000 complaint resolution cases and about 350 dispute resolution cases.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Jurisdiction

Agreement

Under the Japanese rules regarding international jurisdiction, parties to an insurance contract may agree on a country in which they are permitted to file an action with the courts. The agreement is not valid unless it is made regarding actions that are based on a specific legal relationship, and executed by means of a written document. An agreement that an action may be filed only with the courts of a foreign country may not be invoked if those courts are unable to exercise jurisdiction by law or in fact. A jurisdiction agreement in which the parties agree exclusive jurisdiction of the court that has the jurisdiction over the head office of the defendant is, in principle, valid, unless the agreement is extremely unreasonable and against public policy (the Supreme Court judgment of 28 November 1975 Minshu 29.10.1554).

Other grounds

The Code of Civil Procedure of Japan provides certain grounds for the jurisdiction of the Japanese courts where no jurisdiction agreement exists. Typical examples are as follows:

- an action that is brought against a corporation whose principal office or business office is located in Japan; and
- an action on a claim for performance of a contractual obligation, on a claim for damages due to non-performance of a contractual obligation or on any other claim involving

a contractual obligation if the contractually specified place for performance of the obligation is within Japan.

However, even when the Japanese courts have jurisdiction over an action (except when an action is filed based on an exclusive jurisdiction agreement specifying the Japanese court), the court may dismiss the whole or part of an action without prejudice if it finds that there are special circumstances due to which, if the Japanese courts were to conduct a trial and reach a judicial decision in the action, it would be inequitable to either party or prevent a fair and speedy trial, in consideration of the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence, and other circumstances.

Choice of Law

General

Under the conflict of law rules of Japan, the applicable law to an insurance policy is the law of the place chosen by the parties at the time of the conclusion of the insurance policy. In the absence of said choice of law, an insurance policy shall be governed by the law of the place with which the insurance policy is most closely connected at the time of the conclusion of the insurance policy. The law of the habitual residence of the insurer is presumed to be the law of the place with which the insurance policy is most closely connected. The parties may agree to change the governing law otherwise applicable to the insurance policy, but such change may not be asserted against a third party when it prejudices the rights of such third party.

Consumer protection

There are special provisions regarding the choice of law for consumer contracts. For example, even when the law applicable to the consumer contract as a result of a choice or a change of governing law is a law other than the law of the consumer's habitual residence, if the consumer has manifested their intention to the business operator that a specific mandatory provision from within the law of the consumer's habitual residence should be applied, such mandatory provision shall also apply to the matters stipulated by the mandatory provision with regard to the formation and effect of the consumer contract. Notwithstanding said general rule, in the absence of a choice of law with regard to the formation and effect of a consumer contract, the formation and effect of the consumer contract shall be governed by the law of the consumer's habitual residence.

2.2 Enforcement of Foreign Judgments

Validity of a Final and Conclusive Judgment Rendered by a Foreign Court

A final and conclusive judgement rendered by a foreign court must satisfy the following requirements in order to be enforceable in Japan:

- the jurisdiction of the foreign court is recognised pursuant to laws and regulations, conventions, or treaties;
- the defeated defendant has been served (excluding service by publication or any other similar service) with the requisite summons or order for the commencement of litigation, or it has appeared without being so served;
- the content of the judgment and the litigation proceedings are not contrary to public policy in Japan; and
- a guarantee of reciprocity is in place.

This general rule is applicable to enforcement by or against insurers in Japan.

General Procedure

A party who seeks enforcement in Japan of a final and conclusive judgment rendered by a foreign court should firstly file a lawsuit against an obligor for an execution judgment. After the execution judgment becomes final and conclusive, the party may apply with the Japanese courts for compulsory execution against real property, vessels, movables, claims and other property rights.

2.3 Unique Features of Litigation Procedure

Litigation Costs

When filing a lawsuit, the plaintiff needs to purchase revenue stamps and attach them to the complaint. The amount of the revenue stamp is roughly proportional to the claim amount. The cost of revenue stamps is included in the litigation costs, which are borne entirely or partly by a losing party. However, in practice, it is not claimed.

Legal Costs

Legal costs (attorneys' fees) shall be borne by each party and are not recoverable from the losing party. In the case of a claim in tort, the Japanese courts often add 10% of the awarded amount as attorneys' fees. However, it is unrelated to the actual amount spent by the winning party.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

If a party files a lawsuit with a Japanese court for a dispute (including insurance and reinsurance) that is subject to an arbitration agreement and the other party requests dismissal without prejudice, the Japanese court will, in principle, dismiss the lawsuit without prejudice. There are exceptions to this general rule where the arbitration agreement is null and void, where the arbitration procedure cannot be carried out based upon the terms of the arbitration agreement and where the other party requests dismissal pursuant to the arbitration agreement after it presented oral arguments on the merits. These rules are applied regardless of whether the place of arbitration is in Japan, outside Japan or has not been fixed.

3.2 The New York Convention

New York Convention

Japan is a contracting state of the New York Convention.

Enforcement of Arbitral Awards Handed Down in Other Jurisdictions

When the place of arbitration is outside Japan and a party seeks to enforce an award from that arbitration in Japan, the party must:

- obtain an execution order of the arbitral award from the Japanese courts; and then
- apply to the Japanese courts for compulsory execution against the respondent's assets. In the application, various documents must be submitted to the Japanese courts, including an arbitral award for which an execution order has become final and conclusive.

Execution Order

A party who intends to enforce an arbitral award may apply for an execution order with the Japanese courts. The court may not make a decision on the application without holding oral arguments or a hearing that both the applicant and the obligor-respondent can attend. The court dismisses the application if it finds that any of the grounds set forth in Article 45 paragraph 2 of the Arbitration Act (which are substantially the

same as Article 5 of the New York Convention) exists. Otherwise, an execution order is issued.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Use of Arbitration

Arbitration is not a significant form of insurance dispute resolution in Japan.

Rules of Arbitration

If the place of arbitration is in Japan, general rules provided in the Arbitration Act are applied to arbitration. According to these rules, the parties must be treated equally in an arbitration procedure, the parties must be given full opportunity to argue their case in an arbitration procedure, and the rules of arbitration provided by the parties' agreement must be observed by the arbitral tribunal, etc. If the parties agree to resolve their dispute at an arbitration institution such as the Japan Commercial Arbitration Association, arbitration rules provided by the institution are also applied.

Private Character

Arbitration is neither presided over by the national courts nor operated at the taxpayer's expense. In this sense, arbitration is private. On the other hand, Japanese law provides for general rules regarding arbitration procedure; a claim by arbitration has the statutory effect of postponing the expiry of the limitation period, and an arbitral award is given the same effect as a final and conclusive court judgment. Considering these aspects, an authoritative academic has pointed out that arbitration has the character of a semi-public dispute resolution.

Appeal to Arbitral Award

If the place of arbitration is in Japan, a party may apply to the Japanese courts for a cancellation of the arbitral award. The court may not make a decision on the application without holding oral arguments or a hearing that both parties to the arbitration can attend. The court may cancel the arbitral award if certain grounds exist that are substantially the same as Article 5 paragraph 1(a)–(d) and paragraph 2 of the New York Convention.

4. Coverage Disputes

4.1 Implied Terms

Terms are not implied into a contract of insurance by operation of law. Japanese insurance contracts normally contain detailed terms and conditions. Disputes are resolved through the construction of specific terms in the contract.

4.2 Rights of Insurers

Principle – Insured's Obligation to Answer the Insurer's Questions

In concluding a non-life insurance policy, a life insurance policy or a fixed-amount accident and health insurance policy, an insurer-to-be has the right to request the disclosure of facts with regard to material matters concerning the likelihood of occurrence of loss to be compensated for under the relevant insurance policy. The policyholder/insured-to-be owes an obligation to disclose the facts requested by an insurer-to-be. This is a mandatory rule under the Japanese Insurance Act that may not be contracted out of to the disadvantage of the policyholder or insured.

If the policyholder or insured fails to disclose such facts or discloses false facts intentionally or by gross negligence, an insurer, in principle, may cancel the insurance policy. This is also a mandatory rule that may not be contracted out of to the disadvantage of the policyholder or insured.

Exception – Insured's Obligation to Voluntarily Disclose Material Matters

These mandatory rules are not applicable to certain non-life insurance policies that compensate damage arising from business activities including marine insurance policies, property insurance policies or liability insurance policies regarding aircraft or nuclear facilities. Freedom of contract is widely admitted. For example, standard hull and machinery insurance policies provide that a policyholder/insured-to-be must disclose facts with respect to important matters that may affect the acceptance of underwriting or the decision of the contents of an insurance policy by the insurer-to-be (ie, in these cases, the scope of disclosure is not limited to facts requested by an insurer-to-be). Such standard policies commonly provide for the insurer's right of cancellation where the policyholder or insured failed to disclose facts or disclosed false facts.

4.3 Significant Trends in Policy Coverage Disputes

Litigation Cases

There are many cases in which insurers allege that the insured caused the incidents intentionally or by gross negligence and rely upon exemption clauses in the insurance policies. The Japanese courts carefully consider the circumstances and background of the incident, occurrences after the incident and economic motivation, among other factors, in their fact-finding and judgment on the issues.

ADR Cases

Wide varieties of cases and issues are raised with regard to various types of insurance. It is difficult to see any trends. In 2022, accident insurance claim cases have increased and automobile insurance cases have decreased. Cases ending without resolution have increased. One noteworthy development is that there was an application for ADR regarding a D&O insurance claim.

4.4 Resolution of Insurance Coverage Disputes

Generally, insurance coverage disputes are resolved through negotiation. If it turns out to be difficult, they are resolved by litigation, arbitration or ADR.

The position is slightly different for reinsurance contracts. Most reinsurance coverage disputes are resolved by negotiation and it is rare for them to be settled though legal proceedings.

4.5 Position if Insured Party Is Viewed as a Consumer

Principle

The position is almost the same where the law views the insured party as a consumer. The differences are as follows.

The Consumer Contract Act

The Consumer Contract Act provides a consumer's right of rescission of a contract. A consumer may rescind a consumer contract, for example, in the case of a consumer's mistake caused by a trader's material misrepresentation or by a trader's provision of a conclusive assessment of uncertain matters. If a consumer rescinds an insurance policy based upon these rights, they receive a refund of the insurance premium, which, however, would not be a sufficient remedy in many cases.

ADR

For a dispute between a consumer and a trader of national import, a consumer may utilise mediation or arbitration by the Dispute Resolution Committee of the National Consumer Affairs Centre of Japan. However, it is unclear how

many insurance disputes are settled by these procedures.

4.6 Third-Party Enforcement of Insurance Contracts

Principle

A third party may neither enforce an insurance contract nor sue an insurer in connection with an insurance contract. If a third party's claim against an insured is established by final and conclusive judgment, the third party may apply to the Japanese courts for a seizure order of the insured's claim against an insurer for insurance payment. The third party is entitled to directly collect the claim for insurance payment from the insurer one week after service of the seizure order to the insured.

Execution of Statutory Lien in Liability Insurance

A third party who has a claim for compensation for damage against an insured under a liability insurance policy has a statutory lien over the insured's claim against the insurer for insurance payment (Article 22 paragraph 1 of the Insurance Act). Even if the third party does not have a final and conclusive judgment that establishes their claim against the insured, the third party may apply to the Japanese courts for a seizure order of the claim for insurance payment, based upon the statutory lien.

Direct Claim Based Upon Insurance Policy

If an insurance policy contains a clause that allows a direct claim by a third party against the insurer, a third party may claim for payment against the insurer to the extent allowed by the clause. Such a clause is often contained in an automobile insurance policy.

Direct Claim Based Upon Japanese Law for Automobile Accidents

The Act on Securing Compensation for Automobile Accidents provides for compulsory automobile liability insurance. Under this insurance, a person who puts an automobile into operational use for their own benefit is included as an insured. When the person is liable to compensate for damage to a third party, the third party may directly claim against the insurer for payment of damage up to the amount of insurance coverage.

4.7 The Concept of Bad Faith

Japan does not have a concept of bad faith or bad faith breach of contract in the areas of insurance and reinsurance law.

4.8 Penalties for Late Payment of Claims

Late Payment Interest

If an insurance policy is governed by Japanese law, an insurer owes the obligation to pay late payment interest if the insurer fails to pay the insurance claim by the due date. If the interest rate is agreed in the insurance policy, the agreed rate is applied. If there is no such agreement, the statutory rate is applied. The current statutory rate is 3% per annum but it may be changed by ministerial order in the future. If an insurer failed to make the payment by a due date that was on or prior to 31 March 2020, the old statutory interest rate of 6% per annum applies.

Due Date

Even if the due date of an insurance claim is provided in an insurance policy, if the due date falls after the expiry of a period of time reasonable to confirm matters that need to be confirmed under the insurance policy for the purpose of payment of an insurance claim, the day on which such period expires is treated as the due date for payment of the insurance claim.

If the due date of an insurance claim is not provided in an insurance policy, the insurer is not responsible for any delay until an insurance proceeds payment is claimed and the period necessary to confirm the insured event, etc, pertaining to said claim expires.

An insurer is not liable to pay late payment interest for the period of delay in investigation that is attributable to a policyholder or an insured.

4.9 Representations Made by Brokers

Generally, an insured would not be bound by representations made by its broker. It is normally understood in Japan that when an insurance broker performs procedures such as application for insurance for its customers – ie, a person who is to be a policyholder or an insured – the insurance broker acts not as an agent but as a messenger of the customer. Under this interpretation, the insurance broker has no authority to represent the customer as agent and, accordingly, an insured is not bound by the broker's representations.

However, in a specific case, the question should be examined carefully, taking factual backgrounds into consideration.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

General

Delegated arrangements such as those adopted between a Lloyd's syndicate and managing agents are not common in Japan. With regard to a Lloyd's syndicate, there is a precedent in which the Japanese court allowed a leading underwriter who was one of the members of a Lloyd's syndicate to pursue legal proceedings relating to an insurance policy on behalf of themselves and other members.

Co-insurance

Co-insurance is widely used in Japan. A leading underwriter and other underwriters usually conclude a business outsourcing contract. Based upon the contract, the leading underwriter would issue the co-insurance policy papers, but the leading underwriter is not usually authorised to conclude the insurance contract on behalf of the other underwriters. Also, the leading underwriter would deal with the administration of the insurance claim payment, but is usually not authorised to assess loss on behalf of other underwriters. Each insurer in a co-insurance owes separate liability to an insured in proportion to each underwriting ratio. In order to pursue 100% of the rights or obligations in a co-insurance policy, all co-insurers must be the plaintiffs or the defendants.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

No statistics are published on the area of claims where insurers fund the defence of insureds or insurers make insurance payment for disputes costs.

Most liability insurance policies in Japan provide insurance cover for disputes costs. As long as the requirements for the cover are satisfied, insurers generally make insurance payments for the costs irrespective of the areas of claims. However, insurers of automobile insurance are specially allowed negotiation with the victims on behalf of the insureds. This allows insureds to save disputes costs, while insurers may negotiate for a smaller insurance payment.

5.2 Likely Changes in the Future

This is unlikely to change in the next few years.

5.3 Trends in the Cost or Complexity of Litigation

As Japanese society and the country's economy have become highly complex, litigation cases have inevitably come to contain complex elements, which has created a general increase in litigation costs. Among recently published court precedents in the area of liability insurance, more than half of them are automobile collision cases, which have traditionally been the most common type of case. However, there are also some cases concerning complex and high-value claims such as those relating to a nuclear incident, asbestos damage, oil pollution, directors' and officers' liability and expert malpractice liability.

5.4 Protection Against Costs Risks

Claimants can buy rights protection insurance for insurance coverage of legal costs or litigation costs (see **2.3 Unique Features of Litigation Procedure**). In many cases, rights protection insurance takes the form of an additional endorsement to the automobile insurance, fire insurance or other major insurance policy. A few insurance companies sell rights protection insurance for natural persons as well as legal persons in the form of independent insurance.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

With respect to an insurance policy governed by Japanese law, the law gives an insurer a right of action to recover sums from third parties causing an insured loss to an insured.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

Article 25 of the Insurance Act of Japan provides the following effects.

- When an insurer has paid an insurance claim, the insurer shall be subrogated with respect to any claim against a third party acquired by an insured due to the occurrence of damages arising from an insured event (the "Insured's Claim").
- The maximum amount of subrogation is the lesser of:
  - (a) the amount of the insurance payment made by the insurer; or
  - (b) the amount of the Insured's Claim (if the amount of the insurance payment made by the insurer falls short of the amount of damages to be compensated, the amount that remains after deducting the amount of the shortfall from the amount of the Insured's Claim).
- If the amount of the insurance payment falls short of the amount of damage to be compensated, the insured's right to receive payment of the un-subrogated portion of the Insured's Claim shall have priority over the subrogated claim.

Name

Under Article 25 of the Insurance Act, the Insured's Claim is transferred to the insurer by operation of law when the insurer has paid the insurance claim. Accordingly, the claim is exercised in the name of the insurer.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

Type of Litigation

There have not been drastic changes in the type of litigation in the year up leading up to August 2023.

The war in Ukraine has not affected the types of litigation in Japan. There have been no other developments that have affected the type of proceedings in Japanese courts.

Amount of Litigation

According to court statistics, the number of ordinary civil and administrative litigation cases in 2022 remained at the same level as in 2021, while there was a 1.7% increase in the number of civil execution cases and a 3.9% decrease in the number of bankruptcy cases compared to the previous year.

7.2 Forecast for the Next 12 Months

Changes in social and economic conditions can cause new types of disputes to be brought before the Japanese courts. For example, a Japanese individual investor filed a lawsuit against a Japanese securities company, seeking damages allegedly suffered in relation to the Swiss authorities' announcement that Credit Suisse's AT1 bonds would be made valueless in March 2023. There are signs of a further class-action lawsuit being filed within 12 months, but it is yet unclear how large it will be.

Generally speaking, however, Japanese individuals and companies prefer to resolve disputes through negotiation, so it may take some time before disputes are brought before the courts. In addition, it can take even longer for the court's decision to be rendered in the form of a judgment, as Japanese court proceedings are time-consuming.

7.3 Coverage Issues and Test Cases

The authors are unaware of any specific coverage issues or test cases deriving from COVID-19, the war in Ukraine, or otherwise.

7.4 Scope of Insurance Cover and Appetite for Risk

Insurance Cover

In a broad sense, the COVID-19 pandemic and the war in Ukraine have affected the scope of insurance coverage available.

On 10 April 2020, the Japanese Financial Service Agency (FSA) requested insurance trade associations to take active measures to protect policyholders exposed to the risk of COVID-19. In response, some insurers introduced a retrospective revision of their insurance products to cover COVID-19-related losses and expenses, while others decided to apply accidental death clauses to COVID-related deaths. In addition, insurers have developed various new products covering COVID-19-specific losses such as loss of earnings due to temporary closure or shortening of business hours and facility disinfection costs.

Meanwhile, the war in Ukraine has led to major Japanese insurers suspending war and strike coverage from cargoes carried near Ukraine in response to reinsurance trends.

Appetite for Risk

There is no evidence of published items that indicate that the pandemic or the war in Ukraine changed appetites for risk within Japan.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

The Effect of Climate Change on Underwriting

The General Insurance Association of Japan, a trade association representing non-life insurance companies licensed in Japan, established its

Climate Change Response Plan in July 2021. The Plan states that its members shall:

- contribute to relieving and responding to climate change risks and assist in a smooth transition into a sustainable society; and
- aim for a decarbonised society by curbing their emission of greenhouse gases.

Various insurers have issued or amended their own climate change response papers to further the association's agenda. For example, in June 2022, a major insurer announced that by 2025 they would stop underwriting, investing in or lending to businesses relying mainly on coal that have no greenhouse gas reduction plans.

The Effect of Climate Change on Insurance Litigation

Particular court precedents showing a connection between climate change and insurance litigation cannot be found.

8.2 Data Protection Laws

In Japan, the Act on the Protection of Personal Information has been in full force since 2005.

With regard to underwriting, the following apply.

- Following recommendations by the Basic Policy on the Protection of Personal Information (Cabinet Decision of 2 April 2004, promulgated under delegation by said Act), non-life and life insurance companies have established and published personal information protection policies, which include the purpose of use of personal information, types of personal information to be obtained, methods of obtaining personal information, provision of personal information, protection and management of personal information and requests for disclosure, correction and deletion of personal data. Each insurance company carries out underwriting work in accordance with their respective personal information protection policy.
- Article 20(2) of the said Act prohibits the acquisition of sensitive personal data (race, creed, social status, medical history, criminal and victim records, etc), except with the prior consent of the subject individual or as provided by the Act. Thus, insurers must obtain prior consent when acquiring such information.
- Article 28(1) of the said Act prohibits the provision of personal data to third parties in foreign countries, except with the prior consent of the individual or as provided by the Act. In obtaining such consent, certain information such as the data protection laws in that foreign country must be provided to the individual. Thus, insurers must provide such information and obtain prior consent when it will conclude reinsurance contracts with foreign reinsurers.

With regard to litigation, the following apply.

- Insurance companies must maintain a high level of information management because they handle highly sensitive information such as an individual's physical characteristics. No court precedents regarding disputes over information management could be found.
- No court precedents regarding insurance claims over leaks of personal information could be found.
- A traffic accident victim is entitled to directly claim against the perpetrator's insurer under the Act on Securing Compensation for Automobile Accidents (see **4.6 Third-Party Enforcement of Insurance Contracts**). In such cases, the victim may dispute whether they gave consent to the insurance

company's obtaining a medical certificate from the victim's hospital. This is considered to be mainly a question of fact-finding, and occasionally it has been found that the victim gave consent with regard to one hospital but not another. The courts pay due respect to the subject individual's right to privacy when considering such issues.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

The Code of Civil Procedure of Japan was amended in May 2022, introducing:

- the digitalisation of court procedures; and
- "fast track" proceedings allowing for a quicker resolution to court disputes.

As of August 2023, the date of enforcement of the revised Code has not been fixed.

Under the current regime, the parties must, in principle, file court submissions by paper, and formal hearings must be attended in person. The amendment will make it possible to commence suit, file submissions, and inspect court files electronically without resorting to paper. It will also allow court hearings and witness examinations to take place electronically.

Also, under the current regime, there are no mandatory limits on the time by which litigation must be concluded. Although there is a law requiring the first-instance courts to aim for the conclusion of proceedings within two years, it is a best-effort provision which cannot be enforced. Further, ordinary litigations are subject to two appeals. The amendment will make it possible for the parties to agree to apply for "fast track" proceedings, whereby the proceedings must conclude within six months from the date of the first hearing, and a judgment issued within one month from the conclusion of the proceedings. A "fast track" judgment cannot be appealed unless the claim was dismissed without prejudice to the merits. The draftsmen anticipated "fast track" proceedings to be utilised in cases where the points of dispute are limited to the interpretation of contractual clauses or the application of law. As such, they may prove helpful in insurance coverage disputes.

However, the "fast track" has certain limitations. First, the proceedings are subject to a court determination that it would not prejudice fairness or proper procedure. The proceedings may not be utilised for consumer and individual labour disputes. Further, any one of the parties has the right to demand a switch to ordinary procedure. In addition, a losing party may file an objection against a "fast track" judgment within two weeks from service, upon which the proceedings will revert to the position before hearings were concluded and transition into ordinary litigation.

Trends and Developments

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Mori Hamada & Matsumoto (MHM) is one of the largest full-service Tokyo-headquartered international law firms. The firm has also established a strong international presence; it now has a presence across East Asia and Southeast Asia, having offices in Beijing, Shanghai, Singapore, Bangkok, Yangon, Vietnam, Jakarta and New York. The firm's insurance expertise encompasses insurance litigation, regulatory affairs, compliance, reinsurance, captive insurers, group restructurings, mergers and acquisitions, and financing. The firm provides solutions to clients engaged in insurance markets globally.

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MORI HAMADA & MATSUMOTO

Recent Trends in Reinsurance Agreements in Japan and Litigation-Related Issues

Block or funded reinsurance agreements in Japan

Due to the introduction of a new solvency regime in Japan, many Japanese insurance companies, especially life insurance companies, are considering entering into new reinsurance agreements, which are sometimes called "block reinsurance" or "funded reinsurance", with overseas reinsurers. The new regime is an economic value-based solvency regime which evaluates both assets and debts on an insurance company's balance sheet on an economic value basis. The index under the regime is called ESR (Economic Solvency Ratio), which can be profoundly affected by fluctuations in interest rates especially when an insurance company has existing blocks of insurance contracts with high scheduled interest rates and long durations. One solution which insurance companies are considering in order to address the new regime is entering into such a reinsurance.

Dispute resolution clauses in reinsurance agreements

To deal with disputes, it is usual for reinsurance agreements to first have negotiations between the ceding company and the reinsurer, and only if the parties cannot resolve the dispute within a certain period of time may either party submit the dispute to formal arbitration. Japanese insurance companies often prefer arbitration at the Japan Commercial Arbitration Association (JCAA). While the seat of arbitration is Tokyo, the parties can choose the language and request that the arbitration be conducted via videoconference.

Licensing requirement and considerations for foreign reinsurers carrying out a reinsurance business in Japan

Under the Insurance Business Act of Japan (IBA), an "insurance business" includes any business that receives insurance premiums in exchange for the agreement to compensate someone for damages caused by uncertain events. This definition is broad enough to capture reinsurance businesses as well. Generally, an insurance business must be licensed. The exception to this licensing requirement is a reinsurance transaction carried out "offshore" (ie, outside Japan) as it is

exempted from regulations on overseas direct insurance. If a reinsurer operates a "(re)insurance business" on an "offshore" basis (ie, it carries out all underwriting, claims handling, contract negotiations, and other activities from outside Japan and does not utilise its own employees or agents to conduct any such activities in Japan), then it is not required to obtain an insurance business licence under the IBA and, thus, is not subject to the supervision of the Financial Services Agency of Japan (the "FSA"), any regulatory (including reporting) obligations, or any capital requirements regardless of the amount of business it conducts with Japanese cedants.

However, cedants must pay attention to regulatory requirements for them to obtain credit for reinsurance on their financial statements. Licensed cedants (insurers) in Japan must hold policy reserves for the policies they have insured. However, there is an exemption for policies that have been reinsured, which exemption is available without limitation for reinsurance transactions concluded by licensed reinsurers in Japan. Foreign reinsurers without a licence in Japan may also invoke this exemption but only to the extent that the reinsurance would not impair the financial soundness of the cedants considering the foreign reinsurer's businesses and financial conditions. There is no bright-line test based on specific monetary thresholds or limits under the IBA; however, if, for example, the maximum reinsurance payment is less than 1% of the total assets of the cedant and there is no concern that the foreign reinsurer would fail to make the reinsurance payments due to insolvency or other reasons, then this exemption may be invoked according to the Supervisory Guidelines for Insurers published by the FSA. Japanese insurance companies (cedants) may ask a foreign reinsurer for information, materials and other evidence regarding the foreign reinsurer's businesses and financial conditions from this perspective.

Data and privacy laws in the context of reinsurance transactions

If cedants in Japan provide a foreign reinsurer with the personal information of policyholders, the insured, or any other individuals in Japan (collectively, "Individuals"), they are subject to the Act on the Protection of Personal Information (the "APPI"). In the context of reinsurance transactions, cedants do not necessarily need to provide reinsurers with information that identifies Individuals. However, if there is any dispute over whether an reinsurance agreement covers specific policies, for example, then relevant information which can be used to identify policyholders may need to be provided to the reinsurer.

If cedants provide the personal information of Individuals to a foreign insurer, they must first obtain the Individuals' prior written consent. In practice, cedants typically obtain such consent from Individuals at the time of entering into the primary insurance contracts with the Individuals. In addition, if an Individual's personal information will be provided to third parties (including foreign reinsurers) in foreign countries, the regulations on cross-border data transfers under the APPI apply, with the exception of certain foreign countries (currently the UK and EU member states). Where a foreign reinsurer is located outside the UK and EU member states, cedants in Japan may provide personal information of Individuals to that foreign reinsurer if (a) the cedants had obtained the prior written consent of the Individuals, or (b) the foreign reinsurer has complied with certain standards, such as taking measures equivalent to those required under the APPI. Japanese insurance companies (cedants)

may ask a foreign reinsurer for information, materials and other evidence regarding the standards taken by the foreign reinsurer from this perspective when Japanese insurance companies seek option (b) as a solution.

Recent Notable Precedents in the Japanese Courts

Reinsurance claim (Tokyo High Court, 28 April 2021)

This lawsuit relates to the Gulf of Mexico oil spill in 2010. An operator was drilling for oil and natural gas at the Gulf of Mexico when a wellbore blew out and the rising gas ignited and exploded, spilling an enormous quantity of crude oil into the Gulf of Mexico. A Japanese insurance company provided insurance to a corporate group which joined the drilling project as a non-operator. The insurance company ceded the risk to foreign reinsurers and made a claim against them for reinsurance payments. Both the original insurance and the reinsurance agreement are governed by the laws of Japan.

One main issue in this case concerned the principle of Follow the Fortunes. The reinsurance policy did not contain a Follow the Settlement Clause, Claim Control Clause, or any clause directly stipulating a Follow the Fortunes rule. The reinsurance was on a proportional basis, with all the conditions being the same as those of the original insurance. The cedant argued that Follow the Fortunes is a widely accepted commercial custom in reinsurance practice even if it is not specified in the reinsurance contract and, therefore, the reinsurer should pay the reinsurance claim even if the cedant had no proof that the requirements for the payment of claims under the original insurance policy were met. However, the court did not agree that Follow the Fortunes is a reinsurance commercial custom and decided that the cedant must allege and prove that the payment of claims under the original insurance satisfied the requirements of the original insurance policy.

The other issue was whether or not the insured assumed a legal liability to compensate, which is an important requirement for the payment of claims under the original insurance. In this accident, the operator and the non-operators received huge compensation claims from the US government, local governments, businesses, and individuals. The insured entered into a settlement agreement with the operator, whereby the insured paid the operator a settlement amount and the operator agreed to defend and indemnify the insured against any present and future claims against the insured by third parties. As a result, the insured was no longer subject to claims or lawsuits in the United States regarding the accident. Given this circumstance, the court found that, since the insured's legal liability to third parties had not been determined, the cedant had not proven that the payment of claims under the original insurance satisfied the requirements of the policy and rejected the cedant's claim.

"Sudden and unexpected accident" (fortuitous or accidental) and "one event/occurrence" on EAR (Tokyo District Court, 17 February 2021)

The court decision concerned an accident that occurred at a large-scale solar power plant, known as a mega solar power plant, and involved an insurance claim under an erection all risk insurance (EAR) purchased by the contractor who was contracted to build the power plant. In this case, after the solar modules were installed, scratches were discovered on the backs of 15,630 modules. The operator replaced the modules, resulting in an insurance claim for the replacement cost of the modules.

The policy stated that the insurance company shall pay insurance for damages to the insured property caused by any "sudden and unexpected accident" at the construction site described in the insurance policy. The policy further provided that the amount of damages covered by the insurance company shall be the amount remaining after deducting the insured's out-of-pocket expenses stated in the policy from the amount of damages for "one event/occurrence".

As for the issue of "sudden and unexpected accidents", the insurance company argued that the damage to the modules was not a "sudden and unexpected accident" because it was easily foreseeable and almost inevitable. However, the court found that the number of damaged modules was only a portion of the total number of modules and, given that 84% of the total modules were not damaged, the damage to the modules was not an almost inevitable consequence and, thus, was a "sudden and unexpected accident".

As to the issue of "one event/occurrence", the operator claimed that the damage to the modules caused damage to the entire power plant, claiming that it was a "one event/occurrence" as a whole. The court decided that, generally, if the insured's damage is caused by the same cause, then it is interpreted that the damage is caused by "one event/occurrence". However, the court indicated that it cannot be said that there was a fault in the construction method itself related to the installation of the modules that caused the damage to the modules, and it is difficult to assess that all damages to the modules were caused by the same cause. Rather, the court decided that the damages were caused by the negligence of individual workers in installing the modules under specific circumstances, including weather conditions, and since the damage to each module was a "one event/occurrence", then the damage to the entire power plant was not caused by the same cause. As a result, the court rejected the operator's claim because the amount of damages to each module was less than the insured's out-of-pocket expenses stated in the policy.

POLAND

Trends and Developments

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DeBenedetti Majewski Szcześniak Kancelaria Prawnicza Sp.k. is a transactional-litigation boutique with 21 lawyers in Warsaw, Poland. The firm specialises in corporate law, private equity, M&A, bankruptcy/restructuring, litigation, mediation, and criminal law (including white-collar crime). Its experience in drafting complicated transactions, tailored to the needs of demanding clients, means that DMS is the go-to firm for any difficult commercial situations, both in Poland and abroad. The firm acts as subcontractor for many international law firms without a Warsaw office, assisting with cross-border M&A transactions, advising on local aspects of Foreign Corrupt Practices Act (FCPA) or Bribery Act claims, and amending contracts in order to reflect Polish law and business aspects.

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Less Than Zero – Interpreting the Law During a Pandemic, Based on the Example of a Business's Entitlement to Idle Time Benefit

According to the literal interpretation of the law, idle time benefit may be paid out to businesses whose income has been reduced significantly, but not to those whose income has fallen to zero. Changing the way this provision is understood required intervention from the courts, and their consideration of appeals made by businesses in their cases.

Financial Benefits Introduced by COVID Law in Poland, and the Criteria for Granting Them

During COVID-19, various financial support instruments were introduced in Poland for businesses that were forced to reduce their activities due to the pandemic. These solutions are contained in the Act on Special Solutions Related to Preventing, Counteracting and Combating COVID-19, Other Infectious Diseases and Emergencies Caused by Them of 2 March 2020 – known as the "Covid Act". One of the support instruments provided for in this act, known as idle time benefit, remains the subject of numerous court disputes. This financial benefit, set out in Article 15zq Section 4.1 of the Covid Act, is payable to sole traders who started conducting non-agricultural business activity before 1 April 2020 and did not suspend it, and where their monthly income from this activity, as defined in the provisions on personal income tax, fell by at least 15% in the month preceding the month of applying for idle time benefit.

This means that idle time benefit was provided for small businesses who continued their activity during COVID-19, but who suffered a significant drop in business income (by at least 15%). These criteria were verified and the idle time benefit granted by the Social Insurance Institution (the institution in Poland responsible for dealing with social security matters, including determining the right to pensions and payments) on the basis of an application by the sole trader which, in addition to basic data, also included a statement that they had not suspended their business and had obtained a lower income. As a rule, the amount of the idle time benefit was set at 80% of the minimum wage in 2020 and amounted to PLN2,080 (circa EUR400). Sole traders could collect idle time benefit up to three times; each time, they had to file a separate application for the awarding of the benefit. The applications did not have to be filed in consecutive months.

Since it is the Social Insurance Institution who issues an official decision on granting or refus-

ing idle time benefit, certain provisions of the Act on the Social Insurance System of 13 October 1998 should be applied to those decisions. Any appeals against decisions of the Social Insurance Institution are resolved by common courts in accordance with the rules set out in the provisions of the Civil Procedure Code for proceedings in social insurance matters. This may lead to the conclusion that the rules accordingly applicable to social security should be applied to the idle time benefit. Accepting this principle would be important when assessing the sole trader's entitlement to the benefit in doubtful or ambiguous situations.

Primacy of Linguistic Interpretation in Social Insurance Matters

It is generally accepted, both in legal theory and in judicial decisions, that the provisions of the social insurance system should be interpreted strictly in view of their construction and function of social security, giving primacy to the linguistic interpretation of these provisions. This was also recently emphasised by the Supreme Court in its resolution of 8 June 2022, in case file number III UZP 1/22, on the background of determining a householder's right to a pension under the provisions concerning social insurance for farmers. Similarly, in its resolution of 11 July 2019, in case file number III UZP 2/19, which concerned the right to maternity benefit, the Supreme Court indicated that, even when the construction of a law's provisions is imperfect, the courts cannot replace the legislature in performing law-making functions and correcting imprecise provisions.

Consequently, when deciding on appeals against decisions of the Social Insurance Institution, both the Social Insurance Institution and the courts of social insurance interpret the content of the law strictly, by first applying its linguistic interpretation and only exceptionally examining and taking into account the purpose that the legislature wanted to achieve through the introduction of these provisions.

However, this practice of strict interpretation has led to a number of disputes in connection with the seemingly clear provision of Article 15qz Section 4.1 of the Covid Act, which states that idle time benefit can be claimed by a sole trader whose monthly income has fallen by at least 15%, resulting in the need to interpret the intention of this provision through lawsuits.

When the Income Amounts to PLN0

There were in fact numerous cases in which sole traders chose not to suspend their business during the COVID-19 pandemic but did not earn any income in a given month. This meant that, when filing an application with the Social Insurance Institution, they truthfully stated that their business income in the previous month had been PLN0. There were obviously such industries and businesses who unexpectedly lost their earning capacity under the restrictions due to the pandemic. In fact, these sole traders found themselves in the same situation as businesses that had suspended their business and did not derive any income from it. In practice, the difference boils down to the fact that, in the latter case, the lack of revenue and consequent reduction in business costs related to the suspension of the business was caused by the business's own decision, while in the former the lack of income occurred despite the sole trader's efforts to maintain it.

When analysing the applications of sole traders who showed a lack of income for the previous month – ie, PLN0 – the Social Insurance Institution issued refusals, following the literal wording of Article 15zq Section 4.1 of the Covid Act and

arguing that there had not been a reduction in the amount of income by at least 15% in the subsequent month, since in the previous month from which the reduction should be calculated the amount was PLN0. Therefore, since the sole trader's income had not been reduced to less than PLN0, based on the linguistic interpretation of the provision, the legislature did not provide for financial support in the form of idle time benefit.

It would be difficult to deny this reasoning if one ignores the purpose of the introduced solution in the form of granting and paying idle time benefit. Indeed, the purpose of this solution was to help sole traders affected by the crisis caused by COVID-19 and to avoid bankruptcy or the threat of a loss of funds, and to thereby reduce the negative economic consequences of the crisis caused by the pandemic. It was not intended to deprive those sole traders who were most affected by the pandemic of assistance.

Purpose-Based Interpretation

In such a situation as discussed above, a strict and literal interpretation of Article 15zq of the Covid Act would lead to unreasonable consequences. Therefore, despite the primacy of linguistic interpretation and the primacy of that interpretation in social security matters, one can and should deviate from the literal wording of a provision when its linguistic interpretation:

- contradicts other norms;
- leads to consequences that are absurd from an economic and social point of view;
- leads to grossly unjust decisions; or
- is in obvious contradiction with universally accepted moral norms.

This was emphasised by the Supreme Court in its resolution of 14 October 2004, case file number III AUA 1269/20. As such, when applying an interpretation in accordance with the purpose of the Covid Act, one concludes that, contrary to the Social Insurance Institution's decisions denying idle time benefits based on the literal content of the provision, the fact that the sole trader's situation is actually worse than that provided for in the Covid Act should make it possible to obtain the support set out therein.

Such are also the decisions of common courts, based on a purpose-based interpretation of Article 15qz Section 4 of the Covid Act, such as the following.

- The Court of Appeals in Warsaw, issued on:
  (a) 18 April 2023 in case file number III Aua 1269/20;
  (b) 8 February 2022 in case file number III Aua 1008/21; and
  (c) 20 August 2021 in case file number III Aua 421/1.
- The Court of Appeals in Poznan, issued on 23 April 2022 in case file number III Aua 473/21.

It is worth noting that, when deciding these cases in favour of sole traders, the courts stipulated that departing from the literal interpretation of the provisions in such cases is a departure from the general rule.

There have been many such rulings, and there will likely be even more, as the state of pandemic was lifted in Poland on 16 May 2023 and applications for idle time benefit could still be filed for three months after that. Since doubts about the application of these regulations have not yet been removed by the amendment of the provision, it is also likely that the Social Insurance Institution's position based on the linguistic content of the regulations has not changed.

When the Help Comes Late

Given that the negative consequences of such extraordinary circumstances were supposed to be mitigated by the solutions adopted in the Covid Act, the effectiveness of these solutions depends on their rapid activation and execution. In practice, for achieving the shortest possible time in obtaining support, it is worth at least trying to provide more precise wording when designing such legal solutions as those contained in Article 15qz Section 4.1 of the Covid Act. Several years of court disputes over the interpretation of provisions on assistance in situations of reduced income for sole traders – in commonly occurring, extraordinary and unforeseen circumstances – may be inspiring for lawyers, but are certainly not what is expected by the recipients of the assistance provided in these provisions.

SINGAPORE

Law and Practice

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Contents

Rajah & Tann Singapore LLP is one of the largest full-service law firms in Singapore with over 420 fee earners, and as part of Rajah & Tann Asia, offers clients an integrated network of more than 970 fee earners across ten countries in Southeast Asia – providing a deep pool of talented and well-regarded lawyers dedicated to delivering the highest standards of service across all the firm's practice areas. It is the only large, full-licensed law firm in Singapore with a dedicated insurance department with complete local law capability and rights of audience before all Singapore Courts. Its hybrid insurance law practice is equally strong in contentious and non-contentious insurance matters; giving the team's lawyers an unrivalled edge when advising on all aspects of an insurer's business from start-up to day-to-day regulatory issues to claims and disputes – a truly "cradle to grave" capability unmatched by any other law firm in Singapore.

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Wang Ying Shuang has over a decade's experience devoted to the practice of insurance law and has been involved in high-value international arbitrations, High Court trials and appeals to the Court of Appeal on a wide range of complex insurance coverage disputes, recoveries and defence work. On the non-contentious front, Ying Shuang has advised and structured many high-value and high-profile transactions involving the sale of insurance businesses and portfolios. She has been recognised as "Up and Coming" by Chambers Asia Pacific in its latest (2023) edition. She is currently the deputy head of the Insurance and Reinsurance practice at Rajah & Tann.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

Basis of Insurance and Reinsurance Law

The main statute governing the regulation and the conduct of (re)insurance business in Singapore is the Insurance Act 1966 (the "Insurance Act"). However, provisions from the UK Life Assurance Act 1774 and the UK Fire Prevention Metropolis Act 1774 that deal with insurable interest and accidental fire, respectively, have been adopted (with some modification) in the Insurance Act.

Apart from the Insurance Act, there are other pieces of legislation which govern specific types of insurance contracts or substantive points of insurance law. For example, Singapore has largely adopted the Third Parties (Rights against Insurers) Act 1930 via the Application of English Law Act 1993, and has a Marine Insurance Act 1906 that codifies principles of law applicable to marine insurance. Likewise, legislation such as the Motor Vehicles (Third Party Risks & Compensation) Act 1960 and Work Injury Compensation Act 2019 govern substantive aspects of insurance law in those areas.

When it comes to disputes relating to contracts of insurance, as a common law jurisdiction, Singapore relies heavily on common law principles and case law authorities. Singapore's highest court and court of final appeal is the Court of Appeal, whose decision is binding on the lower courts (for example, the High Court and the State Courts). In the absence of local case precedent, case authorities from Commonwealth jurisdictions (especially England & Wales and to an increasing extent in recent years, Australia), though not binding on the Singapore courts, are likely to be of persuasive effect. Cases from the United States of America may also be of some persuasive authority (typically less so compared to Commonwealth cases) before the Singapore courts.

Regulation of Insurance and Reinsurance Business

The insurance and reinsurance industry is regulated by the Monetary Authority of Singapore (MAS) and the Insurance Act, which contains provisions to regulate the conduct of insurance business in Singapore. The Insurance Act is supplemented by various subsidiary legislation which consist of regulations setting out in greater detail the statutory requirements that (re) insurance companies and intermediaries have to adhere to. These regulations have the same legislative effect as if their provisions had been contained in the parent Act. The MAS may also

issue various types of papers, which can be legally binding and have the force of law.

Forums for Resolving Insurance Disputes

There is no specific statutory or procedural framework that governs insurance coverage disputes. As most (if not all) coverage disputes are contractual in nature, parties will be able to avail themselves of the usual dispute resolution mechanisms and forums – ie, by commencing court proceedings or arbitration (if there is an arbitration clause in the insurance policy or if parties otherwise agree to refer the matter to arbitration). Apart from commencing an action in court or referring the matter to arbitration, there are other platforms where specific types of insurance disputes may be heard and resolved.

FIDReC

In 2005, the Financial Industry Disputes Resolution Centre Ltd ("FIDReC") was launched as an independent and impartial alternative dispute resolution institution that offers services to resolve disputes between insureds and insurers in an amicable, expeditious and affordable manner. FIDReC offers two schemes, both of which consists of a mediation and adjudication stage:

- the FIDReC Non-Injury Motor Accident Scheme ("FIDReC NIMA Scheme") which applies to third-party motor accident claims (ie, where the insured is making a claim against an insurer which is not their own insurer) where no bodily injury is suffered and if the claim amount is below SGD3,000; and
- the FIDReC Dispute Resolution Scheme.

It is mandatory for matters which fall within the FIDReC NIMA Scheme to be first heard by the FIDReC before court proceedings may be commenced.

FIDReC has a track record of handling claims made against insurers, pertaining to the following:

- market conduct issues such as mis-selling or misrepresentation of the product sold to the consumer in life insurance, accident and health insurance and investment-linked products; and
- disputes on liability relating to general insurers involving policies such as travel insurance, motor insurance, and accident and health insurance.

Further, with regard to a claim dispute arising out of an Integrated Shield Plan (IP), which is an optional health insurance coverage provided by private insurance companies typically as an add-on or supplement to the basic and compulsory health insurance scheme for Singapore citizens and permanent residents, insureds can also make use of the Clinical Claims Resolution Process (CCRP). The CCRP is an initiative proposed by the Multilateral Healthcare Insurance Committee commissioned by the Ministry of Health on 27 April 2021 to provide a platform to address issues related to health insurance. The CCRP accepts requests from parties who agree to seek a final and binding determination of their dispute of a clinical nature related to a claim under an IP. The CCRP Panel only hears cases from IP policyholders (ie, patients), medical practitioners and institutions and IP insurers.

1.2 Litigation Process and Rules on Limitation

Litigation Process

Depending on the nature and quantum of the claim, civil proceedings are either instituted in the State Courts (which consists of the Magistrates' Court and the District Court) or the General Division of the High Court.

The jurisdictional limits of the different courts are set out below:

- if the value of the claim is lower than SGD60,000, the case should be filed in the Magistrate's Court;
- if the value of the claim is between SGD60,000 and SGD250,000, the case should be filed in the District Court; and
- if the value of the claim is more than SGD250,000, the case should be filed in the General Division of the High Court.

Additionally, specifically with regard to road traffic accident claims or claims for personal injuries arising out of industrial accidents:

- if the value of the claim is less than or equal to SGD500,000, the case should be filed in the District Court; and
- if the value of the claim is more than SGD500,000, the case should be filed in the General Division of the High Court.

Civil claims are typically first heard in the General Division of the High Court or the State Court (depending on the quantum of the claim and the nature of the relief sought as the High Court only hear claims which exceed SSGD250,000). Appeals from the State Courts are heard in the General Division of the High Court and appeals from the High Court are heard in the Appellate Division of the High Court or Court of Appeal.

The litigation process typically commences with the claimant, known as the plaintiff, filing a writ of summons and a statement of claim, which is served on the defendant, who then files a defence. A litigant can commence an action either by filing an originating claim (OC) or originating application (OA). An OA is appropriate for a civil claim if it is required by law, or if it concerns some question of law and the material facts are not in dispute. Otherwise, an OC would be appropriate. Parties then move on to the exchange of affidavits of evidence-in-chief (ie, witness statements) before the discovery stage (which involves the disclosure of documents). Singapore does not have jury trials and all trials are before a judge (or in the lower courts, a magistrate).

The statutory regime that governs civil procedure is the Rules of Court 2021 (the "ROC 2021"). The ROC 2021 seeks to achieve the following in civil procedure in Singapore:

- fair access to justice;
- expeditious proceedings;
- cost-effective work proportionate to:
  - (a) the nature and importance of the action;
  - (b) the complexity of the claim as well as the difficulty or novelty of the issues and questions it raises; and
  - (c) the amount or value of the claim;
- efficient use of court resources; and
- fair and practical results suited to the needs of the parties.

The Singapore judiciary is well-known for its expediency and efficiency in hearing matters and, as a general guide, the High Court aims to hear and decide on all claims within 18 months from the time the matter is first filed in Court to the time when judgment is rendered.

Singapore International Commercial Court

In 2015, the Singapore International Commercial Court (SICC) was established as a dedicated division of the Singapore High Court (the other two divisions being the General Division and the Appellate Division) to cater to the litigation needs of international parties. Generally, the SICC has jurisdiction to hear claims, regardless of the law

governing the dispute, as long as the claims are of an international and commercial nature and parties agree to submit to the jurisdiction of the SICC.

As parties who refer their disputes to the SICC will be able to adopt a more flexible procedure (as compared to the traditional process in the Singapore courts) which is in line with the international best practices for commercial disputes while still retaining the advantage of obtaining a Singapore court judgment at the end of the process, the SICC is fast becoming a popular alternative to litigation and arbitration in the realm of international commercial disputes. The fact that disputes before the SICC are heard by judges drawn from a diverse panel of distinguished local and international jurists can be an appealing factor if the dispute (for example, coverage disputes under insurance contracts) can be heard by an adjudicator with specialised knowledge of the industry.

However, given the requirements that the nature of the disputes referred to SICC be of an international nature and that parties would have to agree to submit to the jurisdiction of SICC, the SICC has not been a popular forum for insurance coverage disputes, which are still predominantly referred to arbitration.

Rules on Limitation

With regard to the statutory rules on limitation, Section 6 of the Limitation Act 1959 provides that the limitation period for the following actions is six years from the date on which the cause of action accrued:

- actions founded on a contract or on tort;
- actions to enforce a recognisance;
- actions to enforce an award;
- actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of penalty or forfeiture.

Given that policy coverage disputes are largely contractual disputes, the limitation period of six years will start to run from the time when the insured's cause of action arises under the policy. That said, as it is not unusual for insurance policies to provide for a separate contractual limitation period, it would be prudent to ensure that the terms of the policy do not provide for any time period for commencing action.

1.3 Alternative Dispute Resolution (ADR)

ADR is prevalent and strongly encouraged in Singapore. In fact, before the commencement of any civil court proceedings, and during the course of any action, parties have a duty to consider amicable resolution of their dispute. The ROC 2021 requires a party to make an offer of amicable resolution before commencing the action, unless the party has reasonable grounds not to do so. Failure to do so might lead to adverse cost orders against the successful party. Additionally, the effort or attempt to reach an amicable resolution to a matter is a factor which the courts will consider in making the appropriate costs awards for court proceedings.

Apart from the avenues for ADR through FIDReC and CCRP stated at **1.1 Statutory and Procedural Regime**, other forms of ADR are available in Singapore:

- Mediation – where a neutral third party (the mediator) guides parties to find an amicable resolution. This is usually administered by the Singapore Mediation Centre or the Singapore International Mediation Centre.

- Conciliation – where a neutral third party with expertise in the subject matter suggests possible solutions and the parties involved can try to come to an agreement based on these suggestions.
- Neutral evaluation – a neutral third party with expertise in the subject matter provides an early assessment of the case and estimates the likelihood of success at trial. This is currently only available for matters heard in the State Courts.
- Arbitration – see **3. Arbitration and Insurance Disputes** for further detail.
- Expert determination – an independent expert will give an opinion and the parties involved can decide whether they agree to a settlement based on the expert's opinion. This is currently only for cases heard in the Supreme Court involving an expert's opinion.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Where there is a dispute over jurisdiction, it would first be necessary to determine whether the parties' agreement contains a jurisdiction clause, and if that jurisdiction clause is an exclusive jurisdiction clause or a non-exclusive jurisdiction clause.

Exclusive Jurisdiction Clause

Where there is an exclusive jurisdiction clause, parties typically agree to refer all disputes arising from such contracts to a particular jurisdiction in a bid to avoid disputes over the proper forum. The selected forum would have exclusive jurisdiction (Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd [2018] 2 SLR 1271). An applicant seeking to enforce an exclusive jurisdiction clause bears the burden of showing a "good arguable case" that an exclusive jurisdiction agreement exists and governs the dispute in question. A party who commences proceedings in a court not named in the exclusive jurisdiction clause would be in breach of the exclusive jurisdiction clause. The non-breaching party can then apply to stay proceedings commenced in breach of the exclusive jurisdiction clause, and the breaching party would have to satisfy the "strong cause" test, which sets a high threshold for a court to refuse a stay of proceedings commenced in breach of an exclusive jurisdiction agreement.

Non-Exclusive Jurisdiction Clause

Where there is a non-exclusive jurisdiction clause, it indicates that the parties thought that the forum named in the clause was an appropriate forum, and that an agreement to submit to the non-exclusive jurisdiction of one forum does not entail an obligation to sue in that forum (Shanghai Turbo Enterprises Ltd v Liu Ming [2019] SGCA 11). Where Singapore is the forum named in the non-exclusive jurisdiction clause, the defendant must show strong cause why it should not be bound to its contractual agreement to submit. If Singapore is not the named forum in the non-exclusive jurisdiction clause, then the defendant may apply for a stay or to set aside service on the basis that Singapore is forum non conveniens.

Hague Convention on Choice of Court Agreements

The common law position on exclusive jurisdiction clause has now been slightly altered with the promulgation of the Hague Convention on Choice of Court Agreements ("Hague Convention") on 1 October 2005, and its ratification by Singapore on 2 June 2016 by way of the Choice of Court Agreements Act 2016 (CCCA). Under common law, the courts retain discretion to refuse a stay despite the existence of

an exclusive jurisdiction clause, but under the Hague Convention, the court is required to grant the stay should certain conditions be fulfilled. This will have an impact on court proceedings involving exclusive jurisdiction clauses in favour of Hague Convention Contracting States (for example, the USA and some jurisdictions in the European Union).

In the case of 6DM (S) Pte Ltd v AE Brands Korea Ltd and others and another matter [2021] SGHC 257, the High Court held that the question on whether the court is mandated to grant a stay under the CCCA involves a two-stage test:

- First, the court must consider whether there exists an exclusive jurisdiction clause which does not designate Singapore as a chosen court, and which applies to the proceedings at hand.
- Second, if the exclusive jurisdiction clause is found to be applicable, the court must then consider whether any of the five exceptions provided in the CCCA (which the High Court found to be a closed category of exceptions) apply to justify the court's refusal to order a stay or dismissal of proceedings.

Dispute over Choice of Law

Where there is a dispute over choice of law, the approach to determining the governing law of the agreement is a three-stage test laid out in Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal [2008] SGCA 1:

- Firstly, the court would determine if there was an express choice of governing law.
- The second stage was whether an intention of the parties to choose a governing law could be inferred.
- However, if the court was faced with a multiplicity of factors, each pointing to a different governing law, then the proper approach would be to move on to the third stage, which was to determine the law with the closest and most real connection with the contract. This is not an exercise to divine any "intent" of the parties, but to consider, on balance, which law had the most connection with the contract in question and the circumstances surrounding the inception of that contract.

2.2 Enforcement of Foreign Judgments

Reciprocal Enforcement of Foreign Judgments Act

Previously, if the foreign judgment were from a foreign jurisdiction specified in the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) (RECJA) or the Reciprocal Enforcement of Foreign Judgments Act (Cap 265) (REFJA), the foreign judgment could only be enforced against an insurer if it were registered in the General Division of the High Court.

However, the RECJA was repealed with effect from 1 March 2023. With the repeal of RECJA, Singapore's legal framework for the statutory recognition and enforcement of foreign judgments in civil proceedings is streamlined and consolidated under the REFJA. Final money judgments from the superior courts of Brunei, Australia, India, Malaysia, New Zealand, Pakistan, Papua New Guinea, Sri Lanka, and the United Kingdom and Hong Kong SAR are now registrable under the REFJA.

CCCA

In addition, Section 18 of the CCCA specifically provides that the High Court may not limit or refuse the recognition or enforcement of a foreign judgment of liability under the terms of a contract of insurance or reinsurance on the ground that the liability under the contract

includes liability to indemnify the insured or reinsured in respect of a matter to which the CCCA does not apply, or an award of damages that will not be recognised or enforced under Section 16 of the CCCA. Judgments from contracting states of the Hague Convention will therefore be recognised and enforced in Singapore Courts.

Common Law

If the foreign judgment is not from a foreign jurisdiction specified in the REFJA or CCCA, the position in common law would have to be relied on to enforce foreign judgments. Under the common law, a foreign judgment in personam given by a foreign court of competent jurisdiction may be enforced by an action for the amount due under it so long as the foreign judgment is final and conclusive as between the same parties (Hong Pian Tee v Les Placements Germain Gauthier Inc [2002] 1 SLR(R) 515). Additionally, a foreign judgment may be enforced by an action for the amount due under it only if it is a judgment for a definite sum of money (Poh Soon Kiat v Desert Palace Inc (trading as Caesars Palace) [2010] 1 SLR 1129).

2.3 Unique Features of Litigation Procedure

With the introduction of the ROC 2021 in April 2022, civil procedure in Singapore has seen a few significant changes which may have an impact on the way insurers litigate their claims or strategise their litigation. The most important of these changes are as follows:

- As mentioned in **1.3 Alternative Dispute Resolution (ADR)**, before the commencement of any proceedings, and during the course of any action, parties have the duty to consider amicable resolution of their dispute. On this, a party is to make an offer of amicable resolution before commencing the action unless the party has reasonable grounds not to do so. Failure to do so might lead to adverse cost orders against the successful party. The requirement for attempts at amicable resolution means that insurers will need to explore and try to exhaust the possibility of settlement before resorting to litigation.
- Introducing a single application pending trial to deal with all interlocutory matters necessary for the case to proceed expeditiously at that stage of the proceedings (including the discovery process and request for further and better particulars of the pleadings). This replaces the previous common practice of litigating in a systematic fashion and parties taking out multiple interlocutory applications progressively before trial. With this, insurers will have to be more strategic about the interlocutory applications which they take out.
- Exchanging affidavits of evidence-in-chief (ie, witness statements) before (instead of after) the production of documents, to crystallise and streamline the issues in dispute. Apart from compelling insurers to crystallise their case and evidence at an early stage of the proceedings, this also means a huge portion of the legal expenses will be incurred at an earlier stage.
- Appointing a single expert, via a court-supervised process when, previously, parties would typically appoint their own experts.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Courts generally enforce arbitration provisions in commercial contracts of insurance and reinsurance. Courts have taken a generous approach in construing arbitration clauses and the rule of

construction is that all disputes between parties are assumed to fall within the scope of the arbitration clause unless shown otherwise (Silverlink Resorts Limited v MS First Capital Insurance Limited [2020] SGHC 251).

3.2 The New York Convention

Singapore is subject to the New York Convention (the "Convention") as a result of its accession to the Convention in 1986. The Convention is encapsulated in Part III of the International Arbitration Act 1994 (IAA).

Arbitral awards handed down in other jurisdictions can be enforced pursuant to Section 29 of the IAA if it is an arbitral award made pursuant to an arbitration agreement in the territory of a "contracting state" within the meaning of the Convention. Section 30 of the IAA elaborates on the evidence that a person seeking to enforce a foreign award by virtue of Part III of the IAA has to produce to the court. This includes, for example, the duly authenticated original award.

Finally, the grounds on which the Singapore court might refuse enforcement are provided for in Section 31 of the IAA. This includes, for example, if a party to the arbitration agreement pursuant to which the award was made was under some incapacity at the time when the agreement was made, or if a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Popularity of Arbitration

Arbitration is a significant and popular form of insurance dispute resolution forum in Singapore. This is largely due to the fact that it is common for insurance policies to contain an arbitration clause. There is no data specific to insurance litigation and the lines of insurance business that arbitration is common in. However, the Singapore International Arbitration Centre (SIAC) has seen its new case filings rising steadily, with 357 new case filings in 2022 and 332 new case filings in the first quarter of 2023. Additionally, the cases filed with the SIAC comes from a strong international user base, with users from more than 100 jurisdictions with diverse legal systems choosing to have the SIAC administer their disputes in the past five years. Additionally, the SIAC is the most preferred arbitral institution in Asia-Pacific and ranked second in the world among the world's top five arbitral institutions.

Arbitration Rules

In Singapore, the IAA governs international arbitration, whereas the Arbitration Act 2001 (AA) applies to cases of domestic arbitration, where Singapore is the place of arbitration and where Part II of the IAA is inapplicable.

Parties' choice of arbitration rules (for example, the SIAC Rules) in the arbitration clause will typically be binding on parties.

Confidentiality of Arbitration

Arbitration proceedings (including the award) are generally confidential in nature. Specifically, arbitration administered by the SIAC is private unless parties agree otherwise:

- Rule 39.1 of the SIAC Rules 2016 lays down the rules relating to confidentiality of all matters relating to the arbitral proceedings, as well as the arbitral award.
- Rule 39.2 of the SIAC Rules 2016 provides for certain exceptions to confidentiality. This includes, for example, disclosure for the purposes of enforcing or challenging the award, or for compliance with the provisions of the

laws of any state, which are binding on the party making the disclosure.

Parties' Right to Appeal

The following applies to the parties' rights to appeal against an arbitral award:

- For international arbitration governed by the IAA, the IAA does not provide for a right of appeal against the award.
- For domestic arbitration governed by the AA, parties can appeal against the award pursuant to Section 49 of the AA subject to certain requirements and restrictions. In particular, pursuant to Section 50(2) of the AA, the appellant must have first exhausted any available arbitral process of appeal or review and any available recourse under Section 43 of the AA (correction or interpretation of award and additional award).

4. Coverage Disputes

4.1 Implied Terms

An insurer's right of subrogation is implied by law into an indemnity insurance contract (Sompo Insurance Singapore Pte Ltd v Royal & Sun Alliance Insurance plc [2021] SGHC 152. Based on this implied term, the insured promises to take specific steps or actions so that it will not be overcompensated and the insurer's interest in paying only for the insured's actual loss is protected.

Common law also implies a duty of utmost good faith (uberrima fides) in all insurance and reinsurance contracts. For marine insurance contracts, this duty is codified in the Marine Insurance Act 1906. The duty requires both parties to act in good faith and with regard to the interests of the other party. It is particularly relevant where the policy requires the insured to provide information and assistance to the insurer in particular circumstances (in particular, at the pre-contractual stage and before the placement of the policy).

4.2 Rights of Insurers

As mentioned at **4.1 Implied Terms**, insurance contracts are contracts uberrimae fidei (ie, requiring the utmost good faith). This obligation to exercise the utmost good faith (imposed under common law and also codified in the Marine Insurance Act 1906) has arisen frequently in connection with the insured's duty to make a full and frank disclosure of all material facts to the insurer prior to the acceptance of the risk by the insurer. This is based on the assumption that the insured alone possesses the facts which would influence the mind of a prudent insurer in its computation of the risk and there must be disclosure of such material facts in order to enable the insurer to assess the risk.

The insured must disclose to the insurer all facts material to an insurer's appraisal of the risk which are known or deemed to be known by the insured but neither known nor deemed to be known by the insurer. Non-disclosure of material facts must have induced the making of the policy on the relevant terms. If an insured fails to disclose material information that influences the insurer's assessment of the risk, the insurer would be entitled to avoid the contract of insurance and repudiate liability for any claim that has arisen. With regard to what constitutes "material information", the test of materiality is that information must be considered material in the eyes of a prudent and reasonable insurer.

An insurance law reform sub-committee (the "Committee") was formed by the Singapore Academy of Law's Law Reform Committee in March 2017 to review the key areas of Singa-

pore insurance contract law that were in likely need of reform. The main focus of the Committee's work and review was on, amongst other things, the duty of utmost good faith and the duty of disclosure. The "Report on Reforming Insurance Law in Singapore" was published by the Singapore Academy of Law's Law Reform Committee in February 2020 and some of the proposed changes recommended by the Committee includes different remedies for non-disclosure depending on whether non-disclosure was deliberate or reckless and avoidance of policy only if the insurer would not have underwritten the risk if not for non-disclosure. In light of the Committee's recommendations, changes to the law on material non-disclosure are expected to be seen in the near future.

4.3 Significant Trends in Policy Coverage Disputes

Among the more significant coverage litigation heard by the Singapore Courts in the past 12 months has been a dispute under a professional liability insurance policy as to whether a consent judgment falls within the insuring clause of the said policy. The litigation on coverage disputes that has been seen in the Singapore courts is not significant and prolific enough, in the authors' view, to constitute any discernible trend, however.

Globally, the past year has seen a surge in high-value disputes between insurers and their policyholders over sanctions related claims and COVID-19 business interruption losses disputes. The spectre of pandemic-related business interruption insurance claims also continued to hang over the industry with a deluge of disputes, following the most anticipated decision of Corbin & King v AXA Insurance UK Plc [2022] EWHC 409 (Comm), where the English High Court ruled in favour of a restaurant business that a prevention of access clause in its policy was triggered by government-mandated lockdowns. This is likely to continue to prompt more litigation relating to COVID-19 business interruption losses. That said, this trend is unlikely to catch on in Singapore. This is largely because the wording of the infectious disease extension in East Asia has been carefully reviewed and tightened since the SARS pandemic in 2002, so Singapore has not seen and is unlikely to see significant litigation and disputes arising from claims related to COVID-19. As for sanctions-related claims, which seem to be on the upwards trend globally, there has not been a significant quantity of coverage disputes in the region, but as noted in **7.1 Type and Amount of Litigation**, this may be an emerging trend in insurance coverage disputes.

4.4 Resolution of Insurance Coverage Disputes

As mentioned at **1.1 Statutory and Procedural Regime**, insurance and reinsurance coverage disputes can generally be resolved either in court, or through ADR avenues. However, given that insurance and reinsurance contracts typically include arbitration clauses, most coverage disputes are referred to arbitration, rather than court.

4.5 Position if Insured Party Is Viewed as a Consumer

Where the law views the insured party as a consumer, this does have an effect on claims, as additional protection and remedies are offered to consumers under Singapore law.

Under the Consumer Protection (Fair Trading) Act 2003, consumers can commence legal action against suppliers of services if a supplier has engaged in an unfair practice.

An unfair practice is defined as, amongst others:

- doing or saying anything, or omitting to say something, if it reasonably results in a consumer being deceived or misled;
- making a false claim; and
- taking advantage of a consumer if the supplier knows (or ought to have known) that the consumer is not in a position to protect its own interests, or is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction

Further, if the insured party is a consumer, as mentioned at **1.1 Statutory and Procedural Regime**, they can contact the FIDReC, which is an independent institution that provides consumers with an avenue to resolve disputes in the financial industry, including in the insurance sector.

4.6 Third-Party Enforcement of Insurance Contracts

Preliminarily, the doctrine of privity of contract applies to contracts of insurance as well. Thus, a third party who is not privy to the contract cannot enforce an insurance contract or sue an insurer in connection with an insurance contract. However, there are some exceptions where legislation has intervened to provide for certain remedies:

- the Contracts (Rights of Third Parties) Act 1999;
- the Third Parties (Rights Against Insurers) Act 1930; and
- the Motor Vehicles (Third Party Risks and Compensation) Act 1960.

Contracts (Rights of Third Parties) Act 1999

Under the Contracts (Rights of Third Parties) Act 1999, a third party may enforce an insurance contract if the contract of insurance either expressly provides that the third party may enforce its rights, or if the terms of the contract purport to confer a benefit on the third party. It is common for insurance policies to exclude the application of this statute.

Third Parties (Rights Against Insurers) Act 1930

Under the Third Parties (Rights Against Insurers) Act 1930, where an insured takes out a policy against liability to third parties and the insured becomes bankrupt, the third party would be entitled to step into the shoes of the insured and make a claim against the insurers directly.

Motor Vehicles (Third Party Risks and Compensation) Act 1960

Under the Motor Vehicle (Third-Party Risks and Compensation) Act 1960, an insurer must comply with judgments made in favour of a third party following a motor vehicle accident. Where the insured has become bankrupt or has been wound up, a victim of an accident or an involuntary creditor may be entitled to recover its judgment debt directly from the bankrupt tortfeasor's insurer under the Motor Vehicle (Third Party Risks and Compensation) Act 1960.

4.7 The Concept of Bad Faith

There is no concept of bad faith under Singapore insurance law.

4.8 Penalties for Late Payment of Claims

There are no statutory penalties for insurers for paying claims late. Neither is there penalty imposed by common law for late payment of claims. There is therefore no penalty for late claims payment unless the policy provides for it. Insurance policies sometimes (but seldom) provide for such penalties.

4.9 Representations Made by Brokers

Brokers are independent agents appointed by the insured to carry out functions including advice and placement, post-contractual assistance and claims handling services. Generally, a broker acts as the agent of the insured in giving advice to the insured and in dealing with the insurer. Thus, any errors made by the broker while acting on the insured's behalf (for example, misrepresentations) and within the scope of the broker's actual or ostensible authority will bind the insured.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

The Lloyd's Asia platform is the only statutorily recognised delegated underwriting arrangement in Singapore. In April 2015, the MAS gave the green light for Lloyd's Asia service companies to sub-delegate their underwriting authority to insurance intermediaries (known as coverholders) in Singapore. There has been no reported Singapore case on litigation arising out of such arrangements from the few coverholders in Singapore.

Claims handing authority arrangements are common for personal lines products and the engagement of such third-party claims administrators (TPAs) has grown over the years in Singapore. Most issues and complaints against such TPAs and their principals will be handled by FIDReC.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

Insurers would typically fund the defence of insureds of liability insurance. The main areas of claims where insurers fund the defence costs of insureds include bodily injury, property damage, professional indemnity, and advertising injuries.

5.2 Likely Changes in the Future

Given that these are common claims in liability insurance, it is unlikely that there would be a change in the areas of claims. However, the development of technology might simplify the process of resolving such claims. For instance, in the context of traffic accidents giving rise to bodily injury and property damage where motor insurance would typically be engaged, the Singapore Academy of Law had developed an online traffic accident claims simulator called the Motor Accident Claims Online ("Maco"). Maco churns out estimated figures for claimants involved in such accidents, for insurers in cases where there are differing accounts or evidence offered by both parties, or if one party is dissatisfied with the insurance payout.

5.3 Trends in the Cost or Complexity of Litigation

With regard to claims for personal injuries, pursuant to a recent amendment of the Supreme Court and State Courts Practice Directions, Singapore courts will refer to actuarial tables published by the Singapore Academy of Law (the "Actuarial Tables") to determine an appropriate multiplier in personal injury and death claims. This applies for proceedings for the assessment of damages in personal injury and death claims heard on or after 1 April 2021. The aim of the Actuarial Tables is to introduce greater certainty and precision in the quantification of damages in personal injury and death claims.

Upon the recommendation of the Personal Injury Damages Committee, the Actuarial Tables were developed by a multi-disciplinary committee comprising members from the Monetary Authority of Singapore, the General Insurance

Association, the Singapore Actuarial Society, and the Law Society of Singapore, among others. The Actuarial Tables set out the exact multiplier to be applied for a claimant at any given age, based on the claimant's gender, life expectancy and/or the length of their remaining working life.

With the introduction of the Actuarial Tables and greater certainty on the quantum for claims for future losses, it is likely that fewer cases involving personal injuries will be litigated in court. Prior to the implementation of the Actuarial Tables, the bulk of the personal injuries disputes related to the issue of the appropriate multiplier to be adopted.

5.4 Protection Against Costs Risks

A claimant can buy protection against costs risk in connection with such claims. There are possibly two options available to a claimant.

First, an insured can procure legal expenses insurance, which enables the insured to be protected against the cost of litigation. Typically, such insurance will provide that expenses are payable only if the insured has a reasonable prospect of success in bringing or defending the proceedings, and that in the event of a dispute, the opinion of counsel may be sought.

Next, there is also the option of purchasing an after-the-event (ATE) insurance, where a party to a litigation can be indemnified against costs awarded against it if it does not succeed in its case. ATE insurance is purchased after a cause of action has accrued. The claimant's case would typically be assessed to determine whether it stood at least a 50% chance of success and whether the sum recoverable would likely exceed a minimum figure. If certain criteria are fulfilled, a policy would be issued, and the claimant would be granted credit for the amount of the premium. If the claimant's case succeeded, the amount of the ATE premium would form part of the claimant's costs, and recovery would be sought from the defendant.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

Under the common law, the insurer has the right of subrogation, which will allow it to recover sums from third-party tortfeasors. The right of subrogation is sometimes expressly provided for under the policy. Subrogation only applies to indemnity policies and the insurer can only avail itself of subrogation rights after it has made full payment to the insured. In the subrogation process, the insurer assumes or takes on the rights or conditions of the insured that arose as a result of the loss or diminishment that the insured is insured for.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

The right to subrogation is found in common law and has not been statutorily codified.

In a subrogation action, the claim is in the name of the insured as the cause of action for damages remains with the insured. However, if the insured has made an express assignment of rights to the insurer, the insurer can exercise the rights that originally belonged to the insured in its own name.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

ESG

With ESG becoming a global movement that only seems to be gaining traction and with no signs of slowing, ESG-related risks are increasing as governments exert pressure on businesses to change their ways for the greater good. Climate change is already a top boardroom issue, as companies and their directors face an array of physical and liability-related risks from a more extreme climate and from the transition to a low or zero-carbon economy.

Climate change-related litigation is on the rise and is likely to become a significant source of liability exposure for companies and their directors in coming years. As more ESG-related claims are seen (eg, for non-compliance with ESG requirements or misrepresentation claims for "greenwashing"), the insurance industry is also likely to see more claims under its directors' and officers' liability insurance policies.

Sanctions

The Russia-Ukraine conflict has led to an avalanche of sanctions imposed against Russia's and Belarus' financial institutions, state-owned entities, businesses and other targets by the United States, the United Kingdom, the European Union and their allies including Singapore. Apart from the direct impact felt by companies that conduct business or have assets in Ukraine, Russia or Belarus, there is an emerging trend of sanctions-related litigation, in particular, relating to the enforceability and scope of sanctions clauses.

In the Singapore case of Kuvera Resources Pte Ltd v JP Morgan Chase Bank, NA [2022] SGHC 213, the Singapore courts examined the enforceability of a sanctions clause which is very similar to the standard "LMA3100 sanctions clause" wording often seen in insurance policies. The court stated that a clause which requires a party to comply with "all sanctions, embargoes and other laws and regulations of the U.S. and of other applicable jurisdictions to the extent they do not conflict with such U.S. laws and regulations" includes the entire regulatory superstructure and infrastructure of the US sanctions laws and regulations, including guidelines on the standards that it expects US persons to adhere to in order to avoid breaching US sanctions and US Office of Foreign Assets Control's (OFAC) approach to investigating and penalising breaches of US sanctions.

In another English High Court case of Mamancochet Mining Ltd v Aegis Managing Agency Ltd and others [2019] 1 All ER (Comm) 335, which involved a sanctions clause in a marine insurance policy, the Court upheld the sanctions clause and highlighted the importance of the wording of the clause in determining whether insurers can rely on the sanctions clause to deny liability under the policy.

7.2 Forecast for the Next 12 Months

The authors do not expect the type and amount of litigation to change in the next 12 months. For both ESG and sanctions-related litigation, it seems likely that litigation is only starting to emerge and claims only starting to come in. This trend is probably only beginning and will likely continue in the next year.

7.3 Coverage Issues and Test Cases

ESG-related litigation and claims have not given rise to specific coverage issues or test cases of significant importance in Singapore. As for sanctions-related claims, the influx of

claims has prompted many insurers to rethink the scope and efficacy of their sanctions exclusions. In particular, insurers that have the standard "LMA3100 sanctions clause" – which typically excludes payment of claims which would expose insurers to any sanction, prohibition or restriction under a United Nations resolutions or the trade or economic sanctions, laws or regulations of the European Union or United Kingdom or United States of America – in their policies are beginning to review whether there is a gap between the sanctions imposed by the jurisdictions and bodies covered in the clause and the sanctions imposed by their local jurisdiction.

7.4 Scope of Insurance Cover and Appetite for Risk

The macroeconomic factors that have been considered in this chapter are yet to have any clear impact on the scope of insurance cover available or to have changed appetites for risks to date, but it is very likely that insurers will reconsider and tighten their sanctions exclusion clause(s).

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

There has definitely been increased cognisance and integrating of ESG factors into insurance businesses.

The MAS has recognised the need for a transition into a sustainable future and that this involves the transformation of the real economy. As such, it had released Guidelines on Environmental Risk Management for Insurers in 2020 to enhance insurers' resilience to and management of environmental risk. Specifically in relation to underwriting, the MAS had advised that underwriters should be provided with the means to check the potential impact of the proposed transaction on the environment, and should also assess each customer's environmental risk as part of its underwriting assessment, particularly for sectors with higher environmental risk. It also advised that insurers should develop quantitative and qualitative tools and metrics to monitor and assess its underwriting exposures to environmental risk, where material. More recently, in May 2022, the MAS also issued an Information Paper on Environmental Risk Management (Insurers) with various focus areas for insurers.

Whilst the above represents what the MAS perceives to be "best practices" and sets out the MAS' expectations for the industry, they do not have the force of law and insurers are not required to comply with these requirements. That said, a majority of the insurers (especially international insurers who are already well-acquainted with the concept of ESG) have already started to integrate ESG considerations into their business and operations, in particular, at the underwriting stage.

8.2 Data Protection Laws

All insurance companies and intermediaries licensed to operate in Singapore are subject to the Personal Data Protection Act 2012 (PDPA), which provides a baseline standard of protection for personal data in Singapore. It complements sector-specific legislative and regulatory frameworks such as the Insurance Act and imposes on insurance companies and intermediaries various requirements relating to the collection, use, disclosure and care of personal data in Singapore. The MAS has also released circulars such as ID 03/23 on the Notification of Data Breaches to the MAS which sets out expectations for licensed insurers regarding notification of data breaches to MAS.

Currently, organisations must notify the Personal Data Protection Commission (PDPC) of significant-scale data breaches, which occur on or after 1 February 2021. A significant-scale breach is one that affects or is likely to affect 500 or more people. Organisations must also notify both the PDPC and affected individuals when a data breach results in or is likely to result in significant harm to individuals. This includes a combination of personal data and, often, financial, health or other sensitive data. The maximum fine amount was increased in 2021 to up to SGD1 million or 10% of annual turnover in Singapore, whichever is higher.

As the issue of data protection becomes of more significant importance and as organisations become increasingly aware of the potentially severe ramifications of cyber-attacks or data breaches (both in terms of financial penalties and reputational damage), there has been an increasing awareness and demand for cybersecurity insurance policies.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

Actuarial Tables

The impact of the Actuarial Tables which came into force in April 2021 is discussed at **5.3 Trends in the Cost or Complexity of Litigation**. The most immediate consequence of the Actuarial Tables is that awards for future damages in personal injuries matters are likely to increase in quantum. Not only will this impact the way insurers assess claims and strategise litigation, it will likely also have an impact on premiums for certain types of insurance policies, in particular, motor insurance policies.

ROC 2021

The changes brought about by ROC 2021 represent a marked shift in the overall approach to court litigation. The express imposition of a duty to consider and explore amicable resolution and the "front-loading" of litigation costs to an earlier stage of the proceedings – notably, affidavits of evidence-in-chief, which are traditionally responsible for the bulk of the pre-litigation legal costs, are now to be exchanged before the disclosure of documents – will likely have the intended effect of reducing the number of cases which are litigated in court and proceed to trial. This will likely translate into less insurance litigation and also lower defence costs borne by insurers.

SPAIN

Trends and Developments

Contributed by:
Gonzalo Ardila, Margarita Morales, Fátima Mallén and Alberto Witzl
Hogan Lovells

Hogan Lovells has 2,800 lawyers on six continents who provide practical legal solutions and fresh thinking combined with proven experience to deal with a fast-changing, interconnected world. Its experience in cross-border and emerging economies gives it the market perspective to be a global partner and to ensure that its legal solutions are aligned with its clients' diverse business strategies. The team's range of backgrounds and experience gives them a broader perspective, which they can use to their clients' advantage. As advocates of justice, equality, and opportunity, they believe in giving back to their communities and society as a whole. All staff at Hogan Lovells are asked to volunteer for at least 25 hours a year as part of their normal work duties. Around the world, the firm is making a difference through pro bono activities, community investment, and advocating for social justice.

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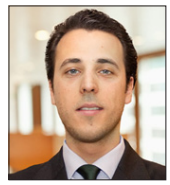

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Insurance Litigation Trends in Spain

The insurance sector in Spain is highly sophisticated, given the complexity and variety of the seemingly infinite subjects it covers. Insurance law is probably the aspect of law that has to evolve the fastest in order to adapt to and regulate the reality that surrounds us (from a pandemic in which citizens are confined to their homes, to a natural disaster that freezes the streets of the country's capital).

In any case, whether they are more or less novel, losses occur and from these, claims are derived – judicial or out of court, between the insured and the insurer, or between the insurer and the party causing the damage.

To this exciting scenario are added the rules of Spain's civil procedure law, which make the judicial procedures that arise in the insurance field more attractive, and clarify the conflicts between the different agents in the sector.

We address here some of the recent trends in the Spanish courts arising from this variety and wealth of cases.

Can irrevocable beneficiary status on a life insurance policy be revoked?

An interesting modification was introduced in the Spanish Wealth Tax by Law 11/2021 of 9 July 2023 on measures to prevent and combat tax fraud. It transposes Council Directive (EU) 2016/1164 of 12 July 2016, laying down rules against tax avoidance practices that directly affect the functioning of the internal market, amending other tax rules and regulating gambling.

In particular, it concerns the amendment made by Law 11/2021 to Article 17 of Law 19/1991, of 6 June, on Wealth Tax. This new amendment means that policyholders, even if they have designated an irrevocable beneficiary in the life insurance policy taken out, are now obliged to declare the mathematical provision of said insurance in the taxable base for Wealth Tax, which simply means paying more tax.

As a consequence of the above, several insurance companies are receiving requests from irrevocable beneficiaries to renounce their status in life insurance.

Let us consider whether, on the one hand, the policyholder of a life insurance policy can revoke the designation of an irrevocable beneficiary and, on the other hand, whether the irrevocable beneficiary can renounce their status.

Regarding the first option, that the policyholder revokes the designation of an irrevocable beneficiary, Article 87 of Law 50/1980 of 8 October 1980 on Insurance Contracts provides that the policyholder may indeed revoke the designation of the beneficiary at any time, provided that the policyholder has not expressly waived this right in writing.

Therefore, as the very word "irrevocable" indicates, when the policyholder has designated a beneficiary of a life insurance policy as expressly irrevocable, the policyholder will not have the legal capacity to revoke this designation. This is because, if the policyholder designates the policy initially as irrevocable, they are clearly renouncing ab initio the possibility of revoking the designation at a later date.

So can the irrevocable beneficiary themselves renounce such a condition?

It should be noted that the irrevocable beneficiary has a full right to obtain the sum insured (a

credit right), which is only subject to the occurrence of a loss indicated in the policy. As they are fully entitled to the sum insured, they can assign this right to third parties (eg, the beneficiary could pass it on to their heirs).

Without prejudice to the fact that this possible waiver is not regulated in positive law, it is addressed by the doctrine which points out, in general terms, that in all legal systems the beneficiary is recognised as having the right to waive, its justification being the principle that no one is obliged to accept a benefit that they do not want. The waiver makes it possible to respect the independence of the third party, if that is their will, and is understood as the power of the beneficiary in any contract in their favour.

How is this to be done if the waiver occurs after the irrevocable beneficiary has accepted? In this case, the general requirements for waiving a right will apply, but this will need to be viewed in light of Article 6.2 of the Civil Code, which indicates that the waiver of a right will only be valid if it is not contrary to the public interest or public order and does not prejudice third parties.

Assuming that the irrevocable waiver of the beneficiary's status would not be contrary to the public interest or public policy and would not cause prejudice to third parties outside the scope of the waiver, it is understood that such a waiver is valid from a substantive legal point of view.

Although Spanish law does not determine the formal requirements for waiving a right, case law and doctrine indicate that, in order for the waiver to be valid, it must be clear and indisputable, and without conditions. The waiver must also be undertaken by the irrevocable beneficiary or their voluntary or legal representative (ie, it must be personal), unequivocal, recognised by the insurer, carried out by adults with full legal capacity and, evidently, undertaken before the insured event occurs.

In short, it seems that the modification of Article 17 of the Wealth Tax Law has brought (and will continue to bring) numerous requests for waiver by the irrevocable beneficiaries of life insurance policies. Such requests will have to be made by the beneficiary themselves and the insurer will have to accept such requests if they fulfil the requirements set out above for them to be valid.

Contradiction over the concepts covered by compensable damage

The professional liability of tax advisers is a subject that has been written about on many occasions: whether to define the legal regulation of this figure, to specify the requirements that must be met for the existence of civil liability to be established, or to analyse the effects of any possible negligent conduct of a tax adviser.

In relation to this last point the concept of "compensable damage" is an issue of great interest and about which there is a great deal of controversy in Spanish courts. Thus, we find resolutions that, analysing practically identical factual cases, disagree as to which concepts are covered by the compensable damage (tax liability, late payment interest and penalties imposed by the tax administration). In this way, depending on the court that judges the case, the tax adviser – and possibly, their D&O insurer – may have to bear some pecuniary consequences.

The courts agree that the concept of compensable damage includes the penalties or surcharges that may be imposed by the tax administration (on the logical ground that if the advice had been given correctly, it would not

have given rise to the penalty). However, this is not the case with other concepts such as late payment interest or tax liability.

In relation to late payment interest, there are courts that understand that this is not penalty interest to be borne by the tax adviser for their negligence, but rather, it is interest derived from capital that should have been paid and which has remained in the hands of the taxpayer, so it must be the one who bears it (see, among others, the Judgment of the Provincial Court of Asturias, 5th Section, 30 December 2021, or the Judgment of the Provincial Court of Jaén, 1st Section, 1 March 2021, in the case of the Provincial Court of Jaén, 1st Section, 30 December 2021). Contrary to this trend, many courts conclude that late payment interest is included in the concept of compensable damage, since the taxpayer would not have been obliged to pay it if the assessor had acted with diligence (see, among others, the Judgment of the Provincial Court of Asturias, 5th Section, 22 December 2022, or the Judgment of the Provincial Court of Madrid, 14th Section, 16 December 2022).

With regard to the tax liability (ie, the difference between what the taxpayer paid and what would have been paid if the tax advice had been given correctly), some Spanish courts understand that the tax liability is not a compensable concept, since the payment of a tax cannot be understood as an economic loss resulting from the negligent actions of the tax adviser, but rather as the inexcusable legal obligation of anyone who carries out an economic activity, in such a way that compensable damage cannot be confused with compliance with a legal obligation (see, among others, the Judgments of the Provincial Court of Malaga, 4th Section, February 2023 and November 2022, and the Judgments of the Provincial Court of Malaga, 4th Section, 21 February 2023 and 11 November 2022). On the other hand, other courts adopt a completely opposite position, concluding that in so far as there is a causal link between the negligent advice and the payment of the tax liability, this must be included in the compensation payable by the tax adviser (see, among others, the Judgment of the Barcelona Provincial Court, 1st Section, 20 February 2023, or the Judgment of the Barcelona Provincial Court, 17th Section, 1 July 2022).

This evident heterogeneity of criteria from one court to another obliges us to review what the Spanish High Court has said on the matter and, surprisingly, to date no common bases or assumptions have been found that provide a clear position on what is included in the compensable damage in cases of the civil liability of tax advisers, in order to know what to follow in general terms.

There is, therefore, expectation in the insurance industry that the Supreme Court will soon make a decision, avoiding the "case by case" approach (the factual assumptions in these types of proceedings are very similar) and clarifying which concepts can be claimed from a tax adviser (and eventually from their insurer) in cases of professional liability.

Article 10 of the Insurance Contract Act: the obligation to declare the risk according to recent case law

Article 10 of the Insurance Contract Act (ICA) establishes the conditions for compliance with the obligation to declare the risk. According to the wording of the article, compliance with the obligation to declare the risk is subject to two conditions:

- The insurer should submit a complete and detailed, but not exhaustive, questionnaire

covering all relevant questions to assess the risk. The particularities that have been analysed in specific cases of insurance contracts linked to loans must be taken into account to determine if the insurer has acted with due diligence.
- The wilful or grossly negligent behaviour of the policyholder in failing to answer or in intentionally providing inaccurate data in a clearly and completely drafted questionnaire, which the policyholder knew to be relevant for assessing the risk.

The non-fulfilment of the duty to declare the risk shall only be considered if both circumstances concur. In such a case, the insurer may exercise their right to cancel the insurance contract, which will result in the release or exoneration from payment of the corresponding indemnity.

As summarised in Ruling No 681/2023 of 8 May, handed down by the Spanish Supreme Court, the case law has already defined the concept of the obligation to declare the risk and has established that:

- there is an obligation to answer or respond to the insurer's questions, and the consequences of omitting the questionnaire or submitting an incomplete questionnaire that is too generic or ambiguous, with clearly stereotyped questions on the insured's general health that do not allow the insured to link this history with the illness that caused the claim, are applicable to the insurer;
- the insured cannot justify the breach of their obligation by the mere circumstance that the questionnaire is filled in or materially completed by the personnel of the insurer or of the entity acting on behalf of the insurer, provided that it is proved that it was the insured who provided the answers to the questions about their health formulated by such personnel; and
- that what the Supreme Court must examine is whether the type of questions asked of the insured were conducive to the insured being able to represent what health history they knew or might have known about, ie, whether the questions allowed the insured to be aware that, by not mentioning their pathologies, they were concealing or silencing relevant data for an accurate assessment of the risk, and causally related to the claim/accident.

Regarding the formal validity of the questionnaire, case law establishes that the effectiveness of the health questionnaire for the purposes of Article 10 of the ICA does not depend either on the form it takes or on who fills it in materially (policyholder or an employee of the insurer or of the entity acting on its behalf), but on whether the questionnaire is drawn up with the answers provided by the policyholder/insured. Thus, what is really relevant in order to rule out a breach of duty to declare the risk on the part of the policyholder is that, "from the way in which it was completed, it can be concluded that the policyholder was not asked for that relevant information".

Regarding its material validity, the case law also specifies that what determines the release of the insurer from the payment of the benefit is not the mere inaccuracy of the insured's answers but fraud or gross negligence, that is to say, "the intentional inaccuracy or [inaccuracy] due to a severe fault or negligence". The Supreme Court has established that the following requirements must be met in order to determine that the provisions of Article 10 ICA have been breached:

- that a relevant piece of information has been omitted or misreported;

- that this information had been requested by the insurer, by means of the corresponding questionnaire, and in a clear and express manner;
- that the declared risk is different from the real one;
- that the omitted or incorrectly reported information was known or should have been known with a minimum of diligence by the applicant at the time of making the declaration;
- that the information was unknown to the insurer at that time; and
- that there is a causal link between the omitted circumstance and the covered risk.

The aforementioned case law has led the Supreme Court to different solutions, justified in each case by the differences in the content of the declaration-questionnaire, and it should be noted that, depending on the specific circumstances, the Supreme Court has assessed the infringement of the obligation to declare the risk both by virtue of the non-vague nature of the questionnaire – because the insured was directly asked about specific illnesses – and also, despite its generality, by virtue of the existence of "sufficient significant elements that the insured had to represent as objectively influential for the insurer to be able to assess the risk".

Delimitation of "justified cause" of Rule No 8 of Section 20 of the Insurance Contract Act

It is well known that, in order to reinforce the protection of the insured, Section 20 of the ICA imposes the payment of high punitive interest on those insurers that are in default (ie, who do not comply with their obligations within three months from the occurrence of the loss or who do not pay the minimum amount of what they owe within 40 days from the receipt of the declaration of the loss).

The referred provision establishes that, if the insurer does not comply with the obligations within three months from the occurrence of the loss or does not pay the minimum owed amount within 40 days from the receipt of the declaration of the loss, the indemnity will be adjusted according to the rules set forth in the same section.

Among such rules is No 8, according to which "there shall be no indemnity for delay on the part of the insurer when the failure to pay the indemnity or to pay the minimum amount is based on a justified cause or is not attributable to him".

The fundamental question, therefore, is to determine when it should be understood that there is justified cause.

Over time, the Supreme Court has been refining its position with respect to the interpretation of the concept of "justified cause" referred to in Rule 8 of Section 20 of the ICA. Thus, it has been consolidating a new orientation that makes it necessary to forget about the scope that had been given to the rule in illiquidis non fit mora and to attend to the "reasonableness of the insurer's opposition".

One of the cases most frequently invoked by insurers when availing themselves of Rule 8 of Section 20 of the ICA is the pendency of a legal proceeding on the coverage of the loss.

There are numerous rulings in this regard, but the recent ruling handed down on 6 June 2023 by the Social Chamber of the Supreme Court is particularly explicatory. It upholds the appeals filed by two insurance companies, upholds the appealed ruling and annuls it with respect to the

payment of the interests of Section 20 of the ICA to the aforementioned insurers.

In the case analysed, the appellant insurers argued that there was justified cause for not having paid the compensation to the plaintiff until the resolution of the legal dispute, given the existing doubts as to the liability of the company and of the worker himself in causing the accident.

The judgment handed down by the Supreme Court is exemplary and lists in an exhaustive manner the cases in which an insurer's refusal to pay the compensation claimed while awaiting the outcome of a legal proceeding is justified. Cases that should be kept in mind include:

- when the inclusion of the plaintiff in the policy is disputed;
- when the insurer's position was supported by the case law interpretation then in force;
- those cases in which the date of the event that determined the validity of the policy was disputed, and was not fixed until the appealed judgment was issued; or
- those cases in which, in a labour accident, the salary that served as the basis for the calculation of the indemnity was disputed.

The cases quoted in the aforementioned resolution are very diverse and the elements to be assessed are very varied. And, although the Supreme Court makes it clear that "case by case" consideration is necessary, it does find the following factors must necessarily be taken into account:

- that the insurer's default only disappears when an uncertainty arises from the circumstances of the loss or from the text of the policy as to the insurance coverage that makes the intervention of the court necessary to resolve the discrepancy between the parties;
- that the delay is not attributable to the insurer;
- that the judicial process has not been used as an excuse to hinder or delay payment to the injured parties;
- that there is a genuine need to resort to the process to resolve a situation of uncertainty or rational doubt as to the existence of the duty to pay compensation;
- that – as anticipated above – the illiquidity of the indemnity is not a cause justifying the delay in payment; and
- that, on the contrary, it is when the judicial decision is essential to dispel doubts as to the reality of the loss or its coverage, but only when the discussion of the coverage is not attributable to the obscurity of the clauses drafted by the insurer itself.

In short, the recent Supreme Court decision of 6 June 2023 lays a foundation that will surely be useful to justify, even more so, the exception to the rule of Section 20 of the ICA that regulates excessive interest for insurers.

SWITZERLAND

Law and Practice

Contributed by:
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Contents

Prager Dreifuss Ltd. was established more than 30 years ago and has a long-standing reputation as one of the leading Swiss law firms for insurance and re-insurance litigation (and arbitration). The insurance team acts as counsel for large Swiss and foreign insurance and reinsurance companies in contentious and non-contentious matters, be it as counsel for primary insurers or supervising counsel for reinsurers and co-insurers. In addition, members of the insurance team are regularly designated by insurers as defence counsel for policyholders, requested to provide expert opinions, or selected as arbitrators in reinsurance disputes. The insurance practice of Prager Dreifuss also encompasses any kind of regulatory matter and the representation of clients vis-à-vis the Swiss Financial Market Supervisory Authority. The team advises both domestic and foreign insurers and reinsurers on regulatory matters.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

Statutory Framework

Insurance agreements

The legal arrangement between insurance companies (direct insurers), policyholders, and insureds is governed by the Swiss Insurance Contract Act (ICA) and by the rules provided by the Swiss Code of Obligations (CO). A major revision of the ICA came into force on 1 January 2022. Even though case law on the newly revised act is still very limited, this change in the landscape will without doubt also impact on insurance disputes.

Reinsurance agreements

While the ICA is applicable to direct insurance agreements, it does not cover reinsurance contracts. Therefore, reinsurance contracts under Swiss law are primarily governed by the rules outlined in the CO and reinsurance customs.

Supervisory rules

The regulatory regime for private insurance carriers is governed by the Insurance Supervisory Act (ISA), with important additional rules in the Insurance Supervisory Ordinance (ISO). A partially revised version of the ISA will come into force as of 1 January 2024.

The Swiss regulator is the Financial Market Supervisory Authority ("FINMA").

Procedural Framework

In Switzerland, insurance disputes are either brought before the ordinary courts or – particularly in international contexts – settled through arbitration.

In 2011, the Swiss Civil Procedure Code (CPC) was introduced, establishing a uniform set of procedural rules for both contentious and non-contentious civil matters, the enforcement of non-monetary claims and domestic arbitration.

In cases where civil proceedings extend to international matters, Switzerland relies on the principles of private international law, codified in the Private International Law Act (PILA), along with bilateral and multilateral agreements (of which the Lugano Convention is the most important). The PILA governs the jurisdiction of Swiss judicial and administrative authorities, the applicable law, the conditions for recognition and enforcement, bankruptcy proceedings,

composition agreements, and international arbitration. However, when applicable, multilateral or bilateral treaties (eg, the Lugano Convention) take precedence over the provisions outlined in the PILA.

The enforcement of monetary claims, including claims against insurers for insurance coverage, falls within the scope of the Federal Act on Debt Enforcement and Bankruptcy ("DEBA").

1.2 Litigation Process and Rules on Limitation

Litigation Process

Although Switzerland has had a unified CPC since 1 January 2011, its federal system and history have left their mark on the court system, not only by providing different competent courts depending on the canton in which a claim is lodged, but also by distinguishing between the cantonal and the federal levels within the stages of a court proceeding, applying different rules to each stage.

In general, there is an obligation for the parties to enter into a mandatory conciliation procedure before being allowed to submit a claim to court. If no settlement can be made, the claimant can lodge the claim with the cantonal first instance court. A judgment from this first instance court can be appealed to the supreme court of the canton concerned. This appeal court is entitled to a full review of the first instance judgment on all legal and factual grounds. Following a judgment of the canton's supreme court, a further appeal is possible to the Federal Supreme Court; however, only on limited grounds. In particular, while the Federal Supreme Court will in most circumstances undertake a full review of the legal issues, only manifestly incorrect factual findings can be challenged in the Federal Supreme Court. Proceedings before the Federal Supreme Court are governed by the provisions of the Federal Supreme Court Act (FSCA).

In addition to this court system, the CPC grants the cantons the option to establish commercial courts, which are competent to hear commercial claims, if at least the defendant (eg, the insurer) is registered in a commercial registry, the value of the claim (in insurance matters) amounts to CHF30,000 and the claim concerns the professional activity of at least one of the parties. Four German-speaking cantons – Zurich, Bern, St Gallen and Aargau – have all established such a court. These courts form part of the cantonal high court and serve as a court of first instance, with the Federal Supreme Court as the sole appeal court. In practice, most international commercial disputes that are not referred to arbitration are brought before such commercial courts.

As part of the ongoing revision of the CPC, which is expected to come into force in its revised form on 1 January 2025, the cantons will have the option to allow English as the language of proceedings in addition to their local official language(s). In the Canton of Zurich, the local legislator is considering establishing an International Commercial Court to take on international cases that could be led in English.

Rules on Limitation

The revised ICA, effective from 1 January 2022, introduced a new five-year statutory limitation period, thereby providing for a significant increase compared to the previous two-year limit. It covers all insurance contract-related claims, including premiums and coverage. The limitation period starts running on the date on which the insured event took place, which needs to be determined separately for each coverage.

The limitation period may also start even before a claim becomes due.

Contractual agreements that shorten the limitation period for the claim against the insurance company are invalid. However, apart from a few exceptions, the revised ICA does not apply retroactively. Consequently, policies agreed upon before the revised ICA came into force on 1 January 2022 remain subject to the previous provisions on limitation. Given its nature as a half-binding provision that may not be modified to the detriment of the policyholder and/or insured, the parties are free to agree on a limitation period that is more generous.

1.3 Alternative Dispute Resolution (ADR)

Although most insurance cases are decided in court proceedings, arbitration is common in Switzerland, especially at its globally renowned arbitration centres in Zurich and Geneva. Prominent institutions and rules include the International Chamber of Commerce (ICC) Rules and the Swiss Arbitration Centre (Swiss) Rules. These frameworks offer tailored proceedings and efficient management for disputes of varying scopes and complexities. From the statistical data published by the Swiss Arbitration Centre, it appears that the institution recently saw an increase in insurance and reinsurance disputes being referred to arbitration, as 4% of the new cases relate to insurance or reinsurance matters, while between 2004 and 2020, insurance and reinsurance arbitration only made up 1% of all cases on average.

Other ADR methods play a limited role, although mediation appears to have become more popular recently, as illustrated by an increasing number of organisations offering mediation services and training, and the adoption of the Swiss Rules on Commercial Mediation by the Swiss Chambers of Commerce and Industry in 2021.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Place of Jurisdiction

In a domestic context, the place of jurisdiction is governed by the CPC. Swiss courts generally respect choice of forum clauses, allowing the parties to choose a forum in writing or through other text-reproducible means (eg, emails). Forum selection clauses can relate to an existing or future dispute. In the absence of such an agreement, the CPC provides for a bundle of provisions regarding the place of jurisdiction with the most important being at the defendant's permanent place of residence or registered seat. Different rules apply to insurance contracts involving consumers (see **4.5 Position if Insured Party Is Viewed as a Consumer**).

In international disputes, the place of jurisdiction is determined by the PILA, or in a European context, the Lugano Convention. The PILA has only one specific provision pertaining to insurance contracts in the case of a direct claim against an insurer. In general, the PILA allows for a choice of jurisdiction unless a contract qualifies as a consumer contract. The parties to an insurance contract may, therefore, submit to Swiss jurisdiction even though no party is resident in Switzerland. A sufficient connection allowing a Swiss court to accept the jurisdiction may in that case be created by the choice of Swiss law as the law applicable to the insurance contract. A somewhat different approach applies under the Lugano Convention, which provides for specific places of jurisdiction for disputes under insurance contracts and restricts, in particular, the venues available to the insurer.

Choice of Law

The general principles for determining the law applicable to an insurance contract are found in the PILA. For non-consumer contracts, the parties are free to choose the applicable law in the insurance contract. It should be noted that, although the determination needs to be clear and unequivocal, there is no requirement to make an express choice. Rather, the choice of law can also be implied (Article 116 PILA). Should the choice of law be made subsequent to the contract's formation, it retrospectively applies from the contract's inception.

In the absence of a definite choice, the applicable law is determined by selecting the law of the country with the closest connection to the contract. This closest connection is represented by the characteristic services (ie, in the case of insurance contracts, the services of the insurer). The Federal Supreme Court thus applies the law of the seat of the insurer to the insurance contract. The above principles may not apply to insurance contracts involving consumers (see **4.5 Position if Insured Party Is Viewed as a Consumer**).

2.2 Enforcement of Foreign Judgments

The recognition and enforcement of foreign judgments pertaining to insurance and reinsurance contracts adhere to the same regulations as those governing foreign judgments in other areas of commercial law.

To the extent that the recognition of a foreign judgment is not governed by an international treaty (ie, the Lugano Convention), the PILA is applicable. According to the PILA, a foreign judgment is recognised in Switzerland if the following criteria are met cumulatively:

- A foreign court held jurisdiction over the matter.
- The foreign judgment has become final and binding under the law of the issuing state.
- None of the grounds for refusal specified in the PILA are applicable. The PILA furnishes an exhaustive list of such grounds, encompassing breaches of Switzerland's public order, defective service, or res judicata. Other than that, the foreign decision may not be reviewed by the Swiss court on the merits.

The Lugano Convention applies to the recognition and enforcement in Switzerland of judgments in commercial and civil matters that were rendered in another member state. As a general rule, a judgment issued in a state that is a member of the Lugano Convention is recognised in Switzerland without any special procedure being required. Swiss courts seized with a request for enforcement must declare such a judgment immediately enforceable if certain formal conditions are respected. Thereby, the courts may not, in any event, review the judgment to be declared enforceable on the merits.

2.3 Unique Features of Litigation Procedure

Commercial Courts

In the cantons that have established a commercial court (Zurich, Berne, St Gallen and Aargau), insurance and reinsurance disputes are – if not referred to arbitration – predominantly conducted before these courts. A commercial court typically consists of both professional and commercial judges, with each canton having its own laws determining the precise composition. For example, commercial judges may be selected from a pool of industry experts, including those with backgrounds in insurance and banking, ensuring that the specific needs of each case are adequately addressed. This

approach guarantees that commercial courts possess a high level of expertise in handling commercial matters.

Settlement Discussions

Regarding the commercial court of the Canton of Zurich in particular, it can be stated that the court usually holds a settlement hearing following the initial round of written submissions. In order to enable the judges to provide a detailed assessment of the case, it may be beneficial to the parties to fully state their respective positions and to submit the available evidence in the first round of written submission. Due to this approach, a significant part of the proceedings initiated before the commercial court of the Canton of Zurich may be resolved via settlement.

No Discovery

As in many other civil law jurisdictions, there is no discovery in Swiss state court proceedings. The CPC only foresees a general duty to co-operate in the collection of evidence and to hand over precisely identified documents. This regime generally saves time, and therefore leads to more cost-effective proceedings.

Cost Allocation

Once the claimant has submitted the statement of claim, the court usually orders the claimant to advance the court fees. Upon termination of the proceedings, in accordance to the loser-pays principle, the losing party then has to reimburse the prevailing party for both its court costs and its attorneys' fees. Both are based on the cantonal tariffs related to the amount in dispute and in proportion to the parties winning or losing, respectively. As a consequence of these cost barriers, claimants tend to hesitate to commence proceedings unless and until they have sufficient means of evidence (see also **5.3 Trends in the Cost or Complexity of Litigation**).

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Switzerland is an arbitration-friendly jurisdiction, and arbitration is widely used to resolve commercial disputes in both domestic and international matters. From an international perspective, it can be stated that Switzerland is among the most popular seats for arbitration. Consequently, state courts are adept at handling and enforcing arbitration provisions in commercial contracts (ie, in insurance and reinsurance disputes).

Swiss federal law, as enshrined in Article 61 CPC for domestic arbitration and Article 7 PILA for international arbitration, establishes an arbitration-friendly principle: if parties have referred an arbitrable dispute to arbitration, the state courts will decline jurisdiction, unless one of the following exemptions is applicable (Article 61 CPC, Article 7 PILA):

- the defendant has proceeded on the merits without reservation;
- the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or
- the arbitral tribunal cannot be constituted for reasons that are clearly attributable to the defendant in the arbitration.

3.2 The New York Convention

Switzerland has signed and ratified the New York Convention (NYC). Foreign arbitral awards rendered by arbitral tribunals not seated in Switzerland will therefore be recognised pursuant to the rules of the NYC. Arbitral awards rendered by tribunals seated in Switzerland are enforced in the same way as judgments

of Swiss state courts, meaning that they are automatically enforced and no additional exequatur (recognition procedure) is necessary.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Significance

In Switzerland, no official statistic offers insights into the prevalence of arbitration clauses within insurance and reinsurance contracts. Although insurance disputes, even those of a complex nature with international dimensions, frequently find their way to the Swiss commercial courts, parties involved in commercial insurance arrangements occasionally favour arbitration as their chosen dispute resolution mechanism. In the context of reinsurance contracts, it is fair to state that arbitration is the absolutely dominant mode for resolving disputes.

Appeal

International awards rendered in Switzerland may be appealed before the Swiss Supreme Court within 30 days upon receipt of the award. The (limited) grounds for appeal are set forth in Article 190 paragraph 2 PILA, according to which, an arbitral award may only be set aside:

- where the sole member of the arbitral tribunal was improperly appointed or the arbitral tribunal was improperly constituted;
- where the arbitral tribunal wrongly accepted or rejected jurisdiction;
- where the arbitral tribunal ruled beyond the claims submitted to it, or failed to decide one of the claims;
- where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated; and/or
- where the award contravenes Swiss public policy.

In addition, if none of the parties has their domicile or place of business in Switzerland, the parties may waive any or all grounds for an appeal. Such waiver may be agreed upon in the arbitration agreement or by subsequent written consent.

In the realm of domestic arbitration, the arbitral award may, in addition, also be set aside if the award is arbitrary (in contrast to the public policy-criteria in international disputes) or if the costs and compensation fixed by the arbitral tribunal are obviously excessive.

4. Coverage Disputes

4.1 Implied Terms

Freedom of Contract

Generally speaking, the principle of freedom of contract is upheld in Switzerland for both insurance and reinsurance contracts. The parties are therefore, in principle, free to autonomously determine the content of an insurance contract. If the insurance contract leaves particular matters unaddressed, the general contractual provisions of the Swiss Code of Obligations (SCO) and the more specific provisions of the ICA will be implied.

"Absolutely Binding" and "Relatively Binding" Provisions

There are, however, various limitations to the parties' ability to freely determine the content of their agreement. The amended ICA consists to a large extent of mandatory provisions that either may not be amended at all (they are "absolutely binding provisions" as designated in Article 97 ICA), or at least, may not be amended to the detriment of the insured (they are "relatively binding provisions" as designated in Article 98

ICA). Provisions of the insurance agreement that contravene a binding provision are void.

For instance, it is generally no longer permissible for retail insurance contracts to draft obligations of the insured as condition precedent. Thus, the breach of such an obligation will have no consequence if the insured can establish that a breach had no negative impact on the occurrence of the insured event and on the amount of the insurance payment.

"Professional Policyholders"

The revised ICA, however, acknowledges that not all insureds are in need of such protection, and introduced the concept of so-called "professional policyholders". For these insureds, the provisions of the amended ICA are not mandatory. This concerns not only credit insurance but also, some types of "large risks", in particular regulated financial intermediaries, pension funds, entities with a professional risk management function and entities that fulfil two of the following three criteria: total assets of CHF20 million, net turnover of CHF40 million, and net assets or equity of CHF2 million.

Reinsurance Contracts

Reinsurance contracts do not fall within the scope of application of the ICA, but are mainly governed by the general principles of Swiss contract law set forth in the Swiss Code of Obligations (CO). The drafting of reinsurance contracts is therefore left to the private autonomy of the parties, with the reinsurance contract being the main source for the assessment of the legal relationship between the insurer and the reinsurer.

4.2 Rights of Insurers

The ICA sets out certain pre-contractual disclosure duties of the applicant when negotiating the insurance contract (Article 4 et seq). The applicant's foremost duty is to answer the written questions of the insurer on all material facts affecting the risk, as far as they are known or ought to be known to the applicant. The ICA requires a disclosure on the basis of a questionnaire or any other written question. According to case law and the prevailing legal doctrine, the applicant's pre-contractual disclosure duty is limited to the facts covered by the written questions of the insurer. Put differently, the scope of the duty of disclosure depends on the questions of the insurer. Unlike in other jurisdictions, Swiss insurance law does not provide for an additional duty to spontaneously disclose such facts based on the general obligation to act in good faith.

The sanctions for a breach of duty are strict. The insurer has a right to terminate the insurance contract by written declaration within a deadline of four weeks after the insurer has become aware of the breach of the duty of disclosure. In addition, the insurer is released from its obligation to provide indemnification for damages that have already occurred, the occurrence or extent of which was influenced by the fact affecting the risk incorrectly disclosed or withheld.

As an exception, despite the breach of the duty to disclose, the insurance company is not entitled to terminate the contract if:

- the concealed or incorrectly disclosed fact ceased to exist before the occurrence of the insured event;
- the insurance company has caused the concealment or incorrect disclosure;
- the insurer has or must have known the concealed fact;
- the insurer was or must have been aware of the incorrectly disclosed fact;

- the insurer has waived the right of termination; and
- the person obliged to notify fails to answer a question submitted by the insurer, and the insurer has nevertheless concluded the insurance contract.

Pursuant to the prevailing legal doctrine, the insurer may also demand compensation for the damages suffered under culpa in contrahendo, which is a case law-developed concept to address issues that have occurred in the negotiation phase.

4.3 Significant Trends in Policy Coverage Disputes

Identifying significant trends is challenging, as official statistics on insurance coverage litigation are lacking. It is, however, fair to assume that in the past 12 months the number of COVID 19-related coverage disputes has begun to flatten out and that pending proceedings will predominantly be resolved via settlement, as case law has recently provided legal certainty in some core areas (see **7.3 Coverage Issues and Test Cases**).

4.4 Resolution of Insurance Coverage Disputes

Private law disputes between insurers and insureds and between different insurers, respectively, are subject to the jurisdiction of civil courts. Thereby, no specific procedural rules apply on insurance coverage litigation. However, in the Canton of Zurich, where the bulk of Swiss-based insurance companies are domiciled, coverage disputes are predominantly litigated before the commercial court.

Distinguishing features of civil proceedings conducted before the commercial courts are, in particular, an acceleration of the proceedings, as there is no prior conciliation hearing, and no appeal at the cantonal level. Also, the bench in the commercial courts includes specialised judges, who have expert knowledge in the field concerned (eg, in the insurance industry). A further key feature is the strong commitment of the court to conduct settlement discussions. Throughout civil proceedings, the court has the authority to convene a so-called "instruction hearing". This session aims to facilitate settlement discussions and gather specific evidence. The commercial court commonly provides a preliminary, non-binding assessment of the claim (a risk assessment) and proposes a settlement, often leading to the resolution of even complex disputes at an early stage and with reasonable costs.

The parties to an insurance coverage dispute are free to agree on arbitration instead of state court litigation. Arbitration is typically the preferred choice in reinsurance matters and for companies engaging in international business and seeking to have sensitive information kept private and confidential.

4.5 Position if Insured Party Is Viewed as a Consumer

Mandatory Provisions

As pointed out above (see **4.1 Implied Terms**), the ICA consists to a large extent of mandatory provisions that either may not be amended at all ("absolutely binding provisions"), or at least not to the detriment of the insured ("relatively binding provisions"). These are mainly consumer protection provisions encompassing, for instance, minimum information requirements, a 14-day withdrawal right for new insurance contracts, and a termination right for long-term insurance contracts.

Place of Jurisdiction

Swiss civil procedural law provides some privileged provisions that strengthen the consumer's position regarding the place of jurisdiction. According to these provisions, claims concerning consumers must generally be filed with the competent court at the consumer's domicile. The consumer can thus impose the jurisdiction provided by the CPC, even though the parties have entered into an exclusive jurisdiction agreement. The consumer may only agree to a different jurisdiction after the dispute has arisen. Moreover, in international disputes, the PILA and the Lugano Convention provide for similar privileges regarding the place of jurisdiction in consumer-related matters.

Choice of Law

As regards the choice of law in cross-border matters, the PILA contains certain provisions concerning the applicable law for consumer contracts, ie, contracts pertaining to goods or services of ordinary consumption intended for a consumer's personal or family use and not connected with the consumer's professional or business activity. In a nutshell, the parties cannot waive the applicability of the law of the state of the consumer's place of habitual residence if:

- the supplier received the order in that jurisdiction;
- the contract was concluded after an offer or advertising in that jurisdiction and the consumer performed the necessary steps towards contracting in that jurisdiction; or
- the consumer was induced by the supplier to go abroad in order to place an order.

Unfair Competition Act

Furthermore, the use of general terms and conditions (referred to as "GTC") by insurance companies is subject to Article 8 of the Unfair Competition Act (UCA). The revised provision came into force more than a decade ago, as of 1 July 2012. It foresees that the use of GTC that, to the detriment of consumers and in violation of the principle of good faith, results in a significant and unjustified imbalance between the rights and obligations set out in the contract, is prohibited. In contrast to the European Directive 93/13/EEC on unfair terms in consumer contracts, Article 8 of the UCA does not enumerate unfair terms in a catalogue. It is also important to note that Article 8 of the UCA specifically applies to consumers and does not extend to individuals using insurance services for their commercial or professional activities. From what has been observed in the last decade, however, Article 8 of the UCA has in practice not substantially altered the legal landscape in insurance litigation.

4.6 Third-Party Enforcement of Insurance Contracts

The revised ICA (that came into force on 1 January 2022) introduced a direct right of claim against the insurer in the area of third-party liability insurance. Up to that point, a direct claim against the insurer had only been provided in very limited sectors of insurance, the most important being motor insurance. According to the new law, the third party suffering damage or its legal successor has a direct right of claim against the insurer within the framework of any existing insurance cover; however, this is limited by the objections and defences that the insurance company may hold against the insured on the basis of the ICA or the insurance contract.

In the realm of mandatory liability insurance, the third-party claim's right goes even further, by denying the insurer defences arising from:

- negligent or intentional causation of the insured event;

- breach of obligations;
- failure to pay the premium; or
- contractually agreed deductible.

From the damaged party's point of view, the recently introduced direct right of claim offers some advantages. Most notably, the risk of insolvency of the liable insured is fully shifted to the insurer. To facilitate enforcement, the new ICA also grants the damaged party a right of information. Accordingly, the damaged party is entitled to request from the liable insured or from the competent supervisory authority the disclosure of the insurance company. The latter is obliged to provide information on the type and extent of the insurance cover.

4.7 The Concept of Bad Faith

The general duty to act in good faith is a cornerstone in Swiss law. From this general principle, a number of specific duties of conduct have been derived by case law. In an insurance context, for example, liability arising from the breach of a pre-contractual duty is generally referred to as "culpa in contrahendo" (see **4.2 Rights of Insurers**). There is, however, no particular bad faith concept giving rise to claims for damages in the context of the claims-handling process (see **4.8 Penalties for Late Payment of Claims**).

4.8 Penalties for Late Payment of Claims

According to the ICA, the claim arising from the insurance contract becomes due four weeks after the insurance company has received information that allows the verification of the claim. A contractual agreement between the parties that the insurance claim only becomes due after recognition by the insurance company or after a final and binding judgment against the insurance company, is invalid. If the insurer disputes its duty to pay, the beneficiary can demand payments on account up to the undisputed amount after expiry of the same four-week period.

Since the current ICA does not contain a specific provision on late payments of claims by the insurer, the provisions of statutory contract law are applicable on the basis of the reference in Article 100 paragraph 1 ICA. According to these provisions, notice is required in order to put the debtor in default. Thereby, the mere fact that the four-week period for the verification of the claim has lapsed, does not constitute an expiry date that would make a notice superfluous.

From the date the insurer has been put in default, interest at 5% per annum (or at another contractually agreed percentage) begins to accrue on the outstanding amount of the claim. Where the insured party has suffered additional damages due to late payment by the insurer, it may further claim to be compensated for such damages.

4.9 Representations Made by Brokers

Under Swiss law, the insured is, in principle, bound by representations made by its broker vis-à-vis the insurer. This follows from the general principles of Swiss agency law, according to which the rights and obligations arising from a contract made by an agent in the name of another person accrue to the person represented (insured or policyholder), and not to the agent. Representations made by a broker are therefore legally binding for the insured provided there is an agreement on representation between the insured and the broker. Also, the knowledge of an insurance broker is, in principle, attributed to the insured.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Delegated underwriting or claims handling for insurance intermediaries is in general permitted in Switzerland, and is not uncommon. There are also various types of insurance intermediaries available.

The current amendment of the ISA is likely to bring some considerable changes in the future concerning intermediaries. The notions of tied versus non-tied insurance intermediaries are redefined and intermediaries can no longer act simultaneously as tied and non-tied intermediaries. The registration of non-tied intermediaries is subject to new requirements including the proof of guarantee of irreproachable business activity and the proof of sufficient education and advanced training. Tied insurance intermediaries can no longer be registered with the public FINMA register for intermediaries, unless they demonstrate that they wish to take up an activity abroad for which the relevant state requires an entry in the Swiss register. Also, according to the ISO, the provision of a website through which insurance contracts can be concluded (including comparison portals) will also be considered insurance mediation in the future.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

In third-liability insurance, the insurer typically promises to defend the insured against unjustified claims. Depending on the contract, Swiss insurers provide this defence directly or fund the defence costs of policyholders or insureds, including lawyers' fees, court fees and party compensation fees.

Directors' and Officers' (D&O) Liability Insurance

D&O liability insurance has become increasingly important in Switzerland, extending beyond publicly traded companies to small and medium-sized, non-listed enterprises. These policies are typically purchased by corporations, with the premium considered a tax-deductible expense. Deliberate wrongful acts or legal violations are typically not covered and indemnification may also be reduced if a director has acted with gross negligence. The insurance regularly excludes penalties, punitive damages, claims connected to social security contributions, and tax claims.

Legal Protection Insurance

It is common in Switzerland for policyholders to rely on legal protection insurance. The coverage provided by this insurance encompasses a wide spectrum of services, ranging from offering advice and legal assistance to covering legal expenses and attorneys' fees. For instance, the policy extends protection in legal matters related to areas such as tenancy law, patient law, and employment law, falling within the scope of private legal protection. Additionally, it includes legal disputes arising from road traffic incidents, such as those following a traffic accident or in connection with vehicle leasing, purchasing, or repairs, falling within the scope of traffic legal protection.

5.2 Likely Changes in the Future

No significant change is expected in relation to the funding of the defence of insureds.

5.3 Trends in the Cost or Complexity of Litigation

The Swiss Civil Procedure Code (CPC) is currently under revision, with lawmakers aiming to

introduce provisions to lower the bar for a claimant to initiate litigation.

- Claimants are currently required to pay the full amount of the expected court costs upfront when lodging a claim. Additionally, even if the court orders the opposing party to cover the court costs, the advance paid by the claimant is deducted from the total costs, leaving the claimant responsible for potentially collecting these costs from the other party.
- The revised CPC introduces changes aimed at reducing financial barriers for claimants. Under the revised CPC, courts should generally only require claimants to pay half of the expected court costs upfront. However, there are exceptions, such as cases falling under the jurisdiction of international commercial courts and appeal proceedings, where claimants may still be asked to pay the full expected costs.
- Regarding cost allocation, under the revised CPC, court costs will still be offset against the advance payments made by the party responsible for these costs. However, if the party not responsible for the costs has made an advance payment, it will be refunded, and any remaining costs will be sought from the party responsible for covering the court costs. This shift means that the state, rather than the claimant, now bears the risk of collecting outstanding court costs.

It can also be stated that there has been a slight trend in referring complex cases to arbitration rather than to state court litigation. See **1.3 Alternative Dispute Resolution (ADR)**.

5.4 Protection Against Costs Risks

There is generally no prohibition of third-party litigation funding in Switzerland.

Protection against costs risks in the form of legal expense insurance is widespread in Switzerland (see **5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds**). According to the data company Statista, the revenues from legal expense insurances in Switzerland have increased consistently over the last decade, amounting to a total of CHF709.84 million in 2021.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

Prior to the revision of the ICA in 2022, Swiss law was generally hostile to the recovery of losses paid by insurers. Recourse was governed by a complex system of case law on a double basis of subrogation into the insured's claims and the original right of recourse of the insurer. In general, the recourse possibilities were limited by the legal ground due to which a third party would have been liable for the loss, and differed also for first-party loss and liability insurers. This recourse system may still be in force for contracts which came into force prior to the amendment of the ICA.

Contrary to this, the revised ICA supports the recourse rights of the insurer, who subrogates at the time and to the extent of its payment into the claims of its insured against third parties, this for the items of damage of the same type it covers. Put differently, once an insurer has indemnified its insured and has been subrogated into its rights, the ICA provides insurers with a right of action to recover sums from third parties causing an insured loss to an insured.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

The subrogation of the insurer is set out in Article 95c ICA. The insurer exercises the rights of recovery in its own name.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

The COVID-19 pandemic has led to a temporary increase in insurance-related litigation in Switzerland. In particular, it has been highly controversial whether business interruption losses resulting from COVID-19 shutdowns are subject to coverage under "epidemic insurance" wordings. Epidemic insurance is often added as an extension to basic property business interruption insurance. In a high-profile judgment, the Swiss Federal Supreme Court rejected insurance coverage for such losses (for more details, see **7.3 Coverage Issues and Test Cases**).

As far as can be seen, the outbreak of war in Ukraine and the sanctions imposed on Russia in the Swiss Ordinance on Measures in Connection with Ukraine (SR 946.231.176.72) have not yet produced any insurance-related court decisions in Switzerland. Nevertheless, they have raised coverage issues among (re)insurers and insureds regarding, inter alia, war exclusions and other definitions, particularly in the property and political risks lines of business. It is, however, difficult to predict whether, and if yes to what extent, these developments will affect the amount of litigation in insurance matters in Switzerland in the mid-term.

7.2 Forecast for the Next 12 Months

As regards general macroeconomic developments, it is not expected that the Swiss insurance market will deviate significantly from global trends. While in the recent past, the pandemic has taken a central role in the insurance sector, court decisions have in the interim provided legal certainty regarding some core issues and it can be expected that going forward, the number of coverage disputes in pandemic-related matters will decline significantly.

As is the case in other jurisdictions, there's a growing expectation that in the post-pandemic era a rise in D&O liability claims as well as in cyberinsurance matters may be expected. In addition to this, insurers are likely to witness a surge in demand for coverage against climate-related risks. In this context, there might also be a rise in discussions around the exclusion of these risks in many negotiations on new reinsurance contracts, as well as litigation related to such matters.

7.3 Coverage Issues and Test Cases

In a judgment that has received considerable attention among practitioners, the Swiss Federal Supreme Court rejected insurance coverage under "epidemic insurance" wordings for business interruption losses due to COVID-19 shutdowns. The following describes what happened in more detail.

A restaurant company concluded a business insurance policy for small- and medium-sized enterprises (SMEs). The policy included, inter alia, property insurance, which covered losses of income and additional costs arising out of an epidemic. The general terms provided under the headings "not insured are" and "epidemic" listed various exclusions in the event of an epidemic. In particular, losses caused by pathogens

for which the World Health Organisation (WHO) pandemic phases 5 or 6 were applicable, at the national or international levels, were excluded from coverage. As a result of the (first) nation-wide shutdown ordered by the Federal Council from 17 March 2020 until the end of April 2020, the restaurant company suffered an estimated loss of income of about CHF75,000.

In a first step, the Swiss Federal Court ruled that the exclusion had become part of the insurance contract. Also, the exclusion clause was not deemed objectively unusual and had, thus, validly been included in the insurance contract. In a next step, the court had to assess the meaning of the exclusion. Although it was uncontested between the parties that the corona pandemic (COVID-19) fulfilled all the requirements of a phase 6 pandemic according to the relevant WHO definition, the issue remained that the policy effectively referred to a definition that was no longer in use. The Federal Supreme Court clearly held that the construction of a clause cannot stop at the wording: doing so would denude the exclusion of any applicability. Rather, the Federal Supreme Court found a clear intention to exclude high-scale pandemics, a level that COVID-19 had reached. Against this background, the Federal Supreme Court also refused to give importance to the fact that no authority had formally relied on the WHO definition of pandemic levels. Rather, the court concluded that the construction of the exclusion clause led to an unambiguous result. By this finding, the court could desist from examining whether an ambiguity had to be held against the insurer.

The judgment was of great significance in relation not only to the settlement of many COVID-19 shutdown losses in Switzerland, but also in the interpretation of insurance contracts and their general terms and conditions.

7.4 Scope of Insurance Cover and Appetite for Risk

The aforementioned decision of the Swiss Federal Supreme Court (see **7.3 Coverage Issues and Test Cases**) is likely to have a massive impact on COVID-19-related litigation, as many policies will have similar wording to the one assessed by the Federal Supreme Court. A considerable decline in coverage disputes related to business interruption losses resulting from COVID-19 shutdowns is therefore to be expected.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

In Switzerland, as in many countries, ESG issues are largely considered a potential source of emerging liability for directors and officers. Investors, employees and consumers expect that companies will increasingly actively address ESG considerations. Moreover, potential exposure for companies may come from claims of “greenwashing” or “climate-washing” litigation, where a company is sued by investors for unsubstantiated or misleading ESG claims, or the failure to meet net zero commitments. Against this background, an increase in ESG-related disclosure requirements and regulation for companies is to be expected in the near future, leading to a new field for insurance litigation, in particular in the realm of D&O liability insurance.

As a Side Note

The relevance of ESG-related topics in Switzerland is illustrated by the fact that FINMA

has recently issued a communication on preventing and combating greenwashing, as well as a circular on the disclosure obligations of banks and insurance companies. Therein, FINMA explains that greenwashing, or at least, a greenwashing risk, can be assumed if terms such as "zero carbon" or "impact" are used without being measurable or verifiable. In the circular on disclosure requirements, FINMA specifies the disclosure requirements of banks and insurance companies with regard to climate risks. According to the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD"), a description of the short-, medium- and long-term climate-related financial risks and their impact on business and risk strategy, as well as the effects on existing risk categories, must be disclosed.

8.2 Data Protection Laws

The use of customer data is subject to the Data Protection Act (DPA) and its underlying ordinance, the Data Protection Ordinance (DPO). As of 1 September 2023, a revised version of the DPA came into force. The main principles applicable to data processing are set out in Article 6 DPA. As a general principle, data processing must be carried out in good faith and must be proportionate. Personal data may only be processed for the purpose indicated at the time of collection, as evident from the circumstances, or as provided for by law. Furthermore, the collection of personal data and, in particular, the purpose of its processing must be evident to the data subject.

Compliance with the DPA is subject to supervision by the Federal Data Protection and Information Officer. Unlike the previous DPA, the revised version defines clear sanctions. It foresees that individuals who intentionally breach the DPA may be fined up to CHF250,000.

In court proceedings, data protection is not governed anymore by the DPA, but by the respective procedural act.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

Tailor-Made Provision for Lloyd's

Asserting a claim against Lloyd's under current law may be associated with certain procedural pitfalls, as Lloyd's is not the party subscribing to the policy nor is it contractually liable for the indemnification. From a procedural perspective, a Lloyd's syndicate does not have the legal capacity to act as a party, which under Swiss law is a requirement for the court to consider an action.

The legislator has addressed this particular issue in the course of the revision of the Insurance Supervision Act (ISA), which is set to come into force on 1 January 2024. The draft of the ISA contains, inter alia, a special provision regarding the specific features of Lloyd's as a unique insurance market. According to the draft, the general representative of Lloyd's Switzerland will have standing in all proceedings concerning claims arising from insurance contracts, in place of the Lloyd's insurers involved. The newly introduced provision will help to create welcome legal certainty in civil and supervisory proceedings in the future.

Direct Right of Claim for Liability Insurance

As pointed out above, the revised ICA provides for a direct right of claim against the insurer in the area of third-party liability insurance (see **4.6 Third-Party Enforcement of Insurance Contracts**). The new law might provide for an

increase in litigation, particularly in cross-border matters, as potentially more lawsuits against Swiss insurers may be filed abroad. Whether the direct claims right will lead to remarkably higher claims activity in general remains to be seen. A claim against the insurer still requires the potential liability of the insured and the frequency of events potentially giving rise to liability will not be affected by the revision of the ICA. In addition, (unsuccessful) claimants in Switzerland face considerable cost risks in the form of party compensation and court costs.

Subrogation

As described in **6.1 Right of Action to Recover Sums From Third Parties**, the revised ICA provides for a fundamental change in the field of the insurer's recourse. With the new regime, Swiss insurance law shifts from being a rather recourse-hostile environment to being a recourse-friendly one. Going forward, recourse proceedings are, therefore, likely to be conducted more frequently (and more successfully).

UAE

Law and Practice

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Contents

BSA Ahmad Bin Hezeem & Associates LLP is a regional law firm in the Middle East with nine offices across five countries. Its diverse team of 150 lawyers are from 35 different cultural backgrounds and can speak 22 languages. The firm is a market leader in new and evolving sectors, partnering with clients towards a sustainable, progressive future. It prides itself on being connective: sparking collaboration, creating synergy and driving change. Established for over 20 years, the firm is expanding organically, nourishing its talent and investing in its people. The insurance and reinsurance team is a market leader in the Middle East, with unrivalled local regulatory knowledge. BSA has rights of audience before all courts in the UAE, meaning it offers clients a holistic service in both contentious and non-contentious insurance matters. The firm is involved in many of the region's ground-breaking deals, and advises regulators and governments on legislative developments, as well as assisting legislative bodies in drafting insurance laws.

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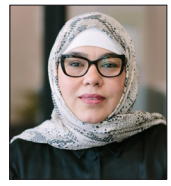

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

There are several statutory and procedural regimes that govern insurance disputes within the UAE, depending upon the dispute forum nominated by the parties, or, in certain circumstances, the dispute forum that applies by default (ie, in the absence of an election, or if certain threshold criteria are met or not met, as the case may be).

By way of background, the parties to an insurance contract (ie, the insurer and insured) within the UAE are permitted to nominate either:

- "onshore"/local court litigation (the Committee for the Settlement and Resolution of Insurance Disputes (the "Committee") is mandatory before onshore litigation commences and is akin to a pre-action protocol requirement; see under Onshore Courts); or
- arbitration before one of the arbitration centres within the UAE (namely, the Dubai International Arbitration Centre (DIAC), the Abu Dhabi Commercial Conciliation & Arbitration Centre, the International Court of Arbitration of the International Chamber of Commerce (ICC Court), the Abu Dhabi Global Market Arbitration Centre (ADGMAC) and other ad hoc arbitration as the applicable dispute forums).

It is also possible for the parties to mutually agree mediation.

It is worth noting that by virtue of Dubai Decree No 34 of 2021 Concerning the Dubai International Arbitration Centre (DIAC), as of 20 September 2021, the Arbitration Institute of the Dubai International Financial Centre (DIFC) and the Emirates Maritime Arbitration Centre were abolished, whereby such disputes will now be governed by DIAC (unless the parties thereto agree to another dispute resolution forum).

Onshore Courts

If the parties agree or nominate (ie, within the policy of insurance) to pursue any insurance dispute through the "onshore" courts, or if those courts are applicable by default (see under Arbitration), then the parties are required to initially raise a complaint before the Committee, which sits within the UAE Central Bank – Insurance Division (Article 110(3) of Federal Law No 6/2007

on the Regulation of Insurance Operations, as amended).

The process before the Committee begins with a quasi-reconciliation-style approach, whereby there is an onus on the parties to attempt to resolve their dispute without having to proceed to formal litigated proceedings. Any agreement reached between the disputing parties before the Committee is entered in a deed of reconciliation and attested by the chairman and board of directors of the UAE Central Bank – Insurance Division. If, however, the dispute cannot be resolved before the Committee, the Committee will issue an award/decision on the dispute. The award/decision can be appealed to the Emirate-specific first-instance court (see **1.2 Litigation Process and Rules on Limitation** for discussion on the UAE court structures) "within 30 days from the day next to their notification of the Award, otherwise, the Award shall be considered final and enforceable" (Article 16 of Insurance Authority Board Decision No 33/2019, as amended).

Arbitration

As noted above, the parties to an insurance contract in the UAE are permitted to nominate arbitration as the applicable dispute resolution forum, as an alternative to proceedings before the local onshore courts.

In practice, this option may prove more palatable for "foreign" individuals/entities as the election of arbitration allows the parties to:

- nominate the language of the proceedings (noting that onshore courts are conducted in Arabic only);
- nominate foreign laws in respect of the dispute forum and seat (noting that local policies (direct risk) must apply the substantive law of the UAE and that the local courts are reticent to apply non-UAE laws);
- appoint independent experts (as opposed to experts being appointed by the local, onshore courts without any input or election from the parties); and
- elect internationally tried and tested procedural arbitration rules (ie, the International Chamber of Commerce Arbitration Rules).

Furthermore, disputes arising under, and pursuant to, an insurance contract with a *valid* arbitration clause are not required to proceed before the Committee prior to filing formal proceedings (Article 5(3) of Insurance Authority Board Decision No 33/2019, as amended).

"Separability" and the validity of arbitration clauses

The word "valid" has been emphasised above as it requires further discussion. There are regulatory provisions within the UAE that the parties to an insurance contract are required to follow to validate the nomination of arbitration as the dispute resolution forum. One such provision is that the arbitration clause needs to be "mentioned in a special agreement, separate from the general conditions printed in the insurance policy" (Article 1028(d) of Federal Law No 5/1985 on the Civil Transactions Law of the United Arab Emirates State (the "Civil Code"), as amended). Despite that wording, it should be noted that Federal Law No 6 of 2018 on Arbitration does not specify any such requirement. Rather, it states that "an arbitration agreement may be made... in the form of a separate agreement or included in a certain contract" at Article 5(1) and therefore endorses the doctrine of "separability" to some extent.

Given these apparent inconsistencies, it remains at the discretion of the UAE courts as to whether

a separate arbitration agreement is required to validate the nomination of arbitration as the dispute resolution forum for insurance disputes. As a matter of practice, if the intention is to nominate arbitration as the applicable forum, then a separate arbitration agreement ought to be executed between the parties to the insurance policy/contract to avoid any uncertainties.

In any event, and from a procedural perspective, the inclusion of an "invalid" arbitration clause can result in additional time and cost, if a dispute on jurisdiction is raised. As an example, if an insurance contract contains an arbitration clause, although the clause is not mentioned in an agreement separate from the general policy conditions (ie, in accordance with the above-referenced Civil Code provision), the party intending to rely upon the arbitration clause may commence arbitration proceedings; however, the opposing party(ies) is/are at liberty to contest the jurisdiction based upon the (in)validity of the arbitration clause.

The arbitral tribunal may rule on a plea that the tribunal does not have jurisdiction based upon the invalidity of the arbitration clause/agreement either as a preliminary question or in a final arbitral award on the merits of the dispute. If the tribunal rules on a preliminary basis that it does have jurisdiction, the opposing party can appeal the decision to the local courts (Article 19 of Federal Law No 6/2018 on Arbitration). If the arbitration proceedings are dispensed with for want of jurisdiction, the filing party is responsible for the arbitration fees and would then be compelled to commence separate onshore court proceedings to resolve the dispute.

Financial Free Zone Courts

Separate to the onshore courts within the UAE are the two Emirate-specific financial free zone courts (the Abu Dhabi Global Market (ADGM) Court for Abu Dhabi and the DIFC Court for Dubai). These free zone courts do not govern insurance disputes between the insurer(s) and insured(s) within the UAE; however, it is not unusual for the reinsurance treaties (ie., the agreement that governs the relationship between the insurer(s) and their reinsurer(s)) to nominate these courts to govern the disputes between the insurer/reinsurer. It is also possible for insurers and reinsurers to choose foreign governing law and foreign jurisdiction provisions in reinsurance agreements reinsuring UAE risks.

1.2 Litigation Process and Rules on Limitation

Court Structures

There are two streams of "onshore" courts within the UAE: the Federal Judiciary and the emirate-specific courts. The highest court within the Federal Judiciary is the Federal Supreme Court, which has exclusive jurisdiction over certain reserved matters, such as cases that concern the federal government or ministers/senior officials (Article 99 of the UAE Constitution of 1971).

Notwithstanding this, and save for any exceptions (ie, a valid arbitration agreement), UAE insurance disputes are heard (following the procedures before the Committee) before the emirate-specific courts, which comprise a Court of First Instance and two appellate courts (the Court of Appeal and the Court of Cassation).

All UAE onshore courts apply civil law, whereby the appointed judges are at liberty to issue judgments without reliance upon, or reference to, any previous court judgments or rulings.

Otherwise, and as noted in **1.1 Statutory and Procedural Regime**, disputes between insurers and reinsurers can be heard before the ADGM

Court (in Abu Dhabi) or the DIFC Court (in Dubai), which are independent common law courts, if that forum is nominated within the reinsurance treaty/agreement.

Limitation Periods

There is no single regulation within the UAE that outlines the applicable limitation periods. For each separate practice area (ie, insurance, construction, commercial, etc) there are separate regulations that specify the rules of limitation. From an insurance perspective, the Civil Code states that "claims arising from the insurance contract shall not be heard after the lapse of three years from the occurrence of the event from which the claim arose, or from the knowledge of the interested party of such event" (Article 1036(1)). Marine insurance has a two-year limitation period as a matter of general law (Federal Law No 26 of 1981 (the Commercial Maritime Code), Article 399(1)).

There is some level of jurisprudence within the UAE as to what constitutes the "commencement of a claim" for an insurance dispute (ie, claim notification to the insurer, or otherwise). Nevertheless, to avoid any uncertainty or limitation period defences being raised, the filing of formal court/arbitral proceedings ought to be adopted as the method to preserve the right of limitation (ie, file the claim within the three-year period).

1.3 Alternative Dispute Resolution (ADR)

The UAE is not typically a jurisdiction that has a strong reliance/emphasis on alternative dispute resolution procedures.

Notwithstanding this, it is becoming increasingly prevalent (perhaps as a means to reduce time and costs) that the parties to an insurance dispute are willing to agree to participate in mediation procedures. As is the case in many Western jurisdictions, the mediation procedures within the UAE are not binding, and the parties are not compelled to attend, or agree to, mediation; however, there are certainly benefits in commencing mediation procedures if they can serve to narrow the issues in a dispute and/or prompt the parties to reach a settlement. There are several mediators and mediation centres available within the UAE to accommodate any such intention of the parties. The authors have seen more mediation in respect of insurer and reinsurer disputes over the past few years.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

As noted in **1.1 Statutory and Procedural Regime**, the parties to UAE insurance contracts are at liberty to elect local courts or arbitration as the dispute resolution procedure. If the former is adopted, the disputes are governed by the laws of the UAE, which include the applicable federal (ie, the UAE Civil Code) and emirate-specific laws, and the laws specific to the insurance sector, to the extent applicable. If the latter is adopted, the procedural rules are governed by the laws that the parties elect within the arbitration agreement or the arbitration forum (which could be the laws of England and Wales, as one example) but the UAE laws would need to apply to the substantive dispute arising from the direct insurance policy.

2.2 Enforcement of Foreign Judgments

The process for enforcing foreign judgments within the UAE (whether relating to insurance matters or otherwise) is dependent upon whether there are any treaties between the UAE and the country where the judgment (to be enforced) was issued. If there is a treaty between the UAE

and the foreign country, the rules of the treaty will be applied.

Otherwise, and in the absence of a treaty, the enforcement of a foreign judgment within the UAE is governed by Article 85, "Execution of Foreign Judgments, Orders and Bonds", of Cabinet Decision No 57/2018 on the Regulation of Federal Law No 11/1992 on the Civil Procedure (the "Civil Procedures Law"). It is important to note, however, that it is not possible to enforce a foreign judgment in the absence of the following (Article 85(2)) (the "Enforcement Conditions"):

- the courts of the UAE are not exclusively competent in the dispute in which the judgment or order was rendered and the foreign courts that issued it are competent in accordance with the rules of international jurisdiction established by their law;
- the judgment or order is delivered by a court in accordance with the law of the country in which it was issued and duly ratified;
- the litigants in the case in which the foreign judgment was delivered were summoned and were duly represented;
- the judgment or order has the force of res judicata in accordance with the law of the court that issued it, provided that the judgment has acquired the force of res judicata or provided for it in the same judgment; and
- the judgment does not conflict with a judgment or order rendered by a court of the UAE and does not contain anything contrary to public order or morals.

2.3 Unique Features of Litigation Procedure

At the outset, insurers that have not been issued a licence from the UAE Central Bank – Insurance Division to issue insurance policies within the UAE are not permitted to issue policies (for UAE-based risks) directly to UAE entities and citizens/residents as those risks must be insured by insurance companies licensed and regulated by the UAE Central Bank – Insurance Division. Foreign reinsurers are, however, permitted to enter reinsurance treaties with local/cedent insurance entities to reinsure UAE-based risks.

In the context of the above caveat, insurers licensed to insure against UAE-based risks within the UAE are to be mindful of the "pre-litigation" procedures before the Committee (as highlighted in **1.1 Statutory and Procedural Regime**); namely, the 30-day period within which the parties to the dispute are permitted to challenge any adverse award/decision of the Committee. If the insurance company does not challenge the dispute within the specified period, any award/decision of the Committee shall be considered final and binding.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Generally, arbitration clauses are recognised by UAE law. See **1.1 Statutory and Procedural Regime**, under *"Separability" and the validity of arbitration clauses*, for discussion of the applicability of arbitration provisions in contracts of insurance. Notwithstanding this, and for ease of reference, arbitration clauses need to be mentioned in a special agreement, separate from the general conditions printed in the insurance policy (Article 1028(d) of the Civil Code), to be, without a doubt, enforceable within the UAE. This is not the case for insurers and reinsurers, for which a clause within the applicable reinsurance treaty

will be construed as a separate, and independent, agreement to arbitrate and not otherwise.

Again, from a practical perspective, if proceedings are commenced before the onshore courts, and one of the parties wishes to rely upon an arbitration clause to dispute the jurisdiction, the onshore courts would be more likely to dismiss those proceedings if the parties have entered into an arbitration agreement separate from the general insurance policy provisions (than if an arbitration clause was merely included within the insurance policy). In those circumstances, the filing party would be compelled to commence separate arbitral proceedings to resolve the dispute as a matter of contested jurisdiction.

3.2 The New York Convention

The UAE is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The Convention was adopted in the UAE pursuant to the operation of Federal Decree No 43/2006 on the Adherence of the United Arab Emirates to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

The enforcement of arbitration awards issued within a foreign country is governed by Article 85 of the Civil Procedures Law and is therefore required to satisfy the Enforcement Conditions, as referenced in **2.2 Enforcement of Foreign Judgments**.

An application to execute a foreign arbitral award requires the submission of a petition before the execution judge. The judge of the Court of Execution shall issue their order within three days from submission of the petition. Furthermore, the order from the Court of Execution may be appealed in accordance with the rules for filing an appeal (Article 85(2) of the Civil Procedures Law).

3.3 The Use of Arbitration for Insurance Dispute Resolution

Nomination of Arbitration

At the time of writing, there were 62 insurance companies within the UAE, with 35 being national/local companies and 27 being "foreign" insurance companies. From experience, foreign insurance companies (and reinsurance companies, in respect of reinsurance treaties) are more likely to nominate arbitration as the dispute resolution forum given that it allows (as highlighted in **1.1 Statutory and Procedural Regime**) the parties to:

- nominate the language of the proceedings;
- nominate foreign laws in respect of the arbitration forum;
- appoint independent experts; and
- elect internationally tried and tested procedural arbitration rules.

In the above regard, arbitration is a common method of insurance dispute resolution adopted within the UAE. It is difficult to determine from a macro level if that preference is heightened within any particular line of insurance business; however, there is no limitation to nominating arbitration within any line of insurance business written in the UAE. Marine and aviation tend to attract arbitration as a dispute forum, as do property/casualty insurance lines.

Rules and Privacy

If arbitration is nominated as the means of dispute resolution, the parties are permitted to elect between several governing arbitration rules, including DIAC, the Abu Dhabi Commercial Conciliation & Arbitration Centre, and the ADGMAC.

Unless the parties otherwise agree, arbitration proceedings within the UAE shall be held at private meetings (Article 33(1) of Federal Law No 6/2018 on Arbitration).

Appeals

In order to raise an objection against an arbitral award, a lodgement of an action in nullity before the Court of Appeal, or during the examination of the request for recognition of the award, needs to be filed (Article 53(1) of Federal Law No 6/2018 on Arbitration). The applicant is required to prove the reason(s) to invalidate the arbitration award. Such reasons include demonstrating that the arbitrators relied upon an invalid arbitration agreement, or if there was a failure of the arbitral panel to apply the law agreed between the parties.

Otherwise, the Court of Appeal is permitted to nullify the arbitral award if the subject matter of the dispute is not capable of settlement by arbitration, or if the award is in conflict with the morals of the UAE (Article 53(1) of Federal Law No 6/2018 on Arbitration).

4. Coverage Disputes

4.1 Implied Terms

Generally, UAE law does not recognise the concept of implied terms, other than "good faith". By virtue of Article 246 of the Civil Code, all insurance policies/contracts within the UAE are to be implemented "according to the provisions contained therein and in a manner consistent with the requirements of good faith".

4.2 Rights of Insurers

Insurers are permitted to obtain sufficient details/particulars relating to the insurable "risk" prior to the inception of an insurance policy. This discovery/due diligence process often takes the form of proposals/questionnaires to which the (to be) insured party is required to respond. If the insured party conceals, in bad faith, certain matters, or has presented misstatements, such that the risk was underestimated, the insurer may be permitted to rescind the contract (Article 1033 of the Civil Code).

4.3 Significant Trends in Policy Coverage Disputes

An increasing number of insurers/reinsurers have tightened up existing policy terms and conditions in addition to adding new provisions to avoid uncertainty and reduce the risk of coverage disputes.

4.4 Resolution of Insurance Coverage Disputes

The resolution of coverage disputes follows the same process as any other insurance dispute, as highlighted in **1.1 Statutory and Procedural Regime**. Disputes related to direct insurance in the UAE are resolved through the Committee or through a valid agreement to arbitrate. Reinsurance disputes tend to be resolved by the chosen dispute forum or jurisdiction clause within the reinsurance treaty.

4.5 Position if Insured Party Is Viewed as a Consumer

The rights of the insurer and insured do not change in circumstances where the law views the insured party as a consumer.

4.6 Third-Party Enforcement of Insurance Contracts

Pursuant to Article 252 of the Civil Code, contracts within the UAE are not permitted to impose an obligation upon a third party; however, they are permitted to establish a right in favour of a third party. Article 1035 of the

same code provides a course of action where a third party makes a claim against the insured. In most lines of insurance, a third party may bring a direct claim against an insurer if the third party is named as a beneficiary in the policy.

One example of where a right is conferred upon a third party is within motor vehicle insurance contracts, which are governed by the Insurance Authority Board of Directors' Decision No 25/2016 Pertinent to Regulation of the Unified Motor Vehicle Insurance Policies (the "MV Law").

The MV Law states at Article 2 that an insurance company is permitted to issue a motor vehicle policy against third-party liability, hence it operates to cover liability towards a third party.

4.7 The Concept of Bad Faith

Despite there being a statutory obligation to exercise good faith in commercial contracts (as noted in **4.1 Implied Terms**), the Civil Code does not define what is required to demonstrate good faith, nor is there any regulatory concept of bad faith. Notwithstanding this, the concept of bad faith does exist, and is commonly featured within UAE court pleadings; however, it is at the discretion of the court as to whether the conduct of the party is tantamount to bad faith. In the instances where bad faith has been ruled against the parties to a contract, the conduct has been deliberate and/or intended to cause harm/loss.

4.8 Penalties for Late Payment of Claims

Pursuant to Article 9(2) of the Insurance Authority Decision No 3/2010 Instructions Concerning the Rules of Professional Conduct and Ethics to be followed by Insurance Companies Operating in the State, insurers are required "to develop an appropriate mechanism to deal with the claims filed including... determining an adequate period for deciding upon the claims".

If the insurer delays in settling compensation owing to an insured party, in accordance with the terms of the insurance policy, as soon as the accident occurs or as soon as the insured risk takes place, the insurer may be liable for a penalty (to be issued from the UAE Central Bank – Insurance Division) in the sum of AED50,000 (pursuant to the table enclosed with Cabinet Decision No 7/2019 on the Administrative Fines imposed by the Insurance Authority (the "IA Fines")). Furthermore, any such fine can be doubled in the case of repeated violations within one year (Article 3 of the IA Fines).

4.9 Representations Made by Brokers

If a broker misrepresents an insurance product to their client, the client would be bound by the written and agreed/signed terms of the policy (irrespective of any misstatements made by their broker); however, the insured party may have recourse against their broker (ie, in a professional negligence/misrepresentation suit). The client, as an insured, may also raise and file a dispute to the Committee to address the broker's conduct.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Generally, there is little, if any, delegated underwriting authority in the UAE. The concept of managing general agents/managing general underwriters (MGAs/MGUs) is not recognised in the UAE, other than in the DIFC and ADGM free zones for wholesale reinsurance. Loss adjusters are a common feature and are instructed by insurers/reinsurers to investigate and negotiate/settle claims. In limited circumstances, they may have some delegated authority to settle claims on behalf of insurers.

With regard to health insurance lines of business, insurance companies within the UAE rely upon the services of third-party administrators

(TPAs) to process insurance claims. If there are coverage disputes, the insured party would not ordinarily pursue the TPA for recourse given that they act as an agent of the insurance company. In that scenario, from a practical perspective, the insured party would raise a notification directly with the insurance company and if the coverage is not extended to the insured party, a complaint would be raised before the Committee (for insurance policies that nominate local courts as the dispute resolution forum) or proceedings may be filed before the arbitration centre (according to the nomination within the insurance policy), as applicable.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

It is common for insurance policies (particularly within property all-risks policies) within the UAE to contain a "claims co-operation" clause, whereby the insured is expected to take reasonable steps to mitigate their losses, which invariably means defending any claims initiated against them. If the insured party does not have sufficient funds to defend such proceedings, the insurance company may (at its sole discretion) fund those proceedings, provided the coverage extends to the insured and the limit of indemnity has not been exhausted under the policy. In any event, this is not a common occurrence within the UAE.

5.2 Likely Changes in the Future

The position outlined in **5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds** is unlikely to change within the foreseeable future, although more ADR is expected to be used by the overseas reinsurance market.

5.3 Trends in the Cost or Complexity of Litigation

The formation of the Committee that deals with insurance-related disputes is a sort of mandatory pre-action protocol, which must be exhausted before local litigation is commenced. It is likely that the Committee process will reduce costs and encourage the parties to settle sooner.

5.4 Protection Against Costs Risks

Claimants within the UAE are not able to purchase UAE-based insurance policies to protect against cost risks in litigated proceedings in the UAE. This may be possible, however, in the DIFC and ADGM jurisdictions, but is uncommon.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

Insurance contracts within the UAE typically include a "right of subrogation" clause within their terms. That provision allows the insurer to essentially "step into the shoes" of the insured party and commence proceedings against a third party to recover damages incurred under the insurance policy.

As an example, if a fire event occurs within an insured premises and there is an at-fault/liable third party (ie, the manufacturer of a faulty light bulb that combusted and caused the fire damage), the insurer (provided the policy is responsive and the limit of indemnity has not been exhausted) may opt to pay out the claim to the insured party and commence proceedings against the liable third party to recover the losses that it incurred (only up to the value thereof) under the policy of insurance.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

The statutory right of subrogation in the UAE arises from Article 1030 of the Civil Code, wherein the "insurer may subrogate the insured in what he has paid in compensation as a result of the lawsuits, the insured may have against the author of the prejudice, which has been the source of the insurer's liability".

Any such subrogated claim may be brought in the name of the insurer; however, the insurance policy, containing the right of subrogation clause, would need to be tendered as evidence.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

There are several factors that have influenced the type and amount of litigation, including insurance-related litigation, in the UAE. These factors include the following:

- The pandemic – the COVID-19 pandemic has had a significant impact on litigation and insurance-related activities in the UAE. The government implemented strict measures to control the spread of the virus, which resulted in businesses facing financial losses and disruptions. As a result, there has been an increase in insurance claims filed, particularly in relation to business interruption and event cancellation.
- Economic factors – the UAE's economy has faced challenges due to the pandemic and low oil prices. This has led to businesses experiencing financial difficulties, which in turn has resulted in an increase in commercial disputes and insurance claims related to business losses.
- Regulatory changes – the UAE government has introduced various regulatory changes that have impacted the landscape of litigation and insurance-related activities. For example, the introduction of new insurance laws and regulations may have affected the types of claims that can be made and the procedures involved in filing such claims.
- Construction industry – the UAE has a robust construction industry, and disputes related to construction projects have been prevalent. Issues such as contract breaches, delays, and quality concerns have led to an increase in construction-related litigation and insurance claims.
- Tourism and hospitality sector – the UAE is a popular tourist destination, and the pandemic severely impacted the tourism and hospitality sector. This has resulted in a significant increase in insurance claims related to travel, hotel cancellations, and event postponements.

It is important to note that the specific impact of these factors may vary over time and depend on the overall economic climate, regulatory changes, and other external events.

7.2 Forecast for the Next 12 Months

In the wake of the COVID-19 pandemic and its impact on insurance-related litigation in the UAE, the following are the key current trends and considerations:

- Post-pandemic recovery – if the pandemic comes to an end and economic recovery begins, it is possible that insurance-related litigation in the UAE may gradually decrease. As businesses regain stability and adjust to a new normal, the frequency of claims and disputes may taper off.

- Assessing policy wordings – after the pandemic, insurers and policyholders may closely examine policy wordings to clarify and understand the scope of coverage, particularly in relation to events such as pandemics or other similar crises. Greater clarity in policy wordings could potentially lead to fewer disputes and litigation in the future.
- Future pandemic preparedness – post-COVID-19, insurers and businesses may review and adjust their insurance policies and risk strategies to mitigate the impact of future pandemics or similar events. This could involve developing new coverage options and implementing measures to address potential losses, potentially reducing insurance-related disputes.
- Contractual amendments – businesses in various sectors, such as construction and hospitality, may revise their contractual agreements to include provisions that address unforeseen events such as pandemics. This proactive approach could mitigate future disputes and reduce the need for insurance-related litigation.
- Regulatory impact – the UAE government may introduce new regulations or guidelines concerning insurance coverage and claims procedures in response to the lessons learned from the pandemic. These changes could shape the insurance landscape and potentially influence the nature of litigation in the future.

It is important to note that the impact of the COVID-19 pandemic and its aftermath is highly uncertain, and the future of insurance-related litigation in the UAE will depend on the progression of the pandemic, economic recovery, regulatory developments, and other factors that may emerge.

7.3 Coverage Issues and Test Cases

There have been few, if any, test cases arising from the pandemic. Given that the UAE government has covered the cost for the preponderance of COVID-related treatment costs, there have not been any coverage disputes, or test cases, related to these matters. However, many health (and, in some cases, life) insurers adapted their underwriting of medical risks based on insureds having tested positive for COVID-19.

7.4 Scope of Insurance Cover and Appetite for Risk

Unsurprisingly, given the upturn in claims arising from these insurance products as a consequence of COVID-19, there have been significant changes to the following lines of business:

- policies that cover business interruption have included stricter wording as to what constitutes business interruption and disease/contamination, and have introduced further applicable exemptions/exclusions to avoid similar scenarios; and
- health insurance policies have had their language tightened to stem the avalanche of mental health and well-being claims.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

The authors have not noticed any specific changes to the underwriting and litigation of insurance risks within the UAE as a result of climate change events. Notwithstanding this, on a related topic, insurers within the UAE have amended their policy terms (particularly motor vehicle insurers) to exclude coverage for accidents that occur as a result of “cloud seeding”,

which are typical weather modification events that occur in the UAE for the purpose of extracting moisture from the atmosphere. These events often lead to an increased number of accidents (such as car crashes and flooding) due to the sudden onset of rain, hence the motivation to exclude such occurrences from the insurance policies.

8.2 Data Protection Laws

In the UAE, data protection and privacy laws are primarily governed by the Federal Law No 2 of 2019 (the "Data Protection Law"). Here are some potential impacts of these laws on underwriting and litigating insurance risks in the UAE:

- Consent and data collection – similar to other jurisdictions, insurance companies in the UAE must obtain proper consent from individuals before collecting and processing their personal data. This could impact the underwriting process, as insurers would need to ensure they have explicit consent to collect and use personal information.
- Security and confidentiality – data protection laws require insurance companies to implement appropriate security measures to safeguard personal data. This includes protecting against unauthorised access, loss, or breach. Insurers may need to enhance their information security measures to comply with these requirements.
- Cross-border data transfers – the Data Protection Law in the UAE places restrictions on the transfer of personal data outside of the country. Insurance companies may need to ensure that appropriate safeguards are in place when transferring customer data to jurisdictions without an adequate level of data protection.
- Data minimisation and purpose limitation – insurance companies should only collect and process the minimum amount of personal data necessary for underwriting and litigating purposes. They must also ensure that the data collected is used solely for its intended purpose and not for unrelated reasons.
- Accountability and compliance – insurance companies operating in the UAE need to demonstrate compliance with data protection laws, including appointing a data protection officer and implementing suitable policies and procedures. These measures help ensure accountability and responsible handling of personal data.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

Unemployment Insurance

From a regulatory perspective, the most notable change within the UAE insurance sector over the past 12 months has been the UAE's unemployment insurance scheme. This new unemployment insurance scheme was introduced in Federal Decree-Law No 13 of 2022. Ministerial Resolution No 604 of 2022 and Cabinet Resolution No 97 of 2022 provided the executive details for the implementation of the scheme fixing the deadline of 30 June 2023 for the enrolment. The Unemployment Insurance scheme is a form of insurance/social security that provides Emiratis and residents working in the federal and private sectors, financial support if they lose their jobs, as a result of termination by their employers. The financial support will be given in exchange for a monthly insurance premium paid by workers during their employment. For the worker to be eligible for the compensation, the worker must

have been paying the monthly premium for at least 12 consecutive months.

Worker must submit their claims within 30 days from the date of becoming unemployed. The insurance company has two weeks, from receiving the claim, to transfer the compensation to the insured's account.

The insurance providers must process the insurance claims in accordance with the terms and conditions of the insurance policy and the applicable legislations of the Central Bank of the UAE.

Compensation will be paid from the date the worker loses the job and will be paid for three months or until the worker finds a job, whichever is earlier.

The insured worker will lose his or her eligibility for compensation if any of the following situations occur:

- the worker was dismissed from work for disciplinary reasons under the UAE's Labour Law in the private sector (Federal Decree Law No 33 of 2021 Regarding the Regulation of Employment Relationship and its amendments) and the Human Resources Law in the federal government, in addition to any applicable legislations;
- there has been fraud or deceit involved in the worker's claim; or
- the establishment at which the worker claims to have been employed is fictitious.

UK

Law and Practice

Contributed by:
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Kennedys

Contents

Kennedys is a global law firm with expertise in dispute resolution and advisory services, and over 2,300 people in 24 countries around the world. The firm handles both contentious and non-contentious matters and provides a range of specialist legal services, including corporate and commercial advice, but with a particular focus on defending insurance and liability claims. Defendant claims work is at the heart of Kennedys' practice, and accounts for more than half of the firm's business. This is a global practice with unsurpassed capabilities and expertise that can deal with any type of claim in any country, from high-volume or catastrophic personal injury claims, to settling the largest multibillion-pound property, casualty, financial lines, marine or aviation claims.

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1. Rules Governing Insurer Disputes

1.1 Statutory and Procedural Regime

Statutory Regime: An Overview

In England and Wales, insurance contracts are regarded as private contracts. Insurance disputes are accordingly subject to the general rules on contract law. These rules are derived from a mixture of common law and statute. There is also sector-specific legislation that applies to insurance contracts, with different legislative regimes for consumer and business contracts.

Statutory Regime: Consumer Contracts

The statutory framework governing consumer insurance contracts is largely set out in the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA), which came into force on 6 April 2013.

CIDRA defines a consumer as "an individual who enters into a contract of insurance wholly or mainly for purposes unrelated to the individual's trade, business or profession". CIDRA contains detailed provisions about the information that consumers must provide to insurers when applying for insurance and insurers' remedies for pre-contractual misrepresentations as well as contractual breaches. General consumer protection laws, such as the Consumer Protection Act 2015, also apply to consumer contracts.

Statutory Regime: Business Contracts

The regime relating to business insurance contracts (and reinsurance contracts) is contained within the Insurance Act 2015 (IA 2015), which came into force on 12 August 2016. The IA 2015 applies to contracts entered into on or before 12 August 2016, as well as to variations to contracts of insurance agreed after that date. The IA 2015 reformed the law in relation to pre-contractual misrepresentation and non-disclosure in business contracts. It also updated the law in relation to warranties and fraudulent claims in both business and consumer contracts.

Statutory Regime: Sector-Specific Legislation

Other sector-specific legislation includes the Third Parties (Rights against Insurers) Act 2010 (which allows third parties to enforce a term of an insurance contract in the event that it purports to confer a benefit on the third party); the Enterprise Act 2016 (which creates a legal right to enforce prompt payment of insurance claims); and risk-specific legislation, such as the Life Assurance Act 1774 and the Fire Insurance Duty Act 1782.

Procedural Regime

As insurance contracts are private contracts, they may provide specific mechanisms for resolution of disputes. For example, arbitration is particularly prevalent in many business insurance and re-insurance contracts. Where no specific dispute resolution mechanism is included in the contract, insurance disputes are typically heard in the civil courts. However, consumers or small business owners may also make complaints to the Financial Ombudsman Service.

Financial Ombudsman Service

The Financial Ombudsman Service (FOS) may review complaints for consumers or small businesses against insurers in the UK after the internal complaints process within the insurance company has failed to resolve an issue. The FOS is an independent body which seeks to resolve disputes, without involving the courts, based on what is fair and reasonable in all the circumstances (the FOS is not strictly bound to follow legal precedent). If a matter is referred to the FOS, it will first be reviewed by a case handler who will assess the parties' respective positions before recommending how a dispute should be resolved. If the parties are unsatisfied with the recommendations, the dispute can be referred to an ombudsman. Decisions of the ombudsman are binding on insurers, and can therefore only be challenged by judicial review.

Civil litigation

The Civil Procedural Rules (CPR) make up the procedural code governing litigation and specify the rules to be followed at each stage of court proceedings. Specific guides may also apply in certain courts, such as the Commercial Court.

For low-value personal injury claims in road traffic accidents, or employers' liability (EL) and public liability (PL) claims, proceedings can be issued through the Electronic Claims Portal. Claims pursued via the Electronic Claims Portal are subject to strict procedural rules and fixed fees to keep costs low and speed up the process to resolve disputes.

Other disputes involving insurance are addressed through the court system. Disputes are allocated to a court based on the value of the claim. For disputes valued at less than GBP100,000, the claim will generally be allocated to the county court, while disputes worth more than GBP100,000 will generally be addressed in the High Court. Particularly complex cases of high value may be heard in the Commercial Court, a subdivision of the High Court. Further details about the court procedure can be found in the sections that follow.

1.2 Litigation Process and Rules on Limitation

Rules on Limitation

In England and Wales, the limitation period varies depending on the type of claim. Insurance disputes are typically regarded as claims for breach of contract. The Limitation Act 1980 (as amended) provides that an action founded on a simple contract, such as an insurance contract, must be brought within six years of the date on which the cause of action accrues.

For ordinary claims in contract, the cause of action typically accrues six years from the date of the breach of contract. However, the position is more complicated in relation to insurance contracts. For liability policies (ie, policies covering third-party losses), the cause of action normally accrues when the liability of the insured is ascertained. This may be in the form of an agreement, an arbitral award or a judgment. In other forms of insurance (such as marine, property and life insurance), the cause of action will usually be

deemed to accrue when the relevant insured event occurs.

The limitation period for other types of claims against insurers will differ. For claims brought by policyholders against insurers for late payment of insurance claims, the limitation period is one year from the date on which the insurer has paid all sums due in respect of the insurance claim. In relation to claims for contribution commenced by one insurer against another, the limitation period is two years from the date on which the right of recovery accrued.

The Litigation Process

Overview

As noted in **1.1 Statutory and Procedural Regime**, the procedural rules to be followed at each stage of court proceedings are set out in the CPR.

Typically, insurance contract disputes with a value greater than GBP100,000 will be heard in the High Court, and particularly complex cases will be heard in the Commercial Court, a subdivision of the Business & Property Courts (part of the High Court). Claims of lesser value will usually be heard in the county courts.

The litigation process in England and Wales is adversarial (as opposed to inquisitorial) in nature, with each party trying to prove their case on the "balance of probabilities". Litigation in England and Wales can be expensive, but the legal system in the jurisdiction is thorough, fair and well regarded internationally.

The English legal system operates on the principle of open justice, which in practice means that, save in exceptional circumstances, the public can access key court documents and attend hearings and trials.

A final overarching point of note is that, in litigation in England and Wales, the presumption is that the losing party will pay the winning party's costs (subject to the court's discretion and certain specific costs-protection legislation, such as qualified one-way costs shifting (QOCS) – see **2.3 Unique Features of Litigation Procedure**).

Pre-action conduct

There are specific procedural rules relating to pre-action conduct. These rules are contained in the CPR Practice Direction (PD) on Pre-action Conduct and the associated pre-action protocols that apply to particular types of civil claims, such as the Pre-action Protocol for Personal Injury Claims and the Pre-action Protocol for Construction and Engineering Disputes.

The PD and pre-action protocols set out the steps the court expects parties to take prior to commencing proceedings. The purpose of these rules is to encourage parties to exchange sufficient information so as to be able to:

- understand each other's position;
- make decisions about how to proceed;
- try to settle the issues without proceedings;
- consider a form of alternative dispute resolution (ADR) to assist with settlement; and
- reduce the costs of resolving the dispute.

Parties that have failed to comply with the relevant pre-action provisions may face costs sanctions in any subsequent litigation.

Commencing proceedings

In the event that the parties are unable to resolve a dispute pre-action, a claim may be commenced by a claimant issuing a claim form and serving a copy on the defendant. The claim form may be accompanied by particulars of the claim, setting out the case and the facts relied on, or

these may be served on the defendant up to 14 days after service of the claim form.

Following service of the particulars of the claim, the defendant should file an acknowledgement of service confirming whether or not the matter is disputed. If the claim is disputed, the defendant has the opportunity to file and serve a defence, setting out its position.

Subsequent stages of proceedings

Once the parties' statements of case have been served, the court will allocate the claim to a "track" depending on its value and complexity and the parties will be encouraged to agree a timetable to trial (known as directions). These directions will be approved or amended by the court at a case management hearing. The directions will typically include deadlines for the following:

- disclosure of documents;
- exchange of witness statements;
- exchange of expert reports;
- a meeting of experts and preparation of a joint report of the experts;
- a pre-trial review hearing; and
- the trial.

The court plays an active role throughout the litigation process and, depending on the size and complexity of the case, several case management hearings may take place to ensure the proceedings run smoothly. Parties are typically encouraged to consider settlement options throughout the course of the proceedings. In the event that settlement is reached, the parties must notify the court and the litigation process will end.

Trial

The majority of insurance contract disputes are settled by agreement between the parties. However, if settlement is not achieved, the matter will progress to trial.

Each party will present their case at trial, with witnesses and experts being cross-examined on their evidence. The duration of the trial will vary depending on the complexity of the matter.

The remedies available will depend on the subject matter of the case but may include:

- damages;
- restitution;
- declarations;
- injunctions; and/or
- orders for specific performance.

A judge's final decision takes the form of a reasoned written judgment, which will usually also address costs.

Appeals

If a party wishes to appeal, it must first seek permission from the court. This can be sought from the lower court where the decision was made, or from the appeal court.

For insurance disputes heard in the Commercial Court, appeals can be made to the Court of Appeal.

Parties can appeal on the grounds that the decision of the lower court was wrong or unjust due to a serious procedural or other irregularity. Permission will be granted if there is a real prospect of success or some other compelling reason.

Appeals from the Court of Appeal can be made to the Supreme Court. Applications for permission can only be made to the Court of Appeal, or to the Supreme Court, if permission is refused by the Court of Appeal.

1.3 Alternative Dispute Resolution (ADR)

Alternative dispute resolution (ADR) is encouraged and widely used in different forms to resolve disputes in England and Wales.

The CPR specifically requires the court and the parties to consider whether ADR is appropriate.

Many insurance contracts specify that a particular form of ADR must be used as an alternative to litigation. The most common forms of ADR used in England and Wales include:

- arbitration;
- adjudication;
- mediation; and
- negotiated settlement.

Some of the main advantages of ADR include: costs benefits (it is often much cheaper for all the parties to resolve disputes through ADR); the ability to retain confidentiality; and maintaining commercial relationships.

Arbitration

Arbitration is one of the most common forms of ADR used in insurance disputes and arbitration clauses are often incorporated into business insurance and reinsurance contracts.

The arbitration procedure will depend upon the precise terms of the relevant clause but this may specify that the arbitration is to be conducted under the rules of a particular institution, such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC).

Arbitration proceedings are governed by the Arbitration Act 1996 (AA 1996), which provides that an arbitral award can only be challenged in certain, limited circumstances. The AA 1996 also provides that the court can execute powers in support of arbitration proceedings, such as securing the attendance of witnesses.

Adjudication

Adjudication is a process whereby an independent adjudicator, who is an expert in the relevant subject matter, will make a decision on the matter using information presented by the parties, as well as their experience and expertise. Adjudication is often used in construction disputes.

The process usually takes place within a 28-day timeframe and begins when either party submits a Notice of Adjudication. The timetable set is strict, and the decision will be unenforceable if given outside the timeframe. Adjudication allows parties to resolve the dispute in a timely manner without incurring the costs associated with litigation or arbitration.

Mediation

Mediation is also commonly used in England and Wales. It involves a neutral third-party mediator attempting to reach agreement based on the issues and options for resolution. Mediation can be significantly cheaper than either litigation or arbitration and can be used to resolve a range of insurance disputes.

The most common type of mediation used is facilitative mediation, whereby the mediator does not make a decision, but assists the parties in reaching a commercial settlement.

Mediation is common in construction professional indemnity disputes as it is confidential and enables the resolution of disputes with a result both parties have accepted, so the professional relationship can be maintained.

Negotiations and the "Without Prejudice" Framework

"Without prejudice" negotiations are often used to reach a settlement and this is encouraged by the courts. Where negotiations are conducted without prejudice (with or without legal representatives acting as intermediaries), details of these negotiations cannot be put before the court (except, in some instances, on the question of costs). This encourages the parties to make genuine attempts to reach an out-of-court settlement and ensures that confidentiality is maintained.

2. Jurisdiction and Choice of Law

2.1 Rules Governing Insurance Disputes

Jurisdiction

Jurisdiction clauses are common in insurance contracts. The English courts will typically respect jurisdiction clauses subject to certain exceptions, usually aimed at protecting the weaker party to a contract.

The applicable rules to determine jurisdiction, which were historically determined by the domicile of the parties, depend on whether proceedings were commenced on or before 31 December 2020 (the end of the Brexit transition agreement).

Proceedings Commenced on or before 31 December 2020

For proceedings commenced on or before 31 December 2020:

- in cases where both parties were domiciled in an EU member state, the rules are contained within the Recast Brussels Regulation (1215/2012);
- if only one party was domiciled in an EU member state and another in an EEA member state, the Lugano Convention on jurisdiction applies; or
- in cases where the defendant was domiciled outside of the EEA, jurisdiction would be determined under the common law.

The Recast Brussels Regulation and the Lugano Convention both contain specific rules relating to insurance contracts which are designed to protect the insured as the weaker party to such agreements.

Under the common law rules, jurisdiction will be determined in accordance with Part 6 of the CPR. The common law rules are less prescriptive and the English courts will typically respect the choice of jurisdiction specified in a contract. This is particularly the case where a contract contains an exclusive jurisdiction clause.

Proceedings Commenced on or after 1 January 2021

As of 1 January 2021 (the end of the Brexit transition agreement), the Recast Brussels Regulation ceased to apply and the UK also ceased to be treated as a member of the Lugano Convention. The UK's application to join the Lugano Convention was rejected in April 2021.

The current position is that, for proceedings commenced after 31 December 2020, the relevant rules will be contained within either:

- the Hague Convention on Choice of Court Agreements 2005 (the "Hague Convention"); or

• the common law rules.

The Hague Convention (which became law in its own right in the UK on 1 January 2021) applies only to international cases where there is an exclusive jurisdiction agreement in favour of one of the states in which the Hague Convention applies. The application of the Hague Convention is subject to several limitations. The most important for present purposes is the exclusion of insurance contracts (in the case of EU member states and the UK). However, there is a "carve-out" for reinsurance contracts, large risks and certain other choice-of-court agreements in insurance cases.

Where the Hague Convention does not apply, parties to a contract will be reliant on the common law regime referenced above.

Choice of Law

As with jurisdiction clauses, the English courts typically uphold choice-of-governing-law clauses, subject to certain exceptions.

The Pre-Brexit position

For contracts made after 17 December 2009, Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) applies.

Article 7 of Rome I provides specific rules for insurance contracts. It differentiates between contracts covering "large risks" and other insurance contracts.

For large risks, the insurer can choose which law governs the risk. If the insurance contract does not specify the applicable law, the location of the insurer's head office will determine the choice of law unless the contract is more closely related to another country, in which case the law of that other country will apply.

For all other insurance contracts, the parties may choose the applicable law from a number of specified options. Where the applicable law has not been chosen by the parties, the contract will be governed by the law of the member state in which the risk was situated at the time the contract was concluded.

Where the risk is situated outside the EU, the contract will be governed by the choice of law rules in Rome I (Articles 3 and 4). Article 3 provides that the parties may choose the applicable law. Where the applicable law has not been chosen, the rules specified in Article 4 will apply.

It should be noted that Article 7 expressly does not apply to reinsurance and the general rules will apply in relation to these contracts.

The Post-Brexit position

Little has changed in relation to choice of law as a consequence of Brexit.

Rome I continued to apply to the UK during the transition period and was incorporated into law after 31 December 2020 via the Law Applicable to Contractual Obligations and Non-contractual Obligations (Amendment etc) (UK Exit) Regulations 2019 (SI 2019/834), which is now known as the "UK Rome I". As such, the principles detailed above continue to apply.

2.2 Enforcement of Foreign Judgments

Foreign judgments may be enforced against insurers under one of several distinct regimes depending on the date the proceedings were instituted, the country in which the judgment was reached, the date of the judgment and the type of judgment.

The European Regime

The main European regime remains applicable to the enforcement of judgments given in proceedings instituted in EU/EFTA courts before the end of the Brexit transition period (31 December 2020). The relevant rules are contained within the Brussels Recast Regulation (1215/2012), the Brussels Regulation 2001 (44/2001), the Brussels Convention, the Lugano Convention and the European Enforcement Order Regulation (805/2004).

The Commonwealth Regime

To enforce a judgment in England and Wales that has been handed down in a Commonwealth country (and some other countries) the "statutory regime" may apply.

Part II of the Administration of Justice Act 1920 (AJA 1920) sets out the procedure for the reciprocal recognition and enforcements of the UK courts and certain Commonwealth courts. Under AJA 1920, a judgment obtained in Commonwealth countries that have entered into reciprocal arrangements with the UK may be registered with the English High Court (and the equivalent courts in Scotland and Northern Ireland) and enforced as if it had been a judgment of the High Court.

The Foreign Judgments (Reciprocal Enforcement) Act 1933 contains similar provisions to the AJA 1920 but extends the possibility of recognition and enforcement to all nations with which the UK has reciprocal arrangements. As with the AJA 1920, foreign judgments may be registered with the English High Court (or its equivalent in other parts of the UK).

The UK Regime

The rules concerning the recognition and enforcement of judgments between the courts of the constituent parts of the UK are contained within the Civil Jurisdiction and Judgments Act 1982 (CJJA). Broadly, the CJJA confers upon an interested party the right to apply for a certificate from the court issuing the judgment. The certificate may then be registered with a court in another part of the UK within six months of its issue. Following registration, the registering court will be granted the same powers of enforcement as the original issuing court.

The Common Law Regime

The common law regime is the default regime and applies to judgments issued in all countries not already covered by a specific regime.

This regime requires the party seeking to enforce the judgment to bring new proceedings in the courts of England and Wales, where the foreign judgment is sued as a debt. In accordance with CPR part 24, the party seeking to enforce the judgment may apply to the court for summary judgment once proceedings have been issued, on the grounds that the defendant has no real prospect of successfully defending the action and there is no reason why the case should go to trial.

Enforcement under this regime will only be possible where the foreign judgment is for a debt or other specific sum of money (but not fines, taxes or other penalties) and where the foreign judgment is final and conclusive.

2.3 Unique Features of Litigation Procedure

As previously detailed, the default method for resolving large disputes in England and Wales is by way of litigation in court. The system is adversarial in nature but the courts typically play a fairly active role in case and costs management. Two key features of the jurisdiction that

international insurers should be aware of are the following.

Costs Rules and Regimes

The general rule in civil litigation in England and Wales is that the unsuccessful party pays the successful party's costs. In the absence of unreasonable conduct, the successful party can usually expect to recover 65% (or more) of its legal costs from the losing party.

However, the general rule on costs is subject to the court's discretion. In exercising its discretion, the court will typically consider: the conduct of the parties; whether a party was only partly successful; and any admissible offers-to-settle that are drawn to the court's attention.

There are also certain notable exceptions to the general costs rules. For example:

- where litigation is subject to qualified one-way costs shifting (QOCS) (personal injury claims from 1 April 2013), defendants will generally be ordered to pay the costs of successful claimants but will not be able to recover their own costs if they successfully defend the claim; and
- if a fixed-costs regime applies (for certain small claims and enforcement proceedings specified in CPR part 44), the amount of costs that may be recovered will be capped.

ADR

International insurers should also be aware that the CPR requires parties to a dispute to consider ADR (before and after the commencement of proceedings). Failure to engage in ADR can lead to costs sanctions being imposed by the court.

3. Arbitration and Insurance Disputes

3.1 Enforcement of Arbitration Provisions in Commercial Contracts

Arbitration clauses in insurance and reinsurance contacts are enforceable in England and Wales. The jurisdiction is widely regarded as pro-arbitration and the courts will generally seek to uphold arbitral awards.

The key provisions governing arbitration in England and Wales are contained in the AA 1996. A written arbitration agreement or clause must be clear enough to show that the parties intended to incorporate the clause as an agreement to arbitrate but it need not be signed or contained within a single document.

In accordance with the AA 1996, where a party starts court proceedings in breach of an arbitration agreement or clause, the other party can apply for a stay of the court proceedings, which must be granted unless the arbitration agreement is null and void, inoperative or incapable of being performed.

If required, arbitral awards may be enforced by the courts in England and Wales. There are two principal routes through which an award may be enforced:

- it can be enforced "in the same manner as a judgment or order of the court"; or
- the award can be converted into a court judgment.

To enforce the award under either route, the enforcing party must make an application to the court for permission. This is usually done on a without-notice basis and involves submitting an

arbitration claim form and witness statement attaching the arbitration agreement and award.

If permission is granted, the award can be enforced in the same manner as a court judgment, including, for example, awards of damages, specific performance and/or injunction.

3.2 The New York Convention

The UK has been a party to the New York Convention since 1975. Accordingly, the UK will recognise and enforce arbitral awards from other contracting states.

The AA 1996 gives effect to and implements the New York Convention. An application to enforce a New York Convention award is usually made without notice to the respondent by issuing an Arbitration Claim Form in the English courts, supported by witness evidence alongside an authenticated original award or certified copy, the original arbitration agreement or a certified copy, and an official translation if the award or agreement is in a foreign language.

The court may then give permission to recognise the award and the respondent will usually be served with a copy of the order and original application. Thereafter, a respondent may apply for the order to be set aside. In the event that the order is not set aside, the arbitral award will be treated as if it was a judgment made within the jurisdiction of England and Wales.

3.3 The Use of Arbitration for Insurance Dispute Resolution

Arbitration is a common method of resolving insurance and reinsurance disputes in England and Wales. Contracts governed by English law often contain London-seated arbitration clauses and the same is often true of Bermuda excess liability insurance policies.

The ICC and the LCIA are two of the most frequently chosen institutions.

Provisions of the AA 1996

The AA 1996, alongside common law, governs arbitration in England and Wales. The AA 1996 contains both mandatory and non-mandatory provisions. The mandatory provisions are listed in Schedule 1 to the AA 1996 and include, for example, the right of the parties to stay legal proceedings for a matter referred to arbitration, and the powers of the court to extend time limits or remove an arbitrator. The "non-mandatory provisions" are all of the provisions that are not listed in Schedule 1. The non-mandatory provisions will apply in circumstances where the parties have not made their own arrangements by agreement.

The Arbitration Process

The arbitration process involves an arbitrator or panel of arbitrators who will gather evidence from the parties and make a decision on the dispute. The arbitration process is private, so third parties cannot attend hearings. This makes arbitration a preferred method of dispute resolution for many involved in international transactions and commercial dealings, which are typically kept private and confidential.

Decisions on the merits of a dispute by an arbitral tribunal are typically binding and may only be appealed in limited circumstances within 28 days of the date of an award.

The grounds for challenging an arbitral award are contained within the AA 1996 and include:

- the award was made without jurisdiction (Section 67);

- there has been a serious irregularity that has caused, or will cause, substantial injustice (Section 68); and
- an appeal on a point of law (Section 69).

Importantly, the parties may agree to exclude a right to appeal on a point of law under the AA 1996 (but not on the other grounds). Readers should also be aware that certain institutional rules governing arbitration proceedings (such as the LCIA rules) do not permit appeals, subject to certain limited exceptions.

4. Coverage Disputes

4.1 Implied Terms

Insurance and reinsurance contracts are subject to the same general principles as other commercial contracts in England and Wales. Terms may therefore be implied into such contracts by legislation, by the courts, from previous dealings between the parties and by industry customs. The following legislation implies terms into insurance and reinsurance contracts.

Insurance Act 2015

IA 2015 implies certain terms into a contract of insurance. Under Section 13A of the IA 2015 (introduced by the Enterprise Act 2016), there is a term implied in every contract of insurance that, if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a "reasonable time". See **4.8 Penalties for Late Payment of Claims**. Parties to consumer insurance contracts cannot contract out of the relevant provisions of the IA 2015.

Consumer Legislation

A range of legislation lays down implied terms in consumer contracts, including insurance contracts, for the protection of the consumer. A notable example is the Consumer Rights Act 2015 (CRA). The material requirements of the CRA, when applied to insurance contracts, are as follows:

- every consumer insurance contract contains an implied term requiring the insurer to perform the service with reasonable skill and care;
- every consumer insurance contract contains an implied term providing that anything said or written to the consumer by or on behalf of the insurer that is taken into account by the consumer in making a decision about the contract, or service after entering the contract, is given contractual force;
- if the parties have not agreed the premium, and the contract is silent on how it is to be fixed, the contract contains an implied term that the consumer must pay a reasonable amount for the service, and no more; and
- if the contract does not expressly fix the time for the service to be performed, and does not say how it is to be fixed, the contract contains an implied term that the insurer must perform the service within a reasonable time.

The parties are not permitted to contract out of or breach any of these provisions, and doing so will grant the consumer the right to damages.

4.2 Rights of Insurers

Business Insurance Contracts

The IA 2015 applies to business insurance contracts that were entered into after 12 August 2016. The "old" regime, as set out in Sections 18 to 20 of the Marine Insurance Act 1906 (MIA 1906) and interpreted by common law, will accordingly apply to policies entered into or varied before 12 August 2016.

The Duty of Fair Presentation Implied into Insurance Policies by the IA 2015

The IA 2015 provides that, in the case of non-consumer insurance contracts, the insured has an implied duty of fair presentation of the risk.

The IA 2015 provides some guidance as to what "fair presentation" of the risk entails, including:

- the requirement on the insured to disclose:
  (a) every material circumstance which is known, or ought to be known, by the insured's senior management and the individuals responsible for arranging the insured's insurance; and
  (b) sufficient information to put an insurer on notice that it needs to make further enquiries;
- information can be considered to be "material" if it would influence the judgement of a prudent insurer in setting the premium and/or the terms of the insurance and/or determining whether to accept the risk; and
- the insured "ought to know" what should have been revealed by "reasonable search" of the information available to it (information held internally and by the insured's agents).

Any representations as to expectation or belief should be made in good faith. A presentation will be "fair" if the information provided to the insurer is:

- reasonably clear and accessible; and
- the facts disclosed are substantially correct.

Remedies for Breaches of the Duty of Fair Presentation

In the event that the insured breaches the implied duty of fair presentation, an insurer can seek a remedy only if it proves that it was induced by the breach to enter the contract of insurance on the terms that it did, or at all. The remedy available to the insurer will depend on whether the breach was deliberate or reckless.

If the insured's breach of the duty of fair presentation was deliberate or reckless, the insurer:

- may treat the contract as having been terminated from the time when the contract or variation was concluded; and
- need not return any of the premiums paid.

If the insured's breach is not deliberate or reckless, various proportionate remedies may apply, depending on what the insurer would have done if the insured had complied with its duty:

- if the insurer would not have entered into the contract at all, on any terms, the insurer may refuse all claims under the contract and the contract will be treated as if it never existed, but the insurer must return any premium paid;
- if the insurer would have entered into the contract but on different terms (other than terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms, if the insurer so requires; or
- if the insurer would have entered into the contract but would have charged a higher premium and imposed different terms, the contract will be treated as if it contained those different terms and the insurer will be able to reduce the amount to be paid out on a claim in proportion to the amount of the increased premium.

Consumer Insurance Contracts

CIDRA (referred to in **1.1 Statutory and Procedural Regime**) contains the provisions regarding the consumer insured's duty of utmost good faith.

CIDRA requires consumers to take reasonable care not to make a misrepresentation to an insurer when a contract is entered into or varied. It is therefore less onerous than the "old" duty of disclosure, which implied on an insured a duty of "utmost good faith" (as set out in the MIA 1906), which required consumer insureds to volunteer all material information to insurers, and it can be distinguished from the duty of fair presentation placed on business insureds under the IA 2015.

The remedies available to insurers for misrepresentation under CIDRA are also proportionate to the failings of the insured. CIDRA provides that:

- where a misrepresentation is deliberate or reckless, the insurer may rescind the contract while retaining the premium, unless it would be unfair on the consumer to do so;
- where a misrepresentation is careless, the remedy available to the insurer will depend upon what it would have done had there been no misrepresentation;
- if the insurer would not have entered into the contract on any terms, it may avoid the policy and refuse all past claims but must return the premium;
- if the insurer would have entered into the contract but on different terms it may choose to treat the contract as if those terms applied; or
- if the insurer would have charged a higher premium in relation to a risk, any claim under the policy will be reduced proportionately.

4.3 Significant Trends in Policy Coverage Disputes

There have been several significant trends in policy coverage disputes over the last 12 months.

COVID-19-Related Insurance Claims

As a result of the COVID-19 pandemic, there has been a surge in related insurance claims, most notably, claims under property policies with extensions for non-damage business interruption (BI). These claims have largely been brought as a result of BI losses caused by the government-mandated closure of certain categories of business to prevent the spread of COVID-19.

In 2020, the Financial Conduct Authority (FCA), with the assistance of eight insurers, brought a test case on behalf of affected policyholders which considered various sample policy wordings and was designed to resolve uncertainty as to whether these BI policies respond. The outcome of the FCA Test Case is addressed in **7.3 Coverage Issues and Test Cases**.

While the FCA Test Case provided some welcome clarity on the application of cover under BI policies, it did not conclusively resolve all coverage issues. There is currently a range of satellite litigation underway in the Commercial Court, and a number of other coverage issues of significant value to insurers are also likely to be tested in court within the next year.

GDPR-Related Claims

There has been growing interest as to whether risks of failing to comply with the GDPR can be and are insurable.

On the basis that English law prohibits the insurance of punitive fines, and given that policies will likely specifically exclude cover for such fines, it is unlikely that the risks of failing to comply with the regulation will be insurable.

However, it is possible that insurance may cover the costs of participating in regulator investigations or any follow-on proceedings. It is therefore expected that the number of insurance coverage disputes arising out of failure to comply with data protection regulations will continue to rise.

Civil claims relating to data breaches are increasing, with defendants increasingly turning to insurers to defend and indemnify these claims. Assessing the value of these claims can be complex and there are already a number of claims in the court system on this question.

Artificial Intelligence and Cyber-related Claims

Disputes relating to a failure to appreciate the scope and impact of artificial intelligence have been increasing and this continues to be a developing area for insurance claims. In addition, it is anticipated that, given the growing prevalence of cyber-attacks, the frequency of such disputes will likely increase.

4.4 Resolution of Insurance Coverage Disputes

As discussed in **1.3 Alternative Dispute Resolution (ADR)**, the English courts encourage ADR before and during litigation. Disputes may be resolved through a variety of different ADR mechanisms including, but not limited to, arbitration, adjudication and mediation. If disputes cannot be resolved via ADR, then they will be heard in the courts.

Mediation is one of the most commonly used means of resolving insurance disputes, as it provides considerable flexibility and confidentiality and is less expensive than court proceedings.

The most commonly used resolution mechanism for reinsurance contract coverage disputes is arbitration. This is because reinsurance contracts commonly contain arbitration clauses, which will typically be upheld by the English courts.

4.5 Position if Insured Party Is Viewed as a Consumer

If the law views the insured party as a consumer, the position is different.

Consumers (and small businesses and certain charities and trusts) may take complaints to the Financial Ombudsman Service (FOS), which was established under the Financial Services and Markets Act 2000 (FSMA).

The FOS may make awards of up to GBP150,000. Complaints made to the FOS may be resolved far more quickly than disputes resolved by way of litigation, but the FOS is not bound by strict legal precedent, which means its decisions are difficult to predict. The FOS is also typically regarded by those in the insurance industry as a pro-consumer organisation.

4.6 Third-Party Enforcement of Insurance Contracts

The Third Parties (Rights against Insurers) Act 2010

The Third Parties (Rights against Insurers) Act 2010 (as amended) or TP(RAI)A permits a third party with a claim against an insured to bring proceedings directly against the insurer in the event of the insured's insolvency. The act does not apply to reinsurance contracts.

The TP(RAI)A will specifically apply if:

- an insolvent insured incurs a liability to a third party against which they are insured; or
- an insured subject to such a liability becomes insolvent.

Of particular note, the TP(RAI)A does not require the third party to have established liability prior to bringing proceedings against an insurer, although the third party may not enforce their

rights against an insurer before liability is established. The TP(RAI)A also allows a third party that considers itself to have a right of action to obtain information about an insured's contract of insurance from a party that it reasonably believes may possess such information, such as an employer or agent. A party that receives such a notice is required to provide as much information as it can within 28 days.

The Contracts (Rights of Third Parties) Act 1999

Under the Contracts (Rights of Third Parties) Act 1999 or C(ROTP)A, third parties are permitted to benefit from contractual terms where they are identified by name or by class in the insurance contract. This may, for example, take the form of reference to a subcontractor by a contractor in a construction all-risks insurance policy, or an employer taking out personal accident/injury policies for the benefit of employees. It is possible to exclude the C(ROTP)A entirely from a contract of insurance.

The manner in which the interest of a third party is noted in the policy will affect whether a benefit is conferred on the third party, or whether the third party is given a right of enforcement. It should also be noted that any third-party claim has the potential to be defeated by any defence available to the insurer against an insured claim. A notable example would be a breach of the duty of fair presentation.

4.7 The Concept of Bad Faith

There is no concept of bad faith under English law.

4.8 Penalties for Late Payment of Claims

As noted in **4.1 Implied Terms**, under Section 13A of the IA 2015, damages can be awarded to insureds for late payment of claims. Section 13A was added to the IA 2015 by the Enterprise Act 2016 and implies a term into all consumer and non-consumer insurance contracts that the insurer must pay any sums due to the insured in respect of a claim within a "reasonable time".

The term "reasonable time" is not defined and is therefore decided on a case-by-case basis having regard to the relevant circumstances, including but not limited to the type of insurance, the complexity and/or value of the claim, compliance with relevant statutory or regulatory rules or guidance, and factors outside the insurer's control.

Section 13A states that a reasonable time will include a reasonable time to investigate and assess the claim. If the insurer shows that there were reasonable grounds for disputing the claim, the insurer does not breach the term implied merely by failing to pay the claim (or the affected part of it) while the dispute is continuing. However, the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when. Recent case law has confirmed that "reasonable time" will include defending a claim in court, even if that defence ultimately fails, as long as the defence itself is not unreasonable.

Damages can be awarded for breaches of Section 13A, in addition to the insured's right to enforce payment of the sums due and the right to interest on those sums. A claim under Section 13A must be brought within one year of payment by the insurer.

4.9 Representations Made by Brokers

Insurance brokers are independent agents appointed by an insured. Their primary function is to obtain agreement and understanding between an insured and an insurer in order to

place appropriate insurance cover. In accordance with the principles of agency, it is generally accepted that a broker acts as the agent of the insured. Therefore, in theory, an insured is bound by representations made by its broker. However, in practice, it can be more complicated.

In the case of consumers, Section 9 and Schedule 2 of CIDRA specifically outline the circumstances in which certain classes of person (including brokers) can be regarded as agents of an insured.

4.10 Delegated Underwriting or Claims Handling Authority Arrangements

Insurers commonly use delegated authority arrangements to outsource certain functions to third parties, including underwriting and claims handling activities. While it is possible that this type of arrangement may give rise to litigated issues or disputes, this is a relatively rare occurrence.

5. Claims Against Insureds

5.1 Main Areas of Claims Where Insurers Fund the Defence of Insureds

There are many types of insurance policies in England and Wales which include cover for the costs of funding an insured's defence. Notably, such cover is usually provided under liability insurance policies, such as employers' liability and public liability policies. This compulsory insurance routinely funds the defence of insured businesses for claims of bodily injury or disease sustained by their employees in the course of their employment. Similarly, professional liability cover also provides defence costs cover for any claims brought against professionals.

5.2 Likely Changes in the Future

Defence costs cover is often compulsory for certain types of insured business or professional. For that reason, there are unlikely to be significant changes in the prevalence of defence costs cover under liability policies.

5.3 Trends in the Cost or Complexity of Litigation

Significant efforts have been made by the UK government to streamline the litigation process in recent years. Notable examples include the following.

- The introduction of the Claims Portal, which (as noted in **1.1 Statutory and Procedural Regime**) is an online hub which facilitates the resolution of low-value, straightforward claims, and in certain cases avoids the need to issue court proceedings altogether. The portal was first introduced to facilitate the resolution of motor claims but was more recently expanded to cover employers' liability and public liability claims valued between GBP1,000 and GBP25,000.
- Reform of the CPR. In 2019, the courts introduced a disclosure pilot scheme in an effort to reduce the costs of disclosure in cases heard in the Business & Property Courts. Feedback in relation to the scheme – particularly in relation to its ability to reduce costs – has been mixed. However, the scheme became permanent in October 2022.

Despite attempts to reduce the time and cost of litigation, the litigation process often remains time-consuming and expensive. It is expected that the process of streamlining civil litigation will continue in future, in an attempt to widen access to justice. The increasing move towards technology by the courts – hastened by the COVID-19 pandemic – is also likely to result in the con-

tinued reduction of litigation costs in the longer term.

5.4 Protection Against Costs Risks

Protection against costs risks is readily available and legal expense insurance is very common in England and Wales. There are two types of legal expense insurance, namely "before the event" and "after the event". Due to after-the-event insurance being purchased when legal action is already contemplated, it tends to be offered as a standalone policy.

6. Insurers' Recovery Rights

6.1 Right of Action to Recover Sums From Third Parties

In circumstances where an insurer has paid out money to an insured for a loss under a policy, it accrues subrogation rights to pursue an action, in the name of the insured, to recover some or all of the loss from the third party who caused or contributed to the original loss.

The right of subrogation is based on the principle of indemnity, which prevents the insured from being over-compensated by recovering sums from both its insurer and a culpable third party. Consequently, the right will not arise until the insurer has paid the insured the indemnity under the policy.

6.2 Legal Provisions Setting Out Insurers' Rights to Pursue Third Parties

Subrogation claims must be pursued in the name of the insured. Subrogation rights arise under common law and any recoveries are subject to an established order of priority between the insured and the insurer in the event that there are both insured and uninsured losses. Subrogation rights (often re-stating the common law position) are commonly set out in insurance policies.

7. Impact of Macroeconomic Factors

7.1 Type and Amount of Litigation

COVID-19

Notwithstanding that COVID-19 restrictions have been lifted in the UK, insurers continue to measure the impact of the pandemic. Although the Supreme Court judgment handed down by the UK Supreme Court in January 2021 following the FCA Test Case resolved many BI coverage issues, insurers are yet to settle all BI claims. A number of outstanding legal questions are yet to be determined and there are other cases concerning BI coverage issues currently going through the courts – see **7.3 Coverage Issues and Test Cases**.

War in Ukraine

The effects of the war in Ukraine continue to be monitored across the insurance market. The early effects of the war have been seen primarily in the aviation and marine markets, where insurers are grappling with the issue of whether there is cover for claims under the "War Risks" or "All Risks" sections of cover provided within certain policies. This issue is the subject of a mega-trial commencing in October 2024 – see **7.3 Coverage Issues and Test Cases**.

As the war progresses and the impact of EU/US sanctions and Russian counter-sanctions becomes clearer, other classes of business are increasingly affected by claims, particularly political risk and trade credit.

Insurers must now also consider the stringent sanctions regime when they insure Russian businesses or interests.

7.2 Forecast for the Next 12 Months

It is likely that insurance litigation will continue to experience the effects of COVID-19 and the fallout of the Ukraine war over the next 12 months and beyond – see **7.3 Coverage Issues and Test Cases**. In addition, over the next 12 months, the following are expected:

- disputes between insurers and re-insurers regarding coverage and aggregation of COVID-19 claims;
- a rise in the number of professional indemnity claims against brokers by disgruntled policyholders who believed that they were entitled to cover for travel, contingency or business interruption losses relating to pandemic; and
- an increase in claims under trade credit policies due to the worsening economic climate and anticipated recession in the US, UK and other jurisdictions.

7.3 Coverage Issues and Test Cases

The government-mandated closure of certain categories of business to prevent the spread of COVID-19 resulted in a significant number of BI claims. The FCA, as the regulator with responsibility for insurance in the UK, initiated proceedings under the Financial Markets Test Case scheme (set out at Practice Direction 51M of the CPR) to obtain clarity for insurers and their policyholders concerning coverage under various sample BI policy wordings. It is estimated that the outcome of the FCA Test Case affects approximately 700 types of policy issued to over 370,000 policyholders.

The High Court held that certain of the sample policy wordings ("prevention of access" clauses) were not in response to nationally imposed restrictions, due to the local nature of the cover provided.

However, the operation of certain other sample policy wordings containing "disease" clauses and "hybrid" clauses was the subject of an appeal to the Supreme Court. In January 2021, the Supreme Court held that these policies are triggered by nationally imposed restrictions on businesses and, in reaching that decision, the Supreme Court departed from the previous "but for" test where there are multiple causes of an insured loss.

Litigation in Response to the FCA Test Case

The FCA Test Case left a number of unanswered questions which are the subject of continuing litigation. The judgment in Corbin & King v AXA, early in 2022, held that there were inconsistencies between the High Court and Supreme Court judgments in the FCA Test Case and broadened the scope of cover for "prevention of access" clauses in BI policies.

The High Court heard three additional cases (Stonegate v Amlin; Greggs v Zurich; and Various Eateries v Allianz) over the summer of 2022 on the question of whether insureds are entitled to multiple limits of indemnity where they have more than one premises. The Stonegate and Various Eateries disputes are the subject of appeals which will be heard before Justice Butcher in autumn 2023 (Zurich reached a confidential settlement with Greggs earlier this year). The outcome of those appeals will likely determine some of the key remaining issues when assessing insurers' exposure to BI claims – in particular, the issue of whether furlough and business rates relief payments can be treated as savings.

In June 2023, a group of policyholders were successful in their claim that the Supreme Court's approach to causation in relation to "radius" wordings should equally apply to "at the premises" wordings (London International Exhibition Centre Plc v Royal & Sun Alliance Insurance Plc and others).

Litigation in Relation to the Ukraine Conflict

The Commercial Court has ordered a joint trial of five similar sets of proceedings in which claims are being brought against multiple insurers for the alleged "loss" of aircraft that have not been returned to lessor policyholders following the imposition of sanctions against Russia. The claims are significant (ranging from USD21.5 million up to USD4.6 billion) and impact more than 30 insurers and Lloyds syndicates. A 12-week trial will commence on 2 October 2024.

The main issue to be determined is whether there is cover under the "War Risks" or the "All Risks" cover provided under the policies. Insurers are generally split between one cover, though a number of insurers subscribe to both. The outcome of the dispute will have major implications for the aviation and war risks market, as well as re-insurers.

7.4 Scope of Insurance Cover and Appetite for Risk

The COVID-19 Pandemic

It is clear that the COVID-19 pandemic has impacted insurers' appetite for risk – in the short term, at least. Given the ongoing effects of the pandemic and the repeated implementation of "lockdowns" as a means of controlling the spread of COVID-19, many insurance policies have been amended to include blanket exclusion clauses for COVID-19, and these are now a common feature of most travel, health and BI policies.

In time, the appetite for underwriting pandemic-related risks is likely to grow, as insurers are able to price such risks more accurately and repair their balance sheets from the COVID-19-related losses they continue to incur. However, for now, the uncertainty surrounding the government response to the pandemic means that the appetite for such risks is limited.

The War in Ukraine

The war in Ukraine has also impacted insurance cover and appetite for risk in several classes of business including marine, aviation, trade credit and political risk. Premiums are widely expected to increase across all associated lines of business.

8. Emerging Risks

8.1 Impact of ESG on Underwriting and Litigating Insurance Risks

Insurers are increasingly aware of environmental, social and governance (ESG) risks. The environmental element of this includes consideration of climate change-related risks.

Climate-Related Risks

Climate change risk is a significant area of concern for insurers, who are experiencing climate-related losses and expecting the numbers of these losses to grow. The risks span three main areas.

- Physical risks from extreme weather conditions – such risks are already causing an increase in insurance claims – eg, losses caused by flooding, wildfires and drought, as well as business interruption and supply-chain cover claims.

- Transition risks – those risks resulting from adjustments made for the transition to a low-carbon economy.
- Liability risks – risks related to the financial impact of claims.

Trends in Climate Litigation

The climate litigation landscape is already active and is set to continue to develop rapidly, especially as climate science develops and draws clearer links between emissions and climatic events.

For example, insurers are already handling climate-related D&O claims, arising from litigation brought against company directors alleged to have failed to prepare their organisations for the net zero target.

In addition, claims targeting companies over their emissions are increasing, with US courts, in particular, becoming more willing to establish a "climate change duty of care". At present, proving causation is a significant hurdle for claimants but this could change as climate science develops.

Civil action groups are becoming more organised, paving the way for increased strategic climate litigation with potential consequences for changes in the law, as well as changes to policy wordings and coverage across all lines of business. Activists are becoming increasingly creative in their means, and litigation is often used as a weapon to seek disclosure of corporate climate risk, and to force corporates to tighten and comply with their own climate policies.

The Rise of PFAS Litigation

Dupont, 3M, Chemours and Corteva completed multibillion-dollar settlements in 2023 to settle US lawsuits brought in relation to PFAS contamination in national water systems.

As public awareness of the environmental and health concerns associated with PFAS grows, along with knowledge of the significant settlements which have been achieved in recent PFAS litigation, it is anticipated that there will be an increase in PFAS-related claims globally. This litigation will be the subject of claims under excess liability insurance policies, though it remains to be seen whether such claims will be capable of attracting cover.

Underwriting

The number of climate change liability claims in the UK (and other jurisdictions, including the US) is likely to increase over the coming decade, as climate science improves and extreme weather events become more frequent, resulting in potentially large liabilities for the London insurance market and posing new challenges for the insurability of climate-related events. As shareholder activism in the ESG space more broadly continues to increase, a corresponding increase in D&O claims is also anticipated.

To the extent that climate-related risks are covered, insurers are now considering increased premiums to match the increased risk in underwriting property policies in particular. It is also becoming much more common for insurers to include climate change-related exclusion clauses within insurance policies.

Insurers are also increasingly including clauses that mandate compliance by their insureds with obligations to improve environmental and sustainability standards. Many insurers are also reconsidering their underwriting decisions and are no longer taking on new business which does not meet their ESG thresholds.

As PFAS litigation continues to grow, it is likely that chemical manufacturers and companies that use PFAS in their products will be subject to wholesale PFAS exclusion clauses in their insurance policies.

Due to the rise in strong public sentiment against corporations seen to be undermining the ESG agenda, punitive damage jury awards and collective actions are inherent features of ESG-related litigation. These social inflation trends are increasingly resulting in settlement demands and jury verdicts that are significantly higher than ordinary economic inflationary increases (particularly in the US). Claims inflation trends need to be taken into consideration by underwriters in order to competitively price risks they are seeking to underwrite, and set accurate financial reserves for existing and future claims liabilities.

8.2 Data Protection Laws

Data protection laws in the UK largely reflect the GDPR regime and other legislation derived from the EU prior to the UK's departure. The government is proposing to reform the existing regime by virtue of the Data Protection and Digital Information (No 2) Bill which was introduced to Parliament in March 2023. The Bill aims to create a new pro-innovation data protection framework that simplifies the current rules and reduces the regulatory burden on businesses. GDPR has created practical challenges for insurers in managing personal data, particularly with the highly intermediated business in the London market. It is hoped that the Bill will alleviate those challenges in the future. In litigation terms, the right to make data subject access requests gives claimants the opportunity to seek information by ways other than pre-action disclosure, while the right to compensation for even inadvertent data breaches is contributing to growing class action risk, which claimant law firms are keen to take advantage of.

9. Significant Legislative and Regulatory Developments

9.1 Developments Affecting Insurance Coverage and Insurance Litigation

One of the most significant developments in England and Wales that has affected insurance coverage is Brexit, which has seen various UK insurers establishing subsidiaries in the EU. It has been reported that 35 UK insurers founded branches in EU member states in response to Brexit and an estimated 29 million insurance contracts had, by the end of the Brexit transition period on 31 December 2020, been transferred to new offices.

In future, this may result in a greater number of insurance coverage disputes in the courts of EU member states, although it is expected that the English courts will continue to retain their dominance as the preferred European destination for insurance coverage disputes.

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